

THE DEVELOPMENT OF CONSUMER PROTECTION ACTIVITIES IN THE OHIO ATTORNEY GENERAL'S OFFICE

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Recent years have seen a remarkable rise in public awareness of consumer problems. In the past, the laissez faire, "let the buyer beware" economic philosophy had been supported by laws that favored the businessman in most instances. Legislation on both federal and state levels has reflected dramatic changes in this philosophy. Among the most notable are the Truth-in-Lending Act,¹ the Motor Vehicle Information & Cost Savings Act,² the Fair Credit Reporting Act,³ the Magnuson-Moss Warranty Act,⁴ and consumer protection legislation in many states.⁵ In addition, the Federal Trade Commission recently has proposed numerous rules regulating trade.⁶

The Federal Trade Commission (FTC) has provided much of the impetus for this movement. Created by the Federal Trade Commission Act of 1905,⁷ the FTC was at first primarily concerned with fostering competitive conditions among businessmen. Not until the Wheeler-Lea Amendment⁸ in 1938 added the prohibition against unfair or deceptive acts or practices⁹ did protection of the consumer

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¹ 15 U.S.C.A. §§ 1601-65 (1974), *as amended*, (Supp. 1976), and "Regulation Z", 12 C.F.R. § 226 (1974), promulgated thereunder.

² 15 U.S.C.A. §§ 1901-91 (1974), *as amended*, (Supp. 1976).

³ *Id.* §§ 1681-81t.

⁴ *Id.* §§ 2301-12 (Supp. 1976).

⁵ See Note, *Consumer Protection by the State Attorneys General: A Time for Renewal*, 49 NOTRE DAME LAWYER 410, 411 (1973); note 49 *infra*.

⁶ Pursuant to 15 U.S.C.A. § 57a(a)(1)(B) (Supp. 1976), the FTC may prescribe "rules which define with specificity acts or practices which are unfair or deceptive acts or practices in or affecting commerce Rules under this subparagraph may include requirements prescribed for the purpose of preventing such acts or practices." Acting under this authority, the FTC has proposed rules in numerous areas, including the hearing aid industry, health spas, and the funeral industry. 40 Fed. Reg. 26645, 34615, 39901 (1975). Rules already adopted regulate door-to-door sales, preserve consumers' defenses against holders of commercial paper, and regulate the mail order industry. 16 C.F.R. §§ 429, 433, 435 (1976).

⁷ Ch. 311, 38 Stat. 717 (1905).

⁸ Ch. 49, 52 Stat. 114 (1938).

⁹ As amended, § 3(a) of the FTC Act, 15 U.S.C.A. § 45(a)(1) (Supp. 1976) prohibits "[u]nfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce" The phrase "or affecting" was inserted by the Federal Trade Commission Improvement Act, Title II of the Magnuson-Moss Warranty Act, Pub. L. No. 93-637, § 201(a) (1975).

become a goal of the federal law. Since then, the FTC has led the way by its emphasis on consumer problems. The FTC does not, however, have infinite resources, nor did it until recently have jurisdiction over purely intrastate practices.¹⁰ It has, therefore, supported the development and passage of state consumer legislation.¹¹

Many earlier state laws, including such Ohio statutes as those prohibiting false advertising¹² and theft by deception,¹³ carried criminal penalties. Even though the penalties involved were often minor, a showing of fraud or criminal intent was required, with the attendant difficulties of proof; coupled with the priorities of county prosecutors, this naturally resulted in little enforcement. As recognition of the problem grew, laws against deceptive consumer practices were passed in state after state.¹⁴

Forty-eight states now have some form of consumer protection legislation.¹⁵ In thirty-eight states the Attorney General has sole responsibility for administering the state's consumer protection program.¹⁶ The advantages of placing the consumer protection function in the office of a state's chief law enforcement officer are widely recognized.¹⁷

I. THE PROBLEM

The image of business in the public mind is said to be at its lowest ebb since the days of the robber baron. "In the popular view, the typical industrialist pollutes the air, exploits the land, pays bribes, and makes illegal campaign contributions; he wallows in exorbitant profits; he treats his employees not as names but as numbers; he generally can be found lobbying against any legislation for the common good."¹⁸ The Chamber of Commerce of the United States cites

¹⁰ Prior to passage of the FTC Improvement Act in 1975, the Commission's jurisdiction was limited to practices "in commerce." See *F.T.C. v. Bunte Bros., Inc.*, 312 U.S. 349 (1941).

¹¹ Speech by Dixon, *Section 5 of the FTC Act and State Legislation Dealing with Deceptive Acts—Is There a Conflict?*, in N.Y.B. ASS'N ANTITRUST L. SYMPOSIUM 76, 83 (1968).

¹² OHIO REV. CODE ANN. § 2911.41 (Page 1954), *repealed and replaced by* § 2913.02 (Page 1975).

¹³ OHIO REV. CODE ANN. § 2913.02(A)(3) (Page 1975).

¹⁴ See Lovett, *State Deceptive Trade Practice Legislation*, 46 TUL. L. REV. 724, 729 (1972); note 49 *infra*.

¹⁵ See NATIONAL ASSOCIATION OF ATTORNEYS GENERAL, COMMITTEE ON THE OFFICE OF THE ATTORNEY GENERAL, *PLACEMENT OF STATE CONSUMER PROTECTION PROGRAMS* (February 1976).

¹⁶ *Id.* at 3.

¹⁷ The Council on State Governments and the National Conference of Commissioners on Uniform State Laws have both recommended that the Attorney General alone have the responsibilities for consumer protection. See Lovett, *supra* note 14, at 735.

¹⁸ NATION'S BUSINESS, April 1976, at 9.

the estimate that there is "more crime committed against consumers every day than there is crime in the streets. The public is constantly being fleeced" ¹⁹ The Chamber reports that the annual cost of deceptive practices and consumer fraud to consumer victims is 5.5 billion dollars. ²⁰ As long ago as 1969, Better Business Bureaus in Ohio annually received 403,000 complaints and inquiries. ²¹ These figures and statements demonstrate that self-regulation has not worked—apparently because consumer fraud is enormously profitable.

Consumer problems and protection in Ohio were the objects of study in 1970 by the Legislative Services Commission and the Joint Committee of the General Assembly to Study Consumer Problems and Protection. Their report was issued in January 1971 after an analysis of over 436,000 consumer complaints and inquiries received in 1969 by agencies responding to their survey. ²² Inferior merchandise, inadequate services, and abusive sales techniques were responsible for most complaints. The services most complained of were home improvements and automobile and appliance repair; the abusive sales techniques most often complained of were misleading advertising, telephone solicitation, and door-to-door sales techniques, followed by bait-and-switch advertising and failure to honor warranties. ²³ These problems are the ones most seen by the Attorney General and are typical of consumer complaints nationwide. ²⁴ Although only in existence since October 1975, the Attorney General's Public Action Line receives over 1,000 calls per month from throughout the state. The need for effective mechanisms to deal with these problems is well established.

II. DEVELOPMENT OF CONSUMER PROTECTION ACTIVITIES IN OHIO

The Ohio Legislative Service Commission reported that the most active consumer agencies in Ohio in 1969 were the Attorney General's Consumer Frauds and Crimes Section, the Better Business Bureaus, legal aid societies, municipal sealers of weights and measures, and private consumer organizations. ²⁵ In addition, county pros-

¹⁹ CHAMBER OF COMMERCE OF THE U.S., A HANDBOOK ON WHITE COLLAR CRIME 25 (1974).

²⁰ *Id.* at 6.

²¹ OHIO LEGISLATIVE SERVICE COMMISSION, CONSUMER PROBLEMS AND PROTECTION, Report No. 101, at 4 (January 1971) [hereinafter cited as Report No. 101].

²² *Id.*

²³ *Id.* at 6.

²⁴ See DEPT. OF HEALTH, EDUCATION & WELFARE, OFFICE OF CONSUMER AFFAIRS, STATE CONSUMER ACTION, SUMMARY 1974 (DHEW Publication No. (OS) 75-116). See also *America's Angry Consumers*, U.S. NEWS & WORLD REPORT, May 10, 1976, at 56.

²⁵ Report No. 101, *supra* note 21, at 2.

ecutors and chambers of commerce had provided some consumer protection efforts at the local level, and a number of Ohio cities had established a formal office of consumer protection, usually under either the health department or the department of weights and measures. Except for the Attorney General's Consumer Frauds and Crimes Section, all of these agencies functioned at the local level and, for the most part, lacked any real enforcement power. The exceptions were prosecutions brought under criminal statutes and under consumer protection ordinances in those few cities which had them.

The only formal statutory authority for the Consumer Frauds and Crimes Section when it was established in 1963 was the Attorney General's power as "chief law officer for the state and all its departments."²⁶ Without statutory enforcement powers, the Section concentrated on coordinating information, resolving complaints, and working in cooperation with existing enforcement agencies—primarily the FTC. It also undertook consumer education by means of an information bulletin issued periodically. The Section attempted to resolve complaints through contact with the business involved. If a complaint indicated a violation of a law administered by a state agency, it was referred to that agency; deceptive practices deemed to be within the FTC's jurisdiction were referred to it. The centralized nature of a state office enabled the staff to collect information on businesses or types of practices occurring throughout the state and to supply such information to local agencies and county prosecutors when appropriate.²⁷

The Joint Committee to Study Consumer Problems and Protection made a number of findings and recommendations in its 1971 report. It found that available consumer protection services and agencies, including the Consumer Frauds and Crimes Section of the Attorney General's Office, were "limited in their effectiveness because of the lack of enforcement and investigatory powers necessary for consumer protection."²⁸ It recommended that a deceptive practices law be enacted to "provide adequate means for Ohio consumers to recover their losses from deceptive or misleading practices, and . . . grant investigatory and enforcement powers to a state consumer agency."²⁹

The Committee recommended the Uniform Consumer Sales

²⁶ OHIO REV. CODE ANN. § 109.02 (Page Supp. 1976).

²⁷ See Saxbe, *The Role of the Government in Consumer Protection: The Consumer Frauds and Crimes Section of the Office of the Ohio Attorney General*, 29 OHIO ST. L.J. 897, 900-01, 907 (1968).

²⁸ See Report No. 101, *supra* note 21, at 44.

²⁹ *Id.*

Practices Act as a model for adoption in Ohio³⁰ and the Attorney General's Office as the appropriate administrative agency for its enforcement. It also recommended that the office be given the duty and power to receive and act on consumer complaints, inform consumers and suppliers of consumer goods and services of acts which violate the deceptive practices law, engage in investigations as a result of consumer complaints, conduct research, holds public hearings, make inquiries relating to consumer complaints, and bring actions on behalf of Ohio consumers for actual damages caused by deceptive acts.³¹

The Uniform Consumer Sales Practices Act, "an effort to crystallize the best elements of contemporary federal and state regulation of consumer protection in order to effectuate harmonization and coordination of federal and state regulation,"³² became the basis for House Bill 103, which originally placed the entire consumer protection function in the Attorney General's Office.³³ Before final passage by the General Assembly in 1972, however, the bill was amended to place various administrative responsibilities on the Department of Commerce. Actual enforcement remained with the Attorney General, who was given subpoena powers in investigations requested by the Director of the Department of Commerce, and power to bring court actions.³⁴

Passage of the Consumer Sales Practices Act gave formal legislative authority for initiation of enforcement actions by the Consumer Frauds and Crimes Section. The Section maintained its earlier activities of complaint handling, information coordination, and consumer education. The complaint-handling function was greatly expanded in 1975.

The top priority in the Section since 1972 has, of course, been enforcement of the new law prohibiting deceptive and unconscionable practices in consumer transactions.³⁵ The fact of enforcement power has affected the Section's relationships with other agencies. Cooperation and coordination continues, but other agencies, both state and local, now turn to the Consumer Frauds and Crimes Section

³⁰ *Id.*

³¹ *Id.*

³² THE COUNCIL OF STATE GOVERNMENTS, SUGGESTED STATE LEGISLATION 257 (1973).

³³ In the comment to § 2(2) of the Uniform Consumer Sales Practices Act, regarding the "enforcing authority," the National Conference of Commissioners on Uniform State Laws recommended the Attorney General as "the logical choice for designation as Enforcing Authority [b]ecause The Enforcing Authority may frequently find it necessary to engage in litigation . . ." 7 UNIFORM LAWS ANN. 231 (1976 Supp.).

³⁴ See note 112 *infra* and accompanying text.

³⁵ See section II. *infra*.

for enforcement action when they observe violations of consumer protection laws.

The Section currently has a total staff of forty persons under the direction of the Section Chief. During 1975, eighty-seven proceedings were initiated, 315 investigations undertaken, and over 3200 complaints and inquiries processed. From 1972 to the end of 1975, the Section brought 203 enforcement proceedings under the Consumer Sales Practices Act. Of these, 172 have been concluded: eighty-one by adjudicated court orders, sixty-four by consent judgments, and twenty-seven by written assurances of voluntary compliance. Including the sales volume of suppliers prohibited from doing business as a result of court orders, the Section calculates a total monetary benefit to consumers of \$800,000 from its 1975 efforts.

Specialization in certain types of deceptive practices has developed among both attorneys and investigators in the Section. Experts have emerged in home solicitation sales, pyramid sales schemes, health spas, odometer roll-backs, hearing aid sales, mobile home sales, and other areas of deceptive practices. When the Section has proposed or supported legislation on one of these subjects, the attorney with expertise in that area may be involved in drafting or preparing testimony in support of the legislation. Similarly, he may be called upon to prepare comments for a proposed FTC rule in his area of expertise.

The Section receives cases for investigation and enforcement from several sources. Foremost among these until recently³⁶ has been the Division of Consumer Protection of the Department of Commerce. The Consumer Sales Practices Act provides that the Director of the Department of Commerce "may" request the Attorney General to investigate when he has probable cause to believe that a supplier is violating the Act.³⁷ Complaints also come from local consumer protection agencies;³⁸ local Better Business Bureaus throughout the State are especially helpful in providing complaints once an investigation begins.³⁹ In addition, many complaints come to the Section directly.

³⁶ Since enactment of the Consumer Sales Practices Act, the Director of the Department of Commerce has referred a total of 194 cases to the Attorney General under § 1345.06 of the Revised Code: 13 cases were referred in 1972, 54 cases in 1973, 77 cases in 1974 and 50 cases were referred in 1975. No investigations have been referred by the Director of the Department of Commerce since September 22, 1975.

³⁷ OHIO REV. CODE ANN. § 1345.06 (Page Supp. 1976).

³⁸ Local agencies have been established under municipal ordinances in Cincinnati, Cleveland, Columbus, Dayton, Toledo, and Youngstown. Several of these ordinances have been patterned after Ohio's Consumer Sales Practices Act.

³⁹ Ohio cities in which Better Business Bureaus exist are Akron, Canton, Cincinnati, Cleveland, Columbus, Dayton, Toledo, and Youngstown.

Since deceptive advertising is one of the more severe consumer problems in the state, the Section monitors a number of newspapers, concentrating on different areas at different times. Some court actions result from this review, which more often yields evidence for existing investigations. In the same manner, personal observations of the staff may result in investigations.⁴⁰

The Section also has initiated major investigations of deceptive practices in areas where deception is widespread but proof is very difficult to establish on the basis of individual consumer complaints. These self-initiated investigations are designed to detect violations in those technical areas in which consumers must rely upon services in "blind faith" because they lack sufficient expertise to discover unlawful conduct. One such investigation, initiated in 1972, dealt with automobile repair and service problems.⁴¹ This resulted in enforcement proceedings against eighteen automobile dealerships in 1974.

III. ENFORCEMENT CAPABILITIES

During the past four years, the Ohio General Assembly has given the Attorney General statutory authority to enforce three major consumer protection laws: the Consumer Sales Practices Act,⁴² the Home Solicitation Sales Act,⁴³ and the Anti-Pyramid Sales Act.⁴⁴ Each authorizes the Attorney General to stop violations of their provisions through civil and, when appropriate, criminal actions.

A. *Consumer Sales Practices Act*

The Consumer Sales Practices Act, which became effective on July 14, 1972, was the first comprehensive consumer protection law enacted in Ohio. It prohibits a supplier from engaging in deceptive or unconscionable sales practices in connection with a consumer

⁴⁰ Several of the substantive rules adopted under the Consumer Sales Practices Act proscribe certain advertising practices. See notes 57, 58, and 61 *infra*.

⁴¹ Since 1971, consumers in Ohio and throughout the country have consistently complained more about automobile sales, service, and warranties than about any other consumer product. A nationwide compilation of consumer complaints received by state and local consumer agencies in 1971 through 1974 showed that automobile complaints ranked first for each year. In 1974, automobile complaints accounted for eighteen percent of the total complaints received DHEW Publication, *supra* note 24, at 14-22. The Ohio Department of Commerce listed automobile complaints as the highest ranking category, with 1,735 complaints out of a total 7,488. 1975 OHIO DEP'T OF COMMERCE ANN. REP. 7.

⁴² OHIO REV. CODE ANN. § 1345.01-.13 (Page Supp. 1976).

⁴³ *Id.* §§ 1345.21-.28.

⁴⁴ *Id.* §§ 1333.91-.95, 1333.99.

transaction, whether they occur "before, during, or after the transaction."⁴⁵

The scope of the Act is broad. A consumer transaction includes a sale, lease, assignment, award by chance, or other transfer of an item of goods, a service, a franchise, or an intangible, for purposes that are primarily personal, family, or household.⁴⁶ An actual sale, lease, or other transfer is not an essential element in an action under the Act since mere solicitation to supply any of these things is included in the definition of "consumer transaction." Specifically excluded from the definition are transactions between attorney and client or physician and patient, as well as transactions between financial institutions or public utilities and their customers.⁴⁷ One is a "supplier" and thus subject to the Act if engaged in effecting or soliciting consumer transactions whether or not he deals directly with consumers.⁴⁸

By adopting the Uniform Consumer Sales Practices Act in Ohio, the General Assembly rejected the approach taken by the majority of other states, which have enacted consumer protection laws modeled on the FTC Act.⁴⁹ In addition to a general prohibition in the Ohio Act against deceptive practices⁵⁰ similar to that contained in the FTC Act, the General Assembly included ten specific acts which are per se deceptive.⁵¹ However, these specific prohibitions do not limit the scope of the general prohibition, which can be developed through judicial decisions and substantive rules adopted by the Director of the Department of Commerce.⁵²

⁴⁵ *Id.* §§ 1345.02(A), 1345.03(A). See section IV.B.1. *infra*.

⁴⁶ OHIO REV. CODE ANN. § 1345.01(A) (Page Supp. 1976).

⁴⁷ *Id.* Although the Act's provisions do not protect consumers engaged in direct transactions with these entities, the statute's prohibitions against deceptive or unconscionable conduct do apply to these entities when they act on behalf of other "suppliers" who are subject to the Act. For example, an attorney engaged in debt collection activity on behalf of a client supplier is subject to enforcement action if his conduct violates the Act. See section IV.B.1. *infra*.

⁴⁸ OHIO REV. CODE ANN. § 1345.01(C) (Page Supp. 1976).

⁴⁹ Fifteen states have enacted a "Little FTC Act," which utilizes the broad language from § 5 of the FTC Act to prevent "unfair methods of competition and unfair or deceptive acts or practices." Fifteen states have adopted the Consumer Fraud Act, which applies to all forms of deceptive trade practices. The remaining states have enacted the Deceptive Trade Practices Act or the Uniform Consumer Sales Practices Act. To date, Utah is the only other state to adopt the Uniform Act as its general consumer protection legislation. DHEW Publication No. (OS) 75-116, *supra* note 24, at 236-37. See also Note, *Consumer Protection*, *supra* note 5, at 415.

⁵⁰ OHIO REV. CODE ANN. § 1345.02(A) (Page Supp. 1976).

⁵¹ *Id.* § 1345.02(B) prohibits particular conduct, including misrepresenting the performance characteristics, uses or benefits of a product (§ 1345.02(B)(1)), the standard, quality, or grade of a product (§ 1345.02(B)(2)), the need for repair or replacement (§ 1345.02(B)(7)), and the sponsorship, approval, or affiliation of a supplier who does not exist (§ 1345.02(B)(9)).

⁵² *Id.* § 1345.05(B)(2) (Page Supp. 1976).

While the FTC Act declares "unfair and deceptive practices" unlawful, the Uniform and Ohio Acts apply to "deceptive and unconscionable acts and practices." Although the Ohio Act does not provide specific examples of unconscionable conduct as it does for deception, the statute does enumerate specific circumstances which a court must consider in determining whether an act or practice is unconscionable.⁵³ Each of these circumstances requires the showing of a knowing violation by the supplier. Under the statute, "knowledge" means actual awareness, which may be inferred from objective manifestations indicating that the supplier acted with such awareness.⁵⁴ While this scienter requirement can be established by a supplier's course of conduct, it does impose a greater burden of proof in an action for unconscionable conduct than in an action for deception.⁵⁵ Since the statute contains only a general prohibition against unconscionable acts or practices, specific conduct will be determined to be unconscionable only through judicial decisions and substantive rules adopted by the Director of Commerce.

The statute authorizes the Director of Commerce to adopt substantive rules defining deceptive and unconscionable acts or practices.⁵⁶ Twelve substantive rules have been adopted by the Department of Commerce since 1972. Among other things, these rules cover "fine print" exclusions and limitations in advertisements,⁵⁷ bait ad-

⁵³ *Id.* § 1345.03(B) provides in pertinent part:

In determining whether an act or practice is unconscionable, the following circumstances shall be taken into consideration:

(1) Whether the supplier has knowingly taken advantage of the inability of the consumer to protect his interests . . . ;

(2) Whether the supplier knew . . . the price was substantially in excess of the price at which similar property or services were readily obtainable . . . ;

(3) Whether the supplier knew . . . of the inability of the consumer to receive a substantial benefit . . . ;

(4) Whether the supplier knew . . . that there was no reasonable probability of payment . . . 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;

(6) Whether the supplier knowingly made a misleading statement of opinion on which the consumer was likely to rely to his detriment.

⁵⁴ *Id.* § 1345.01(E).

⁵⁵ See section IV.B.1. *infra*.

⁵⁶ OHIO REV. CODE ANN. § 1345.05(B)(2) (Page Supp. 1976).

⁵⁷ Substantive rule COcp-3-01.02, *Exclusions and Limitations in Advertisements* (May 1, 1975) provides in pertinent part:

It is a deceptive act or practice in connection with a consumer transaction for a supplier, in the sale or offering for sale of goods or services, to make any offer in written or printed advertising or promotional literature without stating clearly and conspicuously in close proximity to the words stating the offer any material exclu-

vertising,⁵⁸ deceptive practices in the repair and services industries,⁵⁹ failure to deliver goods,⁶⁰ and use of deceptive price comparisons.⁶¹

sions, reservations, limitations, modifications, or conditions. Disclosure shall be easily legible to anyone reading the advertising or promotional literature and shall be sufficiently specific so as to leave no reasonable probability that the terms of the offer might be misunderstood.

⁵⁸ Substantive rule COcp-3-01.03, *Bait Advertising* (June 5, 1973) provides in pertinent part:

A. It shall be a deceptive act or practice in connection with a consumer transaction for a supplier to sell goods or services when the offer is not a bona fide effort to sell the advertised goods or services.

1. An offer is not bona fide when a supplier uses a statement or illustration in any advertisement which would create in the mind of a reasonable consumer a false impression of the grade, quality, quantity, make, value, model year, size, color, usability, or origin of the goods and services offered or which otherwise misrepresents the goods or services in such a manner that, on subsequent disclosure or discovery of the true facts, the consumer is switched from the advertised goods or services to other goods or services. An offer is not bona fide, even though the true facts are made known to the consumer before he views the advertised goods or services, if the first contact or interview is secured by deception.

2. An offer is not bona fide if a supplier discourages the purchase of the advertised goods or services in order to sell other goods or services.

⁵⁹ Substantive rule COcp-3-01.04, *Repairs and Services* (June 5, 1973), among other things requires a supplier to provide in advance to a consumer when the cost of anticipated repairs exceeds twenty-five dollars a written estimate of the cost of such repairs; obtain oral or written authorization for additional, unforeseen, but necessary repairs if such exceed the original estimate by 10% or more; tender to the consumer any replaced parts unless such parts are to be rebuilt or sold by the supplier and the consumer is informed of this intended reuse prior to receipt of the original estimate. The rule also prohibits a supplier from charging for repairs which have not yet been authorized, from representing that repairs have been performed when they have not, and from failing to provide the consumer with an itemized list of repairs performed, and the reason for such repairs.

⁶⁰ Substantive rule COcp-3-01.09, *Failure to Deliver—Substitution of Goods* (June 5, 1973), known as the "Eight-Week Rule," provides in pertinent part:

A. It shall be a deceptive act or practice in connection with a consumer transaction for a supplier:

1. To advertise or promise prompt delivery unless, at the time of the advertising, the supplier has taken reasonable action to insure prompt delivery;
2. To accept money from a consumer for goods ordered by mail, telephone, or otherwise and then permit eight weeks to elapse without:
 - a. Making shipment or delivery of the goods ordered;
 - b. Making a full refund;
 - c. Advising the consumer of the duration of an extended delay and offering to send him a refund within two weeks if he so requests; or
 - d. Furnishing similar goods of equal or greater value as a good faith substitute.

⁶¹ Substantive rule COcp-3-01.12, which applies to price comparisons, became effective August 1, 1975. The rule covers out-of-store advertising:

[It] stems from the general principle, codified in Ohio Revised Code Section 1345.02(B), that it is deceptive for any claimed savings, discount, bargain, or sale not to be genuine, for the prices which are the basis of such comparisons not to be bona fide, genuine prices, and for out-of-store advertisements which indicate price comparisons to create false expectations in the minds of consumers.

The rules that have been adopted under the Act define conduct that is deceptive and in violation of Revised Code § 1345.02(A). Yet to be developed are rules which expand upon the general prohibition against unconscionable acts or practices found in Revised Code § 1345.03(A).

The Consumer Sales Practices Act provides that when public enforcement action is warranted, the Attorney General may bring civil actions on his own initiative or upon the request of the Director of the Department of Commerce, for declaratory or injunctive relief.⁶² Since the Act specifically authorizes the imposition of a temporary or permanent injunction, the traditional equitable prerequisites of irreparable injury and an inadequate remedy at law need not be present—a showing that the defendant supplier has engaged in deceptive or unconscionable practices is sufficient.⁶³ A supplier who violates a temporary or permanent injunction is subject to a civil penalty of not more than \$5,000 for each day of the violation.⁶⁴ Although a consent judgment is not evidence of illegal conduct, disregard of the terms of a consent judgment is treated as a violation of an injunction and subjects the offending supplier to this civil penalty for contempt.⁶⁵

A special provision in the Act authorizes the Attorney General to seek restitution for consumers in an injunctive action. Under Revised Code § 1345.07(B), the Attorney General may request appropriate orders from a court, including the appointment of a receiver and the sequestration of a defendant's assets for the purpose of reimbursing consumers. While the Act specifically authorizes the Attorney General to initiate class actions on behalf of consumers damaged by violations,⁶⁶ the goal of a class action suit can be accomplished with-

The rule regulates representations regarding the "character" of a supplier, comparisons with his own prices and those of others, comparisons with nonidentical goods, price reductions for special circumstances, and advance or introductory sales.

⁶² OHIO REV. CODE ANN. § 1345.07(A) (Page Supp. 1976).

⁶³ *State v. Alexander Bros., Inc.*, 43 Ohio App. 2d 154, 334 N.E.2d 492 (Ct. App. 1974).

In this case, the lower court denied injunctive relief authorized by a specific statute on the ground that there was no showing of irreparable injury. The court of appeals reversed and held:

Where an injunction is authorized by statute and the statutory conditions are satisfied, the usual grounds for injunctive relief need not be established. For example, where a statute regulates a certain business and provides that an injunction may be granted to enforce the law, the party who seeks an injunction need not show irreparable injury or that he has no adequate remedy at law, where the statute authorizing an injunction does not place such limitations upon the granting of relief.

45 Ohio App. 2d at 155, 334 N.E.2d at 493.

⁶⁴ OHIO REV. CODE ANN. § 1345.07(A)(1) (Page Supp. 1976).

⁶⁵ *Id.* § 1345.07(E). See section IV.D. *infra*.

⁶⁶ OHIO REV. CODE ANN. § 1345.07(A) (Page Supp. 1976). Individual consumers under certain circumstances may also file class actions to recover actual damages pursuant to Revised Code § 1345.09(B).

out meeting the notice requirements of a class action by using the "appropriate orders" provision in an injunctive action. Under this procedure individual consumers who have been damaged may present their claims to a master appointed by the court, and thus save the court's time.

B. *Home Solicitation Sales Act*

Since January 1, 1973, the Home Solicitation Sales Act has given Ohio consumers an absolute three-day right to cancel contracts resulting from home solicitation sales. The law was amended in 1974 to conform to an FTC rule governing door-to-door sales and to strengthen the rights of Ohio consumers.⁶⁷ Both the Act and the FTC rule authorize cancellation of a contract subject to their coverage until midnight of the third business day following execution of the contract.⁶⁸

As a result of the 1974 amendments, the Ohio Act has a broader scope than the FTC rule.⁶⁹ The definition of "home solicitation sale" now includes all sales of consumer goods or services costing twenty-five dollars or more that are solicited at the residence of the buyer—including those in response to an invitation by the buyer—or in which the buyer's agreement or offer to purchase is made at a place other than the seller's "place of business."⁷⁰ The "place of business" is defined as the main office or a permanent branch office or permanent local address of the seller.⁷¹ Thus sales at temporary booths, shopping centers, or fairs are subject to cancellation by the buyer. The Act also provides that every home solicitation sale must be evidenced by a writing signed by both buyer and seller containing notice of the right to cancel in specific language prescribed by the statute.⁷²

⁶⁷ See Tongren & Olson, *Revisions in Ohio's Door-to-Door Sales Law*, 48 OHIO BAR 387 (1975).

⁶⁸ OHIO REV. CODE ANN. § 1345.22 (Page Supp. 1976); 16 C.F.R. § 429 (1976).

⁶⁹ The FTC rule's definition of door-to-door sales excludes transactions "[c]onducted and consummated entirely by mail or telephone; and without any other contact between the buyer and the seller or its representative prior to delivery of the goods or performance of the services." 16 C.F.R. § 429.1, note 1(a)(4) (1976). Revised Code § 1345.21(A)(2), however, narrows this provision to exclude such transactions only "if initiated by the buyer." The significance of this difference and its beneficial effect for Ohio consumers was pointed out in *Brown v. Periodical Publishers Serv. Bureau*, No. 75CV-05-1977 (C.P. Franklin Cty. May 26, 1976). In granting the Attorney General's cross-motion for partial summary judgment, the court's opinion, at 3, stated that the Ohio "Legislature chose to limit the telephone sales exclusion to only those transactions initiated by the buyer and, therefore, to extend protection of the Home Solicitation Sales Act to buyers in telephone transactions initiated by the seller."

⁷⁰ OHIO REV. CODE ANN. § 1345.21(A) (Page Supp. 1976).

⁷¹ *Id.* § 1345.21(H).

⁷² *Id.* §§ 1345.23(B)(1)-(2).

Until these requirements are met the buyer may cancel at any time.⁷³ A seller may not fail or refuse to honor any valid cancellation and must, within ten days of its receipt, refund all payments and cancel all indebtedness in connection with the sale.⁷⁴

The Attorney General's enforcement authority under the Home Solicitation Sales Act is the same as under the Consumer Sales Practices Act, since a failure to comply with the Act constitutes a deceptive practice in connection with a consumer transaction, in violation of Revised Code § 1345.02.⁷⁵ An injunction accompanied by restitution and other corrective action is the usual relief sought.⁷⁶ The Act also provides a criminal penalty for failure to provide the prescribed notice of the buyer's right to cancel and to perform other affirmative duties imposed by the statute.⁷⁷ These violations are punishable as minor misdemeanors. The Attorney General has also brought criminal actions against sellers pursuant to his authority under Revised Code § 109.16.⁷⁸

C. *Anti-Pyramid Sales Act*

Prior to 1974, the Attorney General brought enforcement actions against pyramid sales schemes under the referral selling prohibition of the Consumer Sales Practices Act.⁷⁹ These civil injunctive actions were ineffective and pyramid schemes continued to flourish

⁷³ *Id.* § 1345.23(C). The three-day cancellation period established under Revised Code § 1345.22 begins to run only after the seller has provided a written contract containing the statutory notice of the buyer's right to cancel. Therefore, the Attorney General seeks court-ordered notification to all buyers of their cancellation rights in enforcement actions against a seller for his wholesale failure to comply with the notice requirements of Revised Code §§ 1345.23(B)(1)-(2).

⁷⁴ *Id.* § 1345.23(D)(4)(a)-(c).

⁷⁵ *Id.* § 1345.28. Substantive rule COcp-3-91.11 (June 5, 1973), dealing with direct solicitations, also provides that failure to conform to the requirements of the Home Solicitation Sales Act is deceptive.

⁷⁶ See note 73 *supra*.

⁷⁷ *Id.* § 1345.99.

⁷⁸ See section IV.C. *infra*.

⁷⁹ OHIO REV. CODE ANN. § 1345.02(C) (Page Supp. 1976) provides:

No supplier shall offer to a consumer or represent that a consumer will receive a rebate, discount, or other benefit as an inducement for entering into a consumer transaction in return for giving the supplier the names of prospective consumers, or otherwise helping the supplier to enter into other consumer transactions, if earning the benefit is contingent upon an event occurring after the consumer enters into the transaction.

Ohio courts have applied this prohibition to pyramid sales schemes. In *Brown v. Source Motivation, Inc.*, No. 72CV-09-2970 (C.P. Franklin Cty., October 17, 1972), an action under the Consumer Sales Practices Act, the court held that Revised Code § 1345.02(C) was dispositive of the pyramid issue. *Accord*, *Brown v. Holiday Magic, Inc.*, No. 72CV-12-3807 (C.P. Franklin Cty., July 3, 1975).

in Ohio. The Anti-Pyramid Sales Act was enacted to solve this problem. It prohibits any scheme by which one pays "consideration" for the opportunity to receive "compensation" for introducing another person into the program or after another participant has introduced a person into the program.⁸⁰ This provision is narrowed by the definition of "consideration,"⁸¹ which excludes payment for sales demonstration materials as well as annual administrative fees up to twenty-five dollars, and the definition of "compensation,"⁸² which excludes payments received for sales to persons who are not purchasing in order to become participants in the plan or program.

The Act prohibits any person from proposing, planning, preparing, or operating a pyramid sales plan,⁸³ and empowers the Attorney General to bring injunctive action against virtually all persons involved from the inception of the scheme. A civil penalty of up to \$5000 per day may be imposed for violation of an injunction.⁸⁴ All contracts in violation of the Act are void.⁸⁵ In addition, an individual who has paid "consideration" in order to participate in a pyramid scheme may recover his consideration plus attorneys' fees in a civil action against "any" participant who received compensation as a result of that individual's introduction into the scheme.

The Anti-Pyramid Sales Act also contains criminal penalties.⁸⁶ If the amount of compensation received by a participant in connection with a violation of the Act is less than \$150, the offense is a misdemeanor of the first degree. If the compensation is \$150 or more, or if the offender has a previous conviction under the statute, the offense is a felony of the fourth degree. As under the Home Solicitation Sales Act, the Attorney General may bring civil and criminal actions against pyramid sales schemes.

IV. ENFORCEMENT ACTIONS

The Consumer Frauds and Crimes Section initiated a total of 239 enforcement proceedings between July 14, 1972 and June 1, 1976 under the three statutes discussed above. The goals of these enforcement actions are to eliminate deceptive and unconscionable sales practices from the marketplace, to remove financial incentives for

⁸⁰ OHIO REV. CODE ANN. § 1333.91(A) (Page Supp. 1976). A plan or program is covered whether or not it includes disposal or distribution of personal or real property.

⁸¹ *Id.* § 1333.91(C).

⁸² *Id.* § 1333.91(B).

⁸³ *Id.* § 1333.92.

⁸⁴ *Id.* § 1333.94.

⁸⁵ *Id.* § 1333.93.

⁸⁶ *Id.* § 1333.99(G).

suppliers to engage in such practices, and to provide restitution to injured customers.

A. *Enforcement Policy*

The prospect of being enjoined from future violations of the law creates little incentive for voluntary compliance among suppliers who are profiting from deceptive tactics. The General Assembly was aware that simply outlawing deceptive and unconscionable sales practices would not stop them, so long as suppliers could keep the profits from their illegal practices. Accordingly, the consumer's right to be reimbursed for damages suffered as a result of a supplier's unlawful sales practices is an integral part of the enforcement mechanisms of these laws. The Section also requires a mechanism for assuring continued compliance once enforcement proceedings have been concluded. Both of these forms of corrective action are regularly incorporated in the court orders or consent judgments that result from enforcement actions. The judgment entry includes a complaint resolution procedure which must be followed by the defendant, with specified time periods and reporting requirements. In many instances an escrow fund is required to assure reimbursement to consumers under the procedure. Defendants are also required to maintain appropriate records and to make them available for inspection by the Attorney General.

The Section continually monitors suppliers' compliance with all court ordered relief, including complaint resolution and record-keeping procedures. The \$5,000 per day contempt penalty has been an effective weapon against those defendants who fail to comply with court imposed requirements.⁸⁷

Certain general enforcement priorities have developed in the Section through its experience with consumer problems. Because of the large sums of money involved and the speed with which multi-level pyramid schemes grow, injunctions are sought as quickly as possible after the schemes are identified. The sixteen pyramid

⁸⁷ *Id.* § 1345.07(A)(1). In *Brown v. Introductions International, Inc.*, No. 74-2529 (C.P. Lucas Cty., September 29, 1975), the court ordered the defendants to establish an elaborate complaint resolution procedure and provide periodic reports of compliance to the Attorney General. In a subsequent contempt action, the court found that none of the defendants attempted to comply with its order and held them in contempt for a continuing period of 114 days. The court's entry of March 22, 1976, permanently enjoined the defendants from engaging in consumer transactions in Ohio and imposed a total civil penalty of 1.7 million dollars upon them. *State v. Happy People's Club*, No. 35-299 (Columbus Mun. Ct., October 28, 1975). See also *Brown v. Check Enterprises, Inc.*, No. 74 CV-07-2667 (C.P. Franklin Cty., August 20, 1975), a contempt action in which the court prohibited the defendants "from doing business in the State of Ohio."

schemes that have been enjoined to date took over twenty-five million dollars from 9000 Ohio consumers before being stopped. Injunctive relief under the Anti-Pyramid Sales Act usually includes an injunction against enforcing or assigning any contracts made in violation of the Act. The provision declaring all these contracts void can bring a pyramid enterprise to an abrupt demise.

Investigations of industries in which consumers, for want of technical knowledge, must totally rely on suppliers' representations have a very high priority in the Section. In addition to the automobile repair project, an extensive investigation to detect and enjoin odometer rollbacks recently led to the initiation of lawsuits against more than twenty automobile dealers in Ohio.

Actions against suppliers of goods or services that are expensive and of little or no benefit to the consumer are also given high priority. These have included actions against basement waterproofers, home remodelers, pest control services, and furnace repair companies. Typically these transactions involve hundreds of dollars, often for a service that was either unnecessary or improperly performed.

Consistent with the statutory prohibition against the Director of the Department of Commerce revealing the names of suppliers under investigation,⁸⁸ the Attorney General does not disclose the name of a supplier under investigation until the filing of a lawsuit or the acceptance of an assurance of voluntary compliance. The fact of the investigation is then a matter of public records. Premature disclosure of the identity of a businessman under investigation could harm the reputation of a legitimate business.

B. *Significant Decisions*

1. Deceptive and Unconscionable Practices

The Consumer Sales Practices Act contemplates that specific practices in addition to the ten enumerated in Revised Code § 1345.02(B)⁸⁹ will be determined by the courts to be deceptive under Revised Code § 1345.02(A), or unconscionable under § 1345.03(A) of the Code. Since the type of relief available in private actions under the Act can depend upon the existence of previous judicial determinations of this nature,⁹⁰ the Consumer Frauds and Crimes Section seeks

⁸⁸ OHIO REV. CODE ANN. § 1345.05(A)(7) (Page Supp. 1976).

⁸⁹ See note 51 *supra*.

⁹⁰ Individual actions for actual damages or a minimum recovery of \$100 are authorized if the violation was an act or practice previously determined by a court to violate the general prohibitions of deceptive or unconscionable acts or practices in Revised Code §§ 1345.02(A) and 1345.03(A). *Id.* § 1345.09. Private class actions are also authorized for such violations. *Id.* § 1345.09(B).

to obtain favorable and innovative judicial precedent in order to expand the list of specific deceptive and unconscionable practices and thus to increase the importance of the private action. Although the Act is barely four years old, the body of case law is already growing.

In *Brown v. Market Development, Inc.*,⁹¹ the defendant, an Ohio resident, was charged with sending deceptive sales literature to consumers in other states. The defendant had previously agreed to an injunction against similar acts practiced on Ohio consumers.⁹² In overruling the defendant's motion to dismiss for lack of jurisdiction, the court held that the residence of the consumer was not determinative, and that the Ohio Consumer Sales Practices Act is intended to prohibit deceptive and unconscionable acts and practices by Ohio suppliers regardless of where the consumers reside. The court concluded that the Act is remedial and not penal in nature and must be liberally construed pursuant to Revised Code § 1.11.⁹³

*Brown v. Lyons*⁹⁴ was an action against a dealer in used appliances who concealed his real identity from consumers by using fictitious names, frequently changing the names and addresses under which he did business, failing to answer his business phones, and failing to return calls to consumers. He also sold defective products and failed to honor warranties. The court concluded that the defendant had maintained a pattern of incompetency and continually evaded his legal obligations to consumers,⁹⁵ and held that this was

[a]n unconscionable act and practice in violation of . . . R.C. 1345.03(A), providing an adequate legal basis for the award to the consumer of punitive damages in an action where such damages have been requested from the court.⁹⁶

The court also held specifically that three of the circumstances considered by the court were each an unconscionable act and practice in violation of Revised Code § 1345.03.⁹⁷ It added that failure to

⁹¹ 68 Ohio Op. 2d 276, 322 N.E.2d 367 (C.P. Hamilton Cty. 1974).

⁹² *Brown v. Market Development, Inc.*, No. A-728958 (C.P. Hamilton Cty., December 15, 1972).

⁹³ OHIO REV. CODE ANN. § 1.11 (Page 1969) provides in pertinent part:

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

⁹⁴ 43 Ohio Misc. 14, 332 N.E.2d 380 (C.P. Hamilton Cty. 1974).

⁹⁵ *Id.* at 18, 332 N.E.2d at 384.

⁹⁶ *Id.* at 21, 332 N.E.2d at 386. The court awarded punitive damages in the amount of \$250 to each of the private consumers who participated as plaintiff-intervenors in the action.

⁹⁷ *Id.* The court held that knowingly taking advantage of the liability of the consumer to reasonably protect his interests (§ 1345.03(B)(1)), entering into a transaction knowing of the inability of the consumer to receive a substantial benefit from the transaction (§ 1345.03(B)(3)),

meet both express and implied warranties was a deceptive practice under Revised Code § 1345.02(A), and further that failure to supply either goods or services or to offer a refund within a reasonable length of time after accepting money is deceptive.⁹⁸

In *Brown v. Bredenbeck*,⁹⁹ the defendant had solicited and accepted paid subscriptions for a monthly magazine and failed to refund money when it suspended publication after three issues. He contended that there was no deceptive practice because his failure was caused by economic factors and because he had no intent to deceive consumers. The court held that

common law intent to deceive is not a prerequisite to violation of the Consumer Sales Practices Act. . . . To violate the Consumer Sales Practices Act all that is necessary is for the supplier to make a representation which has no basis in fact. His knowledge or intent at the time he makes the representation is immaterial.¹⁰⁰

The opinion went on to hold that a representation is deceptive if it is likely to induce in the mind of the consumer a belief which is not in accord with the facts.¹⁰¹ The court thus adopted the definition of "deceptive practice" found in the comments to the Uniform Consumer Sales Practices Act.¹⁰²

These cases have gone far to establish that failure to deliver within a reasonable time is a deceptive practice, regardless of the supplier's intent. In addition, the court in *Brown v. Cole*¹⁰³ held that a supplier who accepts money for goods or services, knowing that they will not be delivered, commits an unconscionable act and practice in violation of Revised Code § 1345.03(A).¹⁰⁴

In *Liggins v. The May Company*,¹⁰⁵ the court confronted the

and knowingly making a statement or opinion upon which a consumer is likely to rely to his detriment (§ 1345.03(B)(6)) were each an unconscionable act or practice in violation of Revised Code § 1345.03(A).

⁹⁸ *Id.* at 19-20, 332 N.E.2d at 385. See note 60 *supra*.

⁹⁹ No. 74CV-09-3493 (C.P. Franklin Cty., July 24, 1975).

¹⁰⁰ *Id.* at 3.

¹⁰¹ *Id.* at 4.

¹⁰² The Official Comment to § 3(a) of the Uniform Consumer Sales Practices Act, which contains the prohibition against deceptive acts or practices, provides:

This subsection forbids deceptive advertising, deceptive statements made when goods are delivered, and deceptive statements made in connection with debt collection. A deceptive act or practice has the likelihood of inducing a state of mind in the consumer that is not in accord with the facts. It is immaterial whether this capacity to mislead arises from a verbal, written, or graphic misrepresentation or a nondisclosure by a supplier.

7 UNIFORM LAWS ANN. 232 (1976 Supp.).

¹⁰³ No. 75-579 (C.P. Richland Cty., January 16, 1976).

¹⁰⁴ *Id.* at 4.

¹⁰⁵ 44 Ohio Misc. 81, 337 N.E.2d 816 (C.P. Cuyahoga Cty. 1975).

question of the Consumer Sales Practices Act's coverage of debt collection practices in connection with a consumer transaction. The defendant collection agency moved to dismiss, claiming that the Act confers no jurisdiction over debt collection practices and that it was not a "supplier" under the Act. The court held that the supplier-consumer relationship continues from the inception of the transaction until the debt is fully paid, that an assignment of the collection of the debt is part of the consumer transaction, and that a person attempting to enforce the payment of the debt is thus a supplier for purposes of the Act.¹⁰⁶ In its opinion, the court construed the provision in Revised Code § 1345.02(A) that a "deceptive act or practice by a supplier violates this section whether it occurs before, during or after the transaction." The comment to that provision in the Uniform Consumer Sales Practices Act also states that it applies to deceptive statements made in connection with debt collection.¹⁰⁷

In another private action, *Santiago v. S. S. Kresge Co.*,¹⁰⁸ the court agreed with the *Liggins* decision and went on to address the "distant forum abuse" alleged by the complaints of the consumer and the Attorney General:

This alarming practice consists of suing persons on small alleged consumer debts in a forum far from the consumer's home and far from the place where the claim arose, with the result that default judgments are obtained . . . [It] denies the consumer a day in court to contest the claim—a right that is the basis of our legal system. Due to the distance of the forum from the consumer's residence and the expense of defending, the creditor easily obtains default judgments and the consumer is prevented from raising defenses or contesting the claim.¹⁰⁹

For these reasons the court found that it is an unconscionable sales practice for a supplier to sue a consumer in a jurisdiction other than that where the consumer resides or where the transaction took place.¹¹⁰ It also granted the Attorney General's motion to intervene, holding that the intervention authorized by Revised Code § 1345.10(B) is as of right under rule 24(A) of the Ohio Rules of Civil Procedure.¹¹¹

¹⁰⁶ *Id.* at 83, 337 N.E.2d at 818.

¹⁰⁷ See note 100 *supra*.

¹⁰⁸ No. 948069 (C.P. Cuyahoga Cty., March 4, 1976).

¹⁰⁹ *Id.* at 3. The court also stated that the distant forum practice takes oppressive advantage of the consumer and forces the consumer into a one-sided situation where the odds are unconscionably stacked against him. It abuses the legal system in order to deny Ohio consumers a meaningful opportunity to be heard, and offends traditional notions of fair play and substantial justice.

¹¹⁰ *Id.* at 4.

¹¹¹ *Id.* at 1.

2. Procedures and Remedies

Revised Code § 1345.06 sets forth at length the powers of the Attorney General in investigations requested by the Director of the Department of Commerce. In *Brown v. Bill Garlic Motors, Inc.*,¹¹² the court affirmed that the Attorney General also had independent investigative authority under the Consumer Sales Practices Act.¹¹³ It also held that proof of the rolling back of even one automobile odometer is sufficient to invoke the powers of the court.

Section 1345.07(B) of the Revised Code provides that in an action for injunctive relief a court may issue orders for restitution, the appointment of a master, and other "appropriate orders." An example of the appropriate orders provision is found in *Brown v. Joe Schott Chevrolet, Inc.*¹¹⁴ After a trial on the merits, the court found that the defendant had charged for performing unnecessary repairs, charged for repairs which were not performed, performed defective repairs, failed to provide a written estimate in advance, and failed to tender replaced parts.¹¹⁵ The court enjoined these violations, ordered the supplier to establish and implement a quality control procedure to oversee its automobile repairs, and authorized the Attorney General to establish a compliance review program of the defendant's repair work, such as consumer transaction test checks of the defendant or the inspection of the records required to be kept by the defendant under the court's entry.

Injunctive relief against a corporation engaging in deceptive practices is often of little value where the corporation is controlled by a few individuals who can simply form a new corporation and proceed with the same deceptive practice. Therefore, the Consumer Frauds and Crimes Section attempts to ensure that the responsible individuals as well as the corporation are enjoined from future violations, in either adjudicated court orders or consent judgments. The largest contempt fine ordered by a court to date under the Consumer Sales Practices Act, 1.7 million dollars, was imposed jointly and

¹¹² No. 40780 (C.P. Huron Cty., February 4, 1976). The defendant asserted that because the statute describes only those investigations requested by the Director of the Department of Commerce, the Attorney General is precluded from initiating investigations. The Court held that the provision in Revised Code § 1345.07(A) that "the Attorney General may, and in consumer transaction cases referred to him by the Division of Commerce, shall" bring actions for violation of the Consumer Sales Practices Act (emphasis added) establishes the Attorney General's independent authority to investigate alleged violations of the law and bring appropriate actions.

¹¹³ Of the 239 enforcement proceedings brought by the Attorney General since 1972, 141 resulted from investigations initiated by the Office.

¹¹⁴ No. A7510051 (C.P. Hamilton Cty., April 29, 1976).

¹¹⁵ *Id.* at 2-3.

severally upon the corporate defendant and its individual owner.¹¹⁶

Piercing the corporate veil is based on the individual's knowledge, control, or authorization of illegal practices, which are grounds under Ohio case law for finding individual responsibility.¹¹⁷ In *Brown v. Cole*,¹¹⁸ the court found this control and held the individual owners to be suppliers who had committed deceptive and unconscionable acts. The defendants were enjoined from further violations and ordered to make restitution to consumers.

Revised Code § 1345.06¹¹⁹ provides for a request of a written assurance of voluntary compliance and a thirty-day waiting period for response prior to filing an action in court, except that "where an injunction is the only relief sought, such thirty-day period does not apply." The effect of these clauses has been at issue in several cases. At first the Attorney General would sue for injunctive relief against alleged violators and subsequently request a written assurance of voluntary compliance within thirty days. If a voluntary assurance was not obtained within that time period, the Attorney General would move for additional relief such as the appointment of a master and restitution to identifiably injured consumers.

This approach was rejected in *Brown v. Town & Country Auto Sales, Inc.*¹²⁰ After the trial court had issued a temporary restraining order and preliminary injunction, the defendant asserted that the written request for voluntary compliance must be sent 30 days before

¹¹⁶ See *Brown v. Introductions International, Inc.*, No. 74-2529 (C.P. Lucas Cty., September 29, 1975). Although the owner and operator of the defendant corporation was not named as a separate defendant, the court's injunctive order applied to the defendant corporation and its officers. In the subsequent contempt action, the court found the individual owner in contempt and imposed a \$570,000 civil penalty upon him.

¹¹⁷ *State v. Stemen*, 90 Ohio App. 309, 106 N.E.2d 662 (Ct. App. 1951), *cert. denied*, 342 U.S. 949 (1952).

¹¹⁸ No. 75-579 (C.P. Richland Cty., January 16, 1976).

¹¹⁹ OHIO REV. CODE ANN. § 1345.06 (Page Supp. 1976) provides

If, by his own inquiries or as a result of complaints, the director of commerce has probable cause to believe that a supplier has engaged, is engaging, or preparing to engage, in an act or practice that violates sections 1345.01 to 1345.13 of the Revised Code, he may request the attorney general to investigate. For this purpose the attorney general may administer oaths, subpoena witnesses, adduce evidence and require the production of relevant matter.

. . . .

The attorney general may terminate an *investigation under this section* upon acceptance of a written assurance of voluntary compliance from a supplier suspected of violation. Unless there is reason to believe that the supplier has or is about to remove himself or any of his property from the state, the attorney general shall request such an assurance from the supplier, in writing, at least thirty days prior to commencing an action under section 1345.09 of the Revised Code. *Where an injunction is the only relief sought, such thirty day period does not apply* . . . [Emphasis added].

¹²⁰ 43 Ohio App. 2d 119, 334 N.E.2d 488 (Ct. App. 1974).

filing *any* action in which more than injunctive relief is sought. The Cuyahoga County Court of Appeals upheld the lower court's dismissal of that part of the complaint which sought other than injunctive relief.¹²¹ The court held, however, that the Attorney General could pursue an injunctive action¹²² without having made such a request.

The next position taken by the Attorney General's Office was that the requirement of a "thirty-day request" in Revised Code § 1345.06 applied only in investigations requested under that section by the Director of the Department of Commerce—the only type of investigation to which the language "an investigation under this section" applied.¹²³ This approach was rejected in four cases consolidated in the Montgomery County Court of Appeals.¹²⁴ The court also rejected the conclusion in *Town & Country Auto Sales*, and held that the provision in Revised Code § 1345.06 that "[w]here an injunction is the only relief sought, such thirty-day period does not apply," does not eliminate the requirement of a written request for voluntary compliance, but only removes the thirty-day waiting period.¹²⁵

Although they reached different conclusions, these two appellate courts have emphasized "the anti-litigious objective sought to be accomplished" and the "legislative preference for voluntary rather than court-ordered compliance"¹²⁶ with the Consumer Sales Practices Act. It remains to be seen how this emphasis on voluntary compliance will be reconciled with conclusions like that of Judge Black of the Hamilton County Court of Common Pleas that "the Act is intended to prohibit (and to provide civil remedies to enforce the prohibition of) deceptive and unconscionable acts and practices by Ohio suppliers in connection with consumer transactions"¹²⁷ Making a written request for voluntary compliance a prerequisite to a temporary restraining order is incongruous, especially when egregious violations are occurring.

¹²¹ Although the defendant moved for a dismissal of the entire action, the court of appeals affirmed the trial court's action of dismissing only the Attorney General's request for a declaratory judgment and motion for restitution which had been filed more than thirty days subsequent to the commencement of the lawsuit. *Id.* at 121, 334 N.E.2d at 490.

¹²² *Id.* at 123, 334 N.E.2d at 491.

¹²³ See note 119 *supra*.

¹²⁴ *Brown v. Borchers Ford, Inc.*, No. 5015, *Brown v. White-Allen Chevrolet, Inc.*, No. 5016, *Brown v. Jack Becker*, No. 5017, and *Brown v. T.D. & P.A. Peffley, Inc.*, No. 5018 (Ct. App. Montgomery Cty., April 8, 1976).

¹²⁵ *Id.* at 3.

¹²⁶ *Id.* at 4.

¹²⁷ *Brown v. Market Development, Inc.*, 68 Ohio Op. 2d 276, 278, 322 N.E.2d 367, 368 (C.P. Hamilton Cty. 1974).

C. *Criminal Actions*

In order to effectively deter prospective violators, the Consumer Frauds and Crimes Section recently has invoked the Attorney General's authority under Revised Code § 109.16¹²⁸ to seek criminal sanctions against violators of the Home Solicitation Sales Act and the Anti-Pyramid Sales Act. A prosecution stemming from a single transaction can result in a criminal conviction on a number of counts, with the imposition of a fine for each count. For example, failure to provide the proper notice of cancellation with a home solicitation sales contract, failure to inform a buyer orally of his right to cancel, failure to refund money, and negotiation of a note or other evidence of indebtedness within five days, each a criminal violation, could all occur in connection with a single home solicitation sale. The Attorney General has brought four such criminal actions thus far: three under the Home Solicitation Sales Act¹²⁹ and one under the Anti-Pyramid Sales Act.¹³⁰ Two of these have resulted in convictions.¹³¹ The threat of a criminal conviction should encourage voluntary compliance with consumer protection laws.

D. *Consent Judgments Illustrating Enforcement Policies*

Whenever an enforcement proceeding is concluded by a consent judgment, the Consumer Sales Practices Act mandates that the judgment provide "appropriate corrective action," and provides that the Attorney General may condition acceptance of an assurance of voluntary compliance on the supplier's agreement to undertake such action.¹³² Typically, a wide range of compliance mechanisms are included in consent judgments obtained under the Act.

The most important feature of a consent judgment is restitution to defrauded consumers. Nearly every consent judgment resulting from the Attorney General's enforcement actions contains a complaint resolution procedure which must be followed by the defendant. Time periods are established within which the defendant must resolve consumer complaints and report the resolution to the Attorney Gen-

¹²⁸ OHIO REV. CODE ANN. § 109.16 (Page Supp. 1976).

¹²⁹ State v. State Aerial Farm Statistics, Inc., No. 75-CR-B-1205 (Newark Mun. Ct., October 17, 1975); State v. Commercial Builders & Floor Coverings, Inc., Nos. 32598, 32599, 32600 (Columbus Mun. Ct., October 28, 1975); State v. Kuhn, No. 75 CR-B-590-S (Celina Mun. Ct., November 4, 1975).

¹³⁰ State v. Happy People's Club, No. 35-299 (Columbus Mun. Ct., November 20, 1975).

¹³¹ State v. State Aerial Farm Statistics, Inc., No. 75-CR-B-1205 (Newark Mun. Ct., October 31, 1975); State v. Commercial Builders & Floor Coverings, Inc., No. 32598, 32600 (Columbus Mun. Ct., March 5, 1976).

¹³² OHIO REV. CODE ANN. § 1345.07(E) (Page Supp. 1976).

eral's Office. Continuing escrow accounts are required to ensure a source of funds for the resolution of complaints received both before and after execution of the judgment.

In appropriate cases, the Attorney General's Office has required suppliers to admit their violations of the Consumer Sales Practices Act. Admissions have taken various forms, such as acknowledging the truth of the allegations in the Attorney General's complaint¹³³ admitting having engaged in the enjoined practices,¹³⁴ and admitting violations of specific provisions of the Act and the substantive rules of the Department of Commerce.¹³⁵

To ensure continuing compliance with consent judgments, the Office has required various forms of reporting by defendants and the opportunity to inspect defendants' business records. Forms of reporting have included monthly submission of affidavits showing mileage of all used cars purchased and sold by the defendant in Ohio¹³⁶ and maintenance of a list of the defendant's employees with a verified statement that each has received, read, and understood the requirements of the consent judgment.¹³⁷

Whatever a consent judgment or an adjudicated court order requires, the Section closely monitors the defendant's subsequent compliance. The force of a court order under the Act is thus strengthened by the supplier's awareness that this scrutiny of his actions might result in the imposition of a \$5000 per day civil penalty.¹³⁸ The Section has brought eighteen contempt actions since enactment of the Consumer Sales Practices Act, resulting in judgments totalling 1.9 million dollars.

V. CONCLUSION

Since 1972, when the Attorney General was first granted specific statutory authority, his consumer protection enforcement efforts have stopped numerous unlawful business practices, resulted in restitution for victimized consumers, and established new and meaningful rights for Ohio's citizens. However, consumer protection in Ohio

¹³³ *Brown v. Smith*, No. 75-CIV-1488 (C.P. Columbiana Cty., March 19, 1976).

¹³⁴ *Brown v. Home Educational Service, Inc.*, No. 72-256 (C.P. Stark Cty., February 24, 1976).

¹³⁵ *Brown v. DiMatteo*, No. 75CV-719 (C.P. Mahoning Cty., November 18, 1975); *Brown v. Community Hearing Service, Inc.*, No. 75-050582 (C.P. Cuyahoga Cty., December 22, 1975).

¹³⁶ *Brown v. Herbert Benton Used Cars, Inc.*, No. 75-CV-09-3961 (C.P. Franklin Cty., September 29, 1975).

¹³⁷ *Brown v. Allied Pest Control, Inc.*, No. 75-62351 (C.P. Licking Cty., October 6, 1975).

¹³⁸ OHIO REV. CODE ANN. § 1345.07(A)(1) (Page Supp. 1976).

is still in its infancy, and more must be done. Consumers, businessmen, and the judiciary must become more fully aware of the rights, obligations, and remedies existing under present Ohio consumer protection laws. The legislature must reexamine existing laws to determine and to eliminate deficiencies. Additional legislation is needed to correct abuses that are not subject to existing law. The Consumer Frauds and Crimes Section of the Attorney General's Office will continue to play a necessary role in accomplishing these tasks.

