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The Kentucky Consumer Act--True Happiness?

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Comments

THE KENTUCKY CONSUMER ACT—TRUE HAPPINESS?

An Epilogue

If we adhere to a strict interpretation of the received economic theory, there would seem to be no necessity for consumer protection. The consumer, in the legends that pass as theory, is a calculating individual who knows what he wants and how he can get it. Producers are forced to respond to the consumer's demands in order to survive in what is held to be a fiercely competitive struggle for the consumer's dollar. As a result of these general conditions, producers are forced to deliver goods in just the quantity and quality that consumers desire them.¹

The above is not an excerpt from *Alice in Wonderland*, although I am certain that were Lewis Carroll alive today he could find room for it in his book. Such naivete may be humorous when read, but it is no laughing matter when acted upon. Yet, this is the same foundation used to construct the common law of consumer protection. The law developed at a time when sellers hawked their wares in the marketplaces of medieval England and variety was limited to a few essentials with which the buyer was familiar. If a man sold cloth he was in one section of the marketplace, if he sold fish he was (to the cloth seller's relief) in another section of the market. The shopper compared products side by side as each seller demonstrated the qualities of his product. Alas, those were "the good old days." Today the producer and the retailer are in most instances two separate entities. The local marketplace is usually composed of large department stores and chain-store food merchandisers who gather all the purchaser's needs in one place and make a profit on whichever competing product is purchased. The vendee, unlike his predecessor, is faced with a plethora of different items from which to choose. He can no longer distinguish the elements indicative of quality and has come to assume that the best product is the one with the highest price tag. In addition to these woes the patron finds that, while he is almost always able to make the product perform, he rarely has the know-how to repair the inevitable breakdown, and—to his chagrin—all too often neither does the vendor. These changes have occurred in the marketplace while too many of the common law aspects of consumer protection have remained in a medieval state. Seeds sown in

¹ D. HAMILTON, CONSUMER PROTECTION IN NEW MEXICO I (1971).

the dark ages wilt in the light of reason, and it was inevitable that someone would cry out:

It must not be; there is no power . . .
Can alter a decree established.
'Twill be recorded for a precedent,
And many an error by the same example
Will rush into the state. It cannot be.²

In the decade since President Kennedy presented his consumer message to Congress,³ an awareness of the consumer's plight has permeated all levels of our society. Every area of the news media has contributed to an awakening of interest in consumer problems, and a substantial body of literature has developed on the subject. The brittle encrustations of an anachronistic common law have necessitated sweeping legislative action.⁴ The United States Congress has been in the vanguard of this consumer protection movement,⁵ but the complementary efforts of state legislatures have shown such marked increase⁶ that they may soon eclipse the federal record. In the 1972 Session of the General Assembly, Kentucky took what some would consider a giant step⁷ toward providing a means of combating egregious business practices⁸ which bilk the unsuspecting consumer. Embodied in this new structure is the Division of Consumer Protection of the Department of Law and an adequate legal foundation from which consumer protection action can be launched. We shall consider two principal questions: What protection is afforded the Kentucky consumer under Senate Bill 52 and how can he avail himself of these rights? How does his situation compare with that of consumers in other states and how can it be improved?⁹

The passage of the new Consumer Protection Act¹⁰ puts the Kentucky purchaser in a more favorable position than that of his counterparts in a major portion of the nation.¹¹ Although eleven states still

² W. SHAKESPEARE, *THE MERCHANT OF VENICE*, Act IV, Scene 1, lines 218-22.

³ H.R. DOC. 364, 87th Cong., 2d Sess. (1962).

⁴ E. KINTNER, *A PRIMER ON THE LAW OF DECEPTIVE PRACTICES: A GUIDE FOR THE BUSINESSMAN* 5-14 (1971).

⁵ *Id.* at 15-21.

⁶ KENTUCKY LEGISLATIVE RESEARCH COMM'N, *CONSUMER PROTECTION AGENCIES: A SURVEY* 24-42 (1969); THE COUNCIL OF STATE GOVERNMENTS, *CONSUMER PROTECTION IN THE STATES* 23-25 (1970).

⁷ Note, *Can the Kentucky Consumer Ever Forget Caveat Emptor and Find True Happiness?* 58 Ky. L.J. 325, 379 (1970).

⁸ KY. REV. STAT. ch. 367 (Supp. 1972) [hereinafter cited as KRS].

⁹ See Note, *supra* note 7, for material on consumer laws in Kentucky prior to the enactment of Kentucky's Consumer Protection Act.

¹⁰ KRS ch. 367.

¹¹ NAT'L ASS'N OF ATTORNEYS GENERAL COMM. ON THE OFFICE OF ATTORNEY GENERAL AND CONSUMER PROTECTION COMM., *STATE PROGRAMS FOR CONSUMER PROTECTION* 74 (Aug. 1972) [hereinafter cited as COMMITTEE].

have no comparable legislation,¹² the remaining states have either the Consumer Fraud, Deceptive Trade Practices or "Little F.T.C." form of Consumer Protection Act.¹³ The "Little F.T.C." pattern is designed to prevent those "unfair methods of competition and unfair or deceptive acts or practices" which are prohibited in interstate commerce by the Federal Trade Commission; it is the approach favored by the F.T.C.¹⁴ This format is followed in nine states.¹⁵ Fourteen states have enacted the type of legislation Kentucky has adopted.¹⁶ The third form—a deceptive trade practices act—proscribes certain enumerated practices.¹⁷ Sixteen states take this approach.¹⁸

Regardless of the form chosen, the overwhelming majority of states have their laws structured so that primary responsibility for enforcement is in the hands of the Attorney General,¹⁹ and in this respect Kentucky is no exception.²⁰ There is strong feeling that this is the most effective method of implementing this type of law.²¹ The fact that the Attorney General's Office is an already existing administrative body normally performing similar functions cogently supports this proposition. However, enacting a consumer protection law and entrusting its enforcement to the appropriate administrative body is no panacea. There must be adequate budgetary allotments for the necessary personnel and material resources which will insure sufficient implementation. In this respect numerous states, including Kentucky, have exercised a frugality which may prove uneconomical in the long run.²² The entire Kentucky Consumer Protection Division consists of an Assistant Deputy Attorney General, two other attorneys, one Education Specialist, one full-time and one part-time clerk and four secretaries.²³ It is indeed fortunate that the majority of Kentucky's businessmen are honest!

A small number of states initiate enforcement actions on their own,

¹² *Id.*

¹³ *Id.*

¹⁴ *Id.* at 75; FEDERAL TRADE COMM'N, UNFAIR TRADE PRACTICES AND CONSUMER PROTECTION LAW 1 (Rev. 1970) [hereinafter cited as COMMISSION].

¹⁵ COMMITTEE, *supra* note 11, at 75-76.

¹⁶ *Id.* at 76; COMMISSION, *supra* note 14, at 1.

¹⁷ COMMITTEE, *supra* note 11, at 76-77; COMMISSION, *supra* note 14, at 2. For a discussion of some of the results in a state following this model see THE JOINT SENATE-HOUSE COMMITTEE, CONSUMER PROTECTION IN FLORIDA (1970). For criticism of this approach see Note, *supra* note 7, at 354-55.

¹⁸ COMMITTEE, *supra* note 11, at 77.

¹⁹ *Id.* at 4-7.

²⁰ KRS § 367.150.

²¹ COMMITTEE, *supra* note 11 at 13-16; Note, *supra* note 7, at 333-36.

²² COMMITTEE, *supra* note 11, at 17.

²³ Interview with Robert V. Bullock, Assistant Deputy Attorney General, Chief of the Kentucky Consumer Protection Division, in Frankfort, October 4, 1972 [hereinafter cited as Interview].

but the usual practice is for the state's consumer protection agency to use consumer complaints as a source upon which to predicate action.²⁴ Since Kentucky has no full-time investigator on its staff,²⁵ it would appear to be relegated to the latter class. The natural corollary of depending upon laymen as the primary source of information is that the vast majority of complaints are merely instances of misunderstanding between the consumer and the merchant.²⁶ These are circumstances at which consumer protection laws are not aimed, and the best assistance the Attorney General's Office can furnish is that of a mediating agency.²⁷ Complaints stemming from a misunderstanding can never be lightly regarded because, should the complainant feel that he has not received proper consideration, he may become discouraged and refrain from reporting future incidents which involve actual violations.

The large number of complaints received by state consumer protection agencies forces them to establish priorities. These priorities vary from state to state, but in general they tend to encompass: 1) the number of consumers affected; 2) the amount of money involved; 3) the degree of deception or fraud being practiced; and 4) the likelihood of successful action.²⁸ Aside from enforcement action, the Kentucky Division for Consumer Protection has other functions to perform and the order of importance of such functions is considered to be: first, bring actions for consumer fraud; second, represent consumers before rate-making agencies; third, conduct consumer education projects; and finally, deal with consumer-business misunderstandings.²⁹ The specific action taken within each category on a state's priority list is also an important aspect of the overall program. Among the various states there are divergent philosophies as to the principal desired result of departmental action. One school of thought sees the main objective as the procurement of refunds to the consumer where there are deceptive practices. A second group contends that the consumer protection division is more an agency for the prevention of deceptive practices than for obtaining restitution.³⁰ The prophylactic effect of the latter philosophy seems especially amenable to situations where the staff is overburdened. When this philosophy is weighed in conjunction with the ability of a private party in Kentucky (though not in most

²⁴ COMMITTEE, *supra* note 11, at 30.

²⁵ Interview, *supra* note 23.

²⁶ *Id.*

²⁷ *Id.*

²⁸ COMMITTEE, *supra* note 11, at 41-42.

²⁹ Interview, *supra* note 23.

³⁰ COMMITTEE, *supra* note 11, at 44.

states³¹) to proceed on his own behalf and as a prevailing party to collect attorney's fees,³² then the preventive philosophy has substantial merit.³³ Of course, from a public relations point of view, consumers will think they are receiving greater benefit from the law when they are able to obtain restitution merely by picking up the telephone and dialing the Attorney General's Office. This is an area in which consumer education can be effective. Educators can make the public aware that they are being protected, but budget realities dictate that they not be spoon-fed. It is unfortunate that we have not reached the level of affluence where such self-contained action can be initiated by the Attorney General (whether it will ever be feasible may be debated) but until that time the public will be better protected if they are left to implement final recovery.³⁴

There are both short-term and long-term goals to be achieved under consumer protection laws. Legal devices are used to combat present emergencies while education aims at long-term prevention. The ignorant and unsuspecting are prime candidates for the crafty swindler. Educating such people is a lengthy process because more than superficial knowledge is needed to keep up with new practices and variations on old schemes. Consequently, stop-gap legal remedies will be the predominant insulation for consumers until education can produce more discerning shoppers.

Kentucky's Consumer Protection Law

An analysis of the new Kentucky Consumer Protection Law³⁵ will now be undertaken. The initial portions of the bill³⁶ formulate a structure to be used for solving consumer problems. The bulk of the duties and responsibilities are delegated to the Attorney General's Office.³⁷ This organizational segment of the Act is followed by legislation modeled after the consumer protection law designed by the Federal Trade Commission³⁸ and recommended by the Committee on Suggested State Legislation of the Council of State Governments.³⁹

³¹ *Id.* at 86.

³² KRS § 367.220.

³³ The position of the consumer in private action suits has certain disadvantages which will be discussed later. Because of these drawbacks, the argument presented here is somewhat weakened.

³⁴ Note the *caveat* in the preceding footnote.

³⁵ KRS §§ 367.110-.990.

³⁶ KRS §§ 367.110-.160.

³⁷ See COMMITTEE, *supra* note 11, at 13-16, for the presentation of arguments justifying such a structure.

³⁸ COMMISSION, *supra* note 14.

³⁹ THE COUNCIL OF STATE GOVERNMENTS, CONSUMER PROTECTION IN THE STATES appendix (1970).

Section 7 of the Act⁴⁰ makes “[f]alse, misleading, or deceptive acts or practices in the conduct of trade or commerce” unlawful; “trade [and] commerce [previously having been defined as] advertising, offering for sale, or distribution of any services and any property, tangible or intangible, real, personal, or mixed, and any other article, commodity, or thing of value, and [including] any trade or commerce directly or indirectly affecting the people of” Kentucky.⁴¹ A prohibition of this magnitude is necessary to insure proper flexibility in the face of changing circumstances.⁴² The prohibition is broader in scope than that of a deceptive trade practice approach, but it does not have the range of the “little F.T.C.” model. The Act expands upon the prohibitive language of the statutes of a number of other states.⁴³ It can be argued that the law cannot be used to reach conduct taking place *after* the transaction.⁴⁴ While the language could have been more exact in this respect,⁴⁵ adoption of a strict judicial construction would not be in keeping with the spirit of the Act. If it is not now readily apparent, further reading will demonstrate that Section 7 is the hub around which the Act revolves. The constricting doctrine of *caveat emptor* no longer looms forebodingly in the path of recovery.

Excluded from the application of Section 7 is “the owner or publisher of newspapers, magazines or publications wherein such advertisements appear, or . . . the owner or operator of a radio or television station which disseminates such advertisements when the owner, publisher or operator has no knowledge that such advertisement may be in violation of Section 7. . . .”⁴⁶ The fear had been expressed previously that an exclusion thus worded might cause the media to be less than diligent in screening advertisements in order to avoid acquiring the requisite knowledge that would expose them to the Section 7 prohibitions.⁴⁷ Experience thus far, while admittedly limited, allays this fear.⁴⁸ The various media have, if anything, increased their vigilance.⁴⁹

⁴⁰ KRS § 367.170.

⁴¹ KRS § 367.110.

⁴² Dixon, *Federal State Cooperation to Combat Unfair Trade Practices*, 39 STATE GOV'T 37, 38 (1966); Note, *Consumer Protection Under the Iowa Consumer Fraud Act*, 54 IOWA L. REV. 319 (1968); COMMISSION, *supra* note 14, at 2.

⁴³ See, e.g., DEL. CODE ANN. tit. 6, § 2513(a) (Supp. 1970), and the discussion concerning the wording of that statute in Note, *supra* note 7, at 356.

⁴⁴ Note, *supra* note 7, at 357.

⁴⁵ *Id.* at 357, n.176.

⁴⁶ KRS § 367.180.

⁴⁷ Note, *supra* note 7, at 362.

⁴⁸ Interview, *supra* note 23.

⁴⁹ *Id.*

Section 9 of the Act is the first of the remedial sections and provides that the Attorney General may, whenever he

has reason to believe that any person is using, has used, or is about to use any method, act or practice declared by [Section 7] . . . unlawful, and that proceedings would be in the public interest . . . immediately move in the name of the Commonwealth in a circuit court for a restraining order or a permanent injunction to prohibit the use of such method, act or practice.⁵⁰

This provision outlines the procedure to which the Attorney General must adhere if he is to obtain a restraining order or an injunction. It does not necessarily follow that a restraining order or injunction will be forthcoming. The court will evaluate the evidence presented to determine the likelihood that the action in question is a violation of Section 7 and make its decision accordingly.⁵¹ If the court is satisfied with the evidence, a restraining order or a temporary or permanent

⁵⁰ KRS § 367.190.

⁵¹ Interestingly enough, this is one of the areas in which the statute received its first constitutional test. In *Commonwealth v. Glenn W. Turner Enterprises, Inc.*, Civil No. 33822 (Fayette Cir. Ct., Aug. 2, 1972), the defendant argued that the fact that the Kentucky Act is modeled after the F.T.C. Act which has been held constitutional was not decisive.

[T]he Federal Trade Commission Act is not applicable to the situation at hand. While its prohibition against "unfair or deceptive acts and practices" is broader than that used in the Kentucky law, the Federal Trade Commission Act is directed to sales in interstate commerce and provides a far different means of enforcement. In an action under [that act] a hearing is held in an appearance before an administrative board based on a show cause order. Such is not the situation in the Kentucky Consumer Protection Act. It is argued that this opportunity to be heard before an administrative board prior to the granting of even a preliminary injunction is what renders the Federal Trade Commission Act constitutional and able to withstand assaults concerning its overbreadth.

Furthermore, Section 9 of the Act provides that if the Attorney General has reason to believe that any person is using what is defined as a deceptive act or practice, he may initiate an action. . . . The foremost constitutional denial is to be found in the Fourteenth Amendment in that the Attorney General must present no proof in order to gain his restraining order for his temporary or permanent injunction. *Id.*

While the request for a restraining order is an *ex parte* proceeding, it is highly questionable that this fact alone should make the act unconstitutional. Of course if the situation were, as contended above, that the Attorney General could obtain the restraining order without presenting any proof no doubt the statute *would* be unconstitutional. The fact that the legislature did not specifically state in the act that the circuit judge must weigh the evidence presented to determine if the necessary proof has been made to issue the restraining order seems immaterial. Is it not reasonable for the legislature to assume that the judge will carry out his normal judicial function without being told? If the legislature had intended such an unusual procedure to be followed by the court then it should have been expressed. The obvious reason no mention is made is that it was taken for granted that the court would follow the normal procedure for issuance of a restraining order in cases where first amendment rights might be affected. This position is supported in Lovett, *State Deceptive Trade Practice Legislation*, 46 *Tul. L. Rev.* 724, 738-39 (1972).

injunction will be issued against any further deceptive acts or practices of the kind specified in the complaint.⁵² Once the restraining order or injunction has been issued, the defendant becomes liable for any violation of the court order.⁵³ The penalty for each violation is not more than twenty-five thousand dollars.⁵⁴ This civil penalty is as stringent as that in any other state and more severe than in the majority of states.⁵⁵

Although criminal penalties are not provided by most states, five states *do* have such penalties.⁵⁶ The imposition of criminal sanctions has one important drawback; it may actually inhibit investigative and enforcement efforts by increasing the burden of proof for the state.⁵⁷ Kentucky's civil penalty is an effective means of deterrence, though it should be noted that continuing violators could be fined, even if there were no specific penalty provision, by utilizing contempt of court proceedings.⁵⁸ The threat of contempt proceedings would be enough to assure adherence to the order by responsible businesses, but the more stringent penalty contained in the Act is necessary "to deter and suppress misconduct by a hard core of ruthless, low-grade entrepreneurs who refuse otherwise to conform with reasonable standards of fairness."⁵⁹ In the more drastic cases and where there is the likelihood of flight or concealment of assets that may destroy the power of the court to grant proper relief, Sections 10 and 11 of the Act may be applied.⁶⁰ In accordance with these sections, a receiver may be appointed to take possession of the violator's assets and distribute them to the victims.⁶¹ The power to revoke a license or certificate authorizing any person to engage in business in Kentucky also falls into this category of extreme remedies.⁶²

It is not entirely clear whether the Kentucky Act permits an ad-

⁵² KRS § 367.190(2). See Lovett, *supra* note 51, at 738-39.

⁵³ KRS § 367.990(1).

⁵⁴ *Id.*

⁵⁵ Lovett, *supra* note 51, at 739. Two other states provide for fines up to \$25,000, one up to \$15,000, eleven specify up to \$10,000, two specify \$5,000 and four range from \$2,500 to \$5,000. Five states use criminal penalties, with maximum fines ranging from \$250 to \$10,000, and four of these states allow imprisonment of up to one year.

⁵⁶ Lovett, *supra* note 51, at 738 n.48.

⁵⁷ *Id.*

⁵⁸ KY. REV. STAT. ANN. § 432.280 (1971) [hereinafter cited as KRSA].

⁵⁹ Lovett, *supra* note 51, at 739.

⁶⁰ KRS § 367.210.

⁶¹ *Id.* See also Lovett, *supra* note 51, at 739-40 wherein it is stated:

The legal opportunity for consumers to force receivership is analogous to the opportunity of business creditors to initiate bankruptcy proceedings for liquidated debts or to obtain attachments that tie up a debtor's assets pending the settlement of unliquidated claims.

⁶² KRS § 367.200.

ministrative right of action by the Attorney General to seek restitution for victims. If the power exists, it is by implication.

[The court] may make such additional orders or judgements as may be necessary to restore to any person in interest any moneys or property, real or personal, which may have been acquired by means of any practice declared to be unlawful . . . including the appointment of a receiver. . . .⁶³

The direct approach would be to consider the Attorney General a "person in interest." Hardly less direct would be appointment of the Attorney General as a receiver, but it might be contended that this provision should not apply except in the most extreme cases.⁶⁴

One administrative remedy that does not give cause for debate is the voluntary compliance statute.⁶⁵ At this juncture the law provides that

the Attorney General may accept an assurance of voluntary compliance with respect to any method, act or practice deemed to be violative of [the Act] from any person who has engaged or was about to engage in such method, act or practice. Any such assurance shall be in writing and [properly filed]. Such assurance . . . shall not be considered an admission of violation for any purpose. . . .⁶⁶

This is a highly desirable provision and has been adopted by eighteen other states.⁶⁷ The advantage of this provision is two-fold. It saves the investigative and litigation resources of the state, and it will satisfy the majority of business firms that will be quite happy to comply.⁶⁸

An equally important remedy is contained in Section 12,⁶⁹ which permits a private action to be brought and allows attorney's fees.⁷⁰ The initial impression is that the Kentucky policy is strong medicine for consumer ills. Upon closer investigation and comparison with other states that have similar statutes, the clause, unfortunately, begins to resemble a placebo rather than an elixir. Of the thirteen other states that have made provisions for private relief, only New Mexico can be said to have given the consumer sandier footing on which to stand.⁷¹ There are obvious overtones of business protection in this

⁶³ KRS § 367.200; *see* Note, *supra* note 7, at 376.

⁶⁴ Note, *supra* note 7, at 376-77; Lovett, *supra* note 51, at 740-41.

⁶⁵ KRS § 367.230.

⁶⁶ *Id.*

⁶⁷ The eighteen states are Alaska, Arizona, Colorado, Delaware, Florida, Kansas, Maine, Michigan, Missouri, New Hampshire, Massachusetts, Oregon, Pennsylvania, Rhode Island, Texas, Vermont, Washington, and Wisconsin.

⁶⁸ Lovett, *supra* note 51, at 741; Note, *supra* note 7, at 372-73.

⁶⁹ KRS § 367.220.

⁷⁰ KRS § 367.220(3).

⁷¹ The states with better consumer policies in this area are Hawaii, Washington, South Carolina, North Carolina, California, Alaska, Idaho, Massachusetts, Colorado, Indiana, Rhode Island, and Vermont.

segment of the Kentucky Act. A detailed look at the laws of other states best illustrates this point.

The consumer finds himself in the best position in Hawaii. There the law provides for reasonable attorney's fees and costs to injured parties with treble damages as the remedy, and it authorizes class actions.⁷² Next on the list is Washington. That state has the same provision except that it limits treble damages to the first \$1,000, allowing actual damages *only* beyond that level; it does *not* provide for class action.⁷³ South Carolina allows actual damages and attorney's fees and costs but grants treble damages only where there is a case of willful or knowing violation of the law.⁷⁴ North Carolina permits treble damages in all cases but has no automatic provision for attorney's fees.⁷⁵ California gives minimum damages of \$300, actual damages if they are greater and punitive damages at the court's discretion. It also grants attorney's fees and specifically authorizes class actions.⁷⁶ Alaska and Idaho are similar; both provide for \$200 minimum recovery with attorney's fees allowed but not required.⁷⁷ Massachusetts limits recovery to actual damages, and attorney's fees are usually awarded to a claimant who has not declined a reasonable settlement.⁷⁸ Colorado law provides actual damages and, at the court's discretion, attorney's fees.⁷⁹ Vermont's recent law allows treble damages and attorney's fees,⁸⁰ where previously it had followed a policy similar to that in Indiana and Rhode Island which allow damages but make no provision for attorney's fees.⁸¹ From the consumer's standpoint Kentucky would rank below all of these states in the area of private action.

The portion at issue in Section 12 of the Act reads:

Any person [injured by acts declared unlawful under Section 7] may bring an action [in accordance with the prescribed procedures and in specified forums] to recover actual damages. The court may, *in its discretion*, award actual damages and may provide such equitable relief as it deems necessary or proper. Nothing in

⁷² HAWAII REV. STAT. § 480-13 (Supp. 1971).

⁷³ WASH. REV. CODE § 19.86.090 (Supp. 1971).

⁷⁴ S.C. CODE ANN. § 66-71.13 (Supp. 1971).

⁷⁵ N.C. GEN. STAT. § 75-16 (Supp. 1971).

⁷⁶ CAL. CIV. CODE §§ 1780-81 (1973).

⁷⁷ ALASKA STAT. § 45.50.531 (Supp. 1971); IDAHO CODE § 46-608 (Supp. 1970).

⁷⁸ MASS. ANN. LAWS, ch. 93A, § 9(1), (2), (4) (Supp. 1971).

⁷⁹ COLO. REV. STAT. ANN. § 55-5-12 (Supp. 1969).

⁸⁰ VT. STAT. ANN. tit. 9 § 2461(b) (Supp. 1972).

⁸¹ IND. HOUSE ENROLLED ACT No. 1169, § 4 (1971); R.I. GEN. LAWS ANN. § 6-13.1-1 (Supp. 1972).

this subsection shall be construed to limit a person's right to seek punitive damages where appropriate.⁸²

At this point, the Kentucky statute might be criticized for being unresponsive in the area of recovery. There is certainly no strong incentive to go into court. If the consumer wins there is no mandate that assures recovery, and it is still not worthwhile to litigate over small amounts. The last sentence merely preserves the common law right to punitive damages. It is hardly an encouraging climate for litigation. The rub is yet to come! It reads:

In any action brought by a person under this section, the court may award, to the *prevailing party*, in addition to the relief provided in this section, reasonable attorney's fees and costs.⁸³

A provision designed to discourage frivolous suits? This stand lacks one supporting leg. There is no incentive to bring spurious suits! The policy dilemma presents itself vividly. On one side is a policy favoring litigation by offering enticing rewards, while the antithetical policy is intent on protecting business firms from harrassing suits.

The Kentucky law is framed in such a way that the court has discretion in awarding actual damages.⁸⁴ The legislative intention appears to be that if the consumer used a product for a substantial period of time he should not be allowed to recover fully, in every situation, upon discovery of the deception⁸⁵—a “what-you-did-not-know-did-not-hurt-you” attitude. This would not seem to be a warranted assumption. It is correct to maintain, from a compensatory standpoint, that any usefulness derived from the product should be allowed in mitigation of damages. This is elementary in the law of remedies and should be considered in arriving at the final determination of the actual damages! Why then should there be any discretion as

⁸² KRS § 367.220(1) (emphasis added).

⁸³ KRS § 367.220(3) (emphasis added).

Although the language, “to the prevailing party” was inserted in this section with the intent that the prevailing party to a particular suit, whether consumer or merchant, might recover, the wording is extremely ambiguous. When “prevailing party” is read in conjunction with the subsequent clause, “in addition to the relief provided in this section,” it seems to imply that only prevailing parties who can receive “additional relief” under this section can receive attorney's fees. Since the only “additional relief” granted is to consumers, then the inference is that *only* consumers can recover attorney's fees. Had the sentence read “the court may award, to a prevailing party, in addition to the relief provided” then it would strongly indicate such an interpretation. This contradiction remains in the statute, hopefully to be seized upon by a court with a consumer perspective.

⁸⁴ KRS § 367.220(1).

⁸⁵ Interview, *supra* note 23.

to the award of *proven* damages? This portion of the Act is additionally weakened when the enigmatic policy implication is further scrutinized. A law intended to protect the public from deceptive commercial practices should not—the deception having been proven—protect the perpetrator of the deception. If anything, the statute should have a deterrent effect.

When the likely investigative expenses, costs, and risk involved in consumer litigation, and the possibilities of flight by some defendants are taken into account, consumers and their counsel should be assured of something more than a chance at actual damages as the end product of a private action.⁸⁶

Without certain recovery of 1) reasonable attorney's fees, 2) costs of the suit, 3) actual damages, and 4) in some cases punitive damages to discourage misconduct or to offset unusual risks in litigation, the bargaining power of consumers to obtain prompt settlements without litigation is bleak. Furthermore, prospective profits from deceptive practices are enhanced.⁸⁷ The only situation in which the Kentucky consumer is strongly motivated to bring an action is when the damage sustained is large enough to render the risk of loss nugatory or when the case is "open and shut."

What cases are likely to arise? Many involve fraud against the aged and the ignorant (consequently in most cases, the poor). Here the practices are usually the severe, fraudulent and deceptive types, which would give the plaintiff a much stronger case in court. On the other hand, the amount involved generally is small. The potential plaintiff is in a precarious financial condition to begin with and the fraud has further weakened that position. The choice that must be made is whether to forego legal action with the hope of surviving the crisis or to risk utter ruination in court. Even the smallest chance of losing may dissuade a party not totally confident of the legal system when the stakes are so high. A completely different situation is likely to arise when more informed and financially stable persons are the victims. Because this group is harder to defraud, rather ingenious traps are required. Many of these traps are in the grey zone of deceptive practices. Even though the financial loss may be substantial the need for qualitative and quantitative evidence increases costs and fees and proportionately decreases the inclination to bring suit. These examples do not exhaust all the possibilities that may arise but they do demonstrate the effect of the policy.

A suggested solution to the dilemma would be to incorporate some

⁸⁶ Lovett, *supra* note 51, at 747.

⁸⁷ *Id.* at 747-48.

elements of punitive damages, thereby offsetting litigative risks and allowing conservative estimates of actual damages to be applied routinely. The cost of marshaling evidence as to the precise amount of damage would be reduced under this plan.⁸⁸ Drawing upon existing state remedies, this approach would favor double or treble damages. Thus Kentucky might adopt a remedy resembling that of the Washington statute.⁸⁹ If Kentucky still desires to cling to the dissuasive policy embodied in Section 2(3) of the present law then it should further enhance the consumer's position to provide necessary incentive for legitimate suits. Adoption of the type of recovery provided for in Hawaii,⁹⁰ with no limit on treble damages, would serve to balance the scales. This combination would assure a rightful claimant a reasonable chance for full recovery as well as incentive for time and effort. The honest businessman would also benefit by avoiding any financial burden from irresponsible plaintiffs.

Not every deserving consumer would prevail, since plaintiffs would continue to bear their basic burden of proof, which would be difficult in cases of marginal claims and conflicting testimony. But wronged consumers could certainly bargain with greater leverage to obtain fair and reasonable treatment under this regime. . . .⁹¹

In order that the reader not lose his perspective while viewing this grim picture of the private litigation provision in Kentucky, it should be noted again that Kentucky is one of only fourteen states that provide for *any* private action. The other states have bowed to business protection policies in this respect.

Comment would not be complete on the subject of private action without mentioning class action suits. Business malpractice that "takes" the consumer for minor sums of money represents a huge amount when aggregated.⁹² For this reason, the class action suit is appealing. Under Rule 23 of the Kentucky Rules of Civil Procedure, four criteria must be met in order to pursue a class action: first the class must be so numerous that joinder of all members is impracticable; second, there must be questions of law or fact common to the class; third, the representatives of the class must present claims or defenses

⁸⁸ Lovett, *Private Actions for Deceptive Trade Practices*, 23 AD. L. REV. 271, 283-90 (1971) [hereinafter cited as *Private Actions*].

⁸⁹ WASH. REV. CODE § 19.86.090 (Supp. 1972).

⁹⁰ HAWAII REV. STAT. § 480-13(1) (Supp. 1972).

⁹¹ Lovett, *supra* note 51, at 749.

⁹² Newberg, *Federal Consumer Class Action Legislation: Making the System Work*, 9 HARV. J. LEG. 217, 219 (1972). See generally Baroni, *The Class Action As a Consumer Protection Device*, 9 AM. BUS. L.J. 141 (1971); Jacobs, *Impact of Consumer Class Actions Upon Confessed Judgments*, 88 BANKING L.J. 683 (1971); Starts, *Continuing Complexities in the Consumer Class Action*, 49 J. URBAN L. 349 (1971).

which are typical of those of the entire class; and finally, the representative parties must be ones that will fairly and adequately protect the interests of the class.⁹³ At least one commentator thinks that this limits the type of activity in which class actions can be maintained to cases where there is a uniform advertising or sales routine that is the predominant factor in the deception.⁹⁴ But such restriction does not retain its severity when one considers that the major source of fraud throughout the United States is large television advertisers.⁹⁵

False advertising of soap, detergents, aspirin, bleach, and a half dozen other major products on TV doubtless inflates prices to the consuming public by more than all the retail frauds put together . . .⁹⁶

On the federal level, consumer class action suits have confronted a major stumbling block which only Congress can remove. In *Snyder v. Harris*⁹⁷ the Supreme Court of the United States held that claims of those similarly situated may not be aggregated to reach the \$10,000 federal jurisdictional amount. There have been a number of bills introduced in Congress⁹⁸ that seek to circumvent this restriction to some degree.⁹⁹ This barricade is not present in the state courts, but availability of the federal courts is certainly desirable since many of the violators are not state residents.¹⁰⁰ The issues evolving from the debate over this topic are pertinent to the evaluation of class action policies on both the state and federal level. The main arguments put forth opposing class action suits are:

1. Legitimate businesses will be harassed by unscrupulous lawyers.
2. Unfounded suits increase operating costs resulting in increased prices to the customer.
3. Consumer class actions will only be brought against well-established corporations, with fly-by-night operators going free.

⁹³ Ky. R. Civ. P. 23.01.

⁹⁴ *Private Action*, *supra* note 89, at 289.

⁹⁵ *Foreword* to 2 ANTI-TRUST L. & ECON. REV. 1, at 14 (No. 4, 1969).

⁹⁶ *Id.*

⁹⁷ 394 U.S. 332 (1969).

⁹⁸ Eckhardt-Bayh Bill, H.R. 5630, 92d Cong., 1st Sess. (1971) (introduced by Representative Eckhardt of Texas on March 4, 1971); S. 1378, 92d Cong., 1st Sess. (1971) (introduced by Senator Bayh of Indiana on March 24, 1971, as a companion bill to H.R. 5630); Magnuson Bill, S. 984, 92d Cong., 1st Sess. (1971) (introduced by Senator Magnuson of Washington on February 25, 1971); Administration's Bill, S. 1222, 92d Cong., 1st Sess. (1971) (introduced on March 12, 1971, on behalf of the Nixon Administration).

⁹⁹ For a discussion of the bills referred to in note 98, see Newberg, *supra* note 92, at 236-59; Leete, *The Right of Consumers to Bring Class Actions in the Federal Courts—An Analysis of Possible Approaches*, 33 U. PITT. L. REV. 39, 42-52 (1971).

¹⁰⁰ See note 92 and accompanying text.

4. Existence of the threat of class action will stifle competitive innovation.
5. Cost of administering recovery will exceed the size of the claim.¹⁰¹

The underlying premise of Federal Rule 23 is to create a method of redress for groups that otherwise could not obtain relief.¹⁰² The policy of motivating lawyers to initiate class actions is "neither startling nor new."¹⁰³ The policy is present on the federal level in antitrust situations,¹⁰⁴ under the Truth-in-Lending Act,¹⁰⁵ in civil rights cases¹⁰⁶ and under the securities acts.¹⁰⁷ The experience in these areas has not indicated that the "flood of frivolous actions" argument has validity.

Under the federal rules and the Kentucky rules, there are safeguards that can be used to prevent harrasing suits. In accordance with Rule 11, the attorney states that to the best of his knowledge, information and belief there are good grounds for the action.¹⁰⁸ The defendant can make use of the motion to dismiss,¹⁰⁹ the motion for summary judgment,¹¹⁰ and the pre-trial conference¹¹¹ as protective devices. In the way of counter-offensive measures, the defendant has at his disposal the weapons of action for malicious prosecution, malicious service of process, and disbarment.¹¹² No doubt business firms, if forced to do so, will forge new weapons in these areas.

When business advocates cry that harrasing litigation will increase prices to the consumer, two rebuttals come to mind. In the first place, large business frequently has a number of pending suits both as plaintiff and as defendant, and it has been argued that management has no problem in treating them as a cost of doing business.¹¹³ The further insinuation that business can simply pass the brunt of the expense to the consumer is, in reality, a threat aimed at undercutting support for

¹⁰¹ Newberg, *supra* note 92, at 221-34.

¹⁰² Kaplan, *A Prefatory Note*, 10 B.C. IND. & COM. L. REV. 497 (1969). See also Ford, *Federal Rule 23: A Device for Aiding the Small Claimant*, 10 B.C. IND. & COM. L. REV. 501 (1969). The Kentucky rules were taken verbatim from the federal rules so these comments are applicable to the state as well.

¹⁰³ Newberg, *supra* note 92, at 222.

¹⁰⁴ 15 U.S.C. § 15 (1970). See, e.g., *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 395 U.S. 100 (1969).

¹⁰⁵ 15 U.S.C. §§ 1640(a)(2), 1681(n,o) (1970).

¹⁰⁶ *Rolfe v. County Bd. of Educ.*, 391 F.2d 77, 81 (6th Cir. 1968).

¹⁰⁷ *Mills v. Electric Auto-Lite Co.*, 396 U.S. 375, 389-97 (1970).

¹⁰⁸ KY. R. CIV. P. 11; FED. R. CIV. P. 11. Unwarranted statements can be dealt with by the bar.

¹⁰⁹ KY. R. CIV. P. 12; FED. R. CIV. P. 12.

¹¹⁰ KY. R. CIV. P. 56; FED. R. CIV. P. 56.

¹¹¹ KY. R. CIV. P. 16; FED. R. CIV. P. 16.

¹¹² See generally Leete, *supra* note 99, at 52-56; Newberg, *supra* note 92, at 221-25.

¹¹³ Newberg, *supra* note 92, at 227.

consumer protection actions.¹¹⁴ It would not be wise to submit to these heavy-handed tactics, for success may spawn similar maneuvers.

The third complaint, that class action suits will be brought discriminatively and are therefore undesirable, lacks cogency. The argument that a substantial business operation which is violating the law and benefiting from deceptive practices should not be prosecuted because fly-by-night operations violate the same law but are inaccessible strikes a sardonic note.¹¹⁵ As previously stated, large business firms receive the major portion of money deceptively obtained from consumers. Why should they continue to enjoy the same inaccessibility as small-time operators? In retort to grumblings that competitive innovation will be stifled, the experience of financial institutions under the Truth-in-Lending Act can be cited. These institutions have satisfactorily conformed to the law without adverse results.¹¹⁶

It is the final issue, that of administrative cost, which has caused faint hearts to abandon class action as an adequate remedy.¹¹⁷ But "the consequences of not fashioning a remedy would permit avoidance of appropriate sanctions and the retention of illegal profits. . . ." ¹¹⁸ "Relying on its own and counsel's ingenuity" the court should be able to create a viable solution. After all, this is one of the problems that the class action suit was designed explicitly to overcome!¹¹⁹

As things now stand the Kentucky law will (whether intended or not) deter a large majority of private consumer litigation and will force the consumer to rely primarily on action by the Attorney General's Office as the first line of defense against deceptive practices. If this is to be the policy and the Division of Consumer Protection is to be the Kentucky consumer's salvation, then the Division must be heavily armed with staff and funds. Placing more power in the hands of private individuals could lighten this burden tremendously.

The almost total reliance upon the Attorney General to carry out the primary goals of the Act makes the powers granted to him particularly significant. Of special importance is the investigative power placed in his hands. "Whenever [he] has reason to believe that a person has engaged in, is engaging in, or is about to engage in any

¹¹⁴ *Id.*

¹¹⁵ *Id.* at 226.

¹¹⁶ Newberg, *supra* note 92, at 226. From address by Federal Trade Commissioner Mary Gardiner Jones, before the Baltimore Better Business Bureau.

¹¹⁷ Lovett, *supra* note 51, at 284.

¹¹⁸ Eisen v. Carlisle & Jacquelin, 391 F.2d 555 (2d Cir. 1968), *on remand* 52 F.R.D. 253, 257 (S.D.N.Y. 1971).

¹¹⁹ Dole, *Consumer Class Actions Under Recent Consumer Credit Legislation*, 44 N.Y.U.L. REV. 80, 81 (1969).

[violation] or when he believes it to be in the public interest that an investigation should be made to ascertain whether" there is a violation, he may invoke investigative powers.¹²⁰ These powers are extensive.¹²¹ The necessity for broad investigative powers is demonstrated by reflecting on the alternatives when such powers are withheld.

(1) [The Attorney General may then] cease pursuing those schemes whose violation of the law is most difficult to prove, thereby allowing even more citizens to be defrauded; (2) he can bring court action with insufficient evidence and risk not only failing his burden of proof but also injuring the reputation of an innocent corporation; (3) he can allow the fraudulent company to continue to deceive and damage its customers while his staff diligently pieces together the necessary proof from the victims after they have been harmed; and (4) he can appropriate the bulk of his budget to hiring investigators even though the money

¹²⁰ KRS § 367.240. The remaining portion of the statute reads:

... a person in fact has engaged in, is engaging in or is about to engage in, any act or practice declared to be unlawful by this Act, he may execute in writing and cause to be served upon any person who is believed to have information, documentary material or physical evidence relevant to the alleged or suspected violation, an investigative demand requiring such person to furnish, under oath or otherwise, a report in writing setting forth the relevant facts and circumstances of which he has knowledge, or to appear and testify or to produce relevant documentary material or physical evidence for examination, at such reasonable time and place as may be stated in the investigative demand, concerning the advertisement, sale or offering for sale of any goods or services or the conduct of any trade or commerce that is the subject matter of the investigation. Provided however, that no person who has a place of business in Kentucky shall be required to appear or present documentary material or physical evidence outside of the county where he has his principal place of business within the Commonwealth.

(2) At any time before the return date specified in an investigative demand, or within twenty days after the demand has been served, whichever period is shorter, a petition to extend the return date, or to modify or set aside the demand, stating good cause, may be filed in the circuit court where the person served with the demand resides or has his principal place of business or in Franklin Circuit Court.

The two additional statutes that are important in this area are KRS § 367.250, which reads:

To accomplish the objectives and to carry out the duties prescribed by this Act, the Attorney General, in addition to other powers conferred upon him in this Act, may issue subpoenas to any person, administer an oath or affirmation to any person, or conduct hearings in aid of any investigation or inquiry, provided that information obtained pursuant to the powers conferred by the Act shall not be made public or disclosed by the Attorney General or his employees beyond the extent necessary for law enforcement purposes in the public interest.

and KRS § 367.260 which states:

Any person may apply to a circuit court for an appropriate order to protect such person from any unreasonable investigative action taken pursuant to this Act.

¹²¹ *Id.*

comes from the same people being defrauded by those under investigation, the public.¹²²

Clearly, the approach adopted is superior to these alternatives. In allowing the Attorney General to conduct the investigation through an administrative proceeding, the legislature has given him a necessary tool to explore potential areas of concern. Absent are the unnecessary constrictions that would flow from the more formal approach of requiring judicial mandates that call for evidence of probable cause.¹²³ Yet, the legislature has not written a *carte blanche*. Any private party affected by an administrative order can seek refuge in the courts.¹²⁴ Unreasonable investigation is not to be tolerated,¹²⁵ so the businessman need not worry that these powers enable the Attorney General to conduct unrestrained harrassing examinations. There is also the assurance that "information obtained pursuant to the powers [in the Act] shall not be made public or disclosed by the Attorney General . . . beyond the extent necessary for law enforcement purposes in the public interest."¹²⁶ It should be anticipated that the Attorney General will meet with opposition on fifth amendment self-incrimination grounds in numerous instances. A number of states have obviated this problem by disqualifying use of information obtained pursuant to the administrative procedure from any criminal prosecution of the witness.¹²⁷ Without such a provision it is likely, especially in cases of actual fraud, that fifth amendment protections would be invoked to quash subpoenas.¹²⁸

If the Attorney General thinks there is danger that evidence may be destroyed by a subpoenaed party, he will move in accordance with Section 17(3) of the Act.¹²⁹ Under this portion the Attorney General may, whenever he has "probable cause" to believe that a person "has engaged in, or is engaging in" any unlawful practice (within the scope of the Act) and has "probable cause" to believe information will not be obtainable pursuant to the administrative procedures, apply to the circuit court *ex parte* for an order impounding the material evidence.¹³⁰

¹²² Note, *supra* note 7, at 365.

¹²³ *Id.* at 367.

¹²⁴ KRS § 367.260.

¹²⁵ *Id.*

¹²⁶ KRS § 367.250.

¹²⁷ IOWA CODE § 713.24 (Supp. 1973).

¹²⁸ Note, *supra* note 7, at 367.

¹²⁹ KRS § 367.270(3).

¹³⁰ This includes "any record, book, document, account, paper or sample of merchandise which is material to the practice under investigation." KRS § 367.270.

This drastic move is reserved for deceptive practices already consummated or presently in progress. The investigative measures previously discussed should be adequate to prevent deceptions still in the planning stages from blossoming, so Section 17 action is not needed in these cases.¹³¹

Sanctions for failing or refusing to comply with administrative demands include injunctive relief and orders "[v]acating, annulling, or suspending the corporation charter" or certificate of authority to do business in Kentucky as well as "revoking or suspending any other licenses, permits or certificates issued pursuant to law to such person which are used to further the allegedly unlawful practice," plus any "other relief as may be required," until the person obeys the administrative demands.¹³² However, before any final order is issued against a person so charged, he is afforded an opportunity for a hearing on the merits and, should he lose, disobedience will then be punishable by contempt.¹³³ Additionally, fines of not less than \$100 nor more than \$5,000 may be imposed.¹³⁴ This sanction is relevant when "any person with actual notice that an investigation has begun or is about to begin . . . intentionally conceals, alters, destroys or falsifies documentary material"¹³⁵ or when any person "in response to a subpoena or demand . . . intentionally falsifies or withholds documents, records, or pertinent materials that are not privileged. . . ."¹³⁶ Without the sting of this sanction the administrative proceedings would be nugatory when dealing with the "hard-core" element.

The provision for service of process is in Section 18.¹³⁷ It has been criticized because it only provides for personal service rather than more economical and expeditious types of service.¹³⁸ This section gives ample consideration to "contact" problems however. Persons outside the state who have engaged in conduct within Kentucky violative of the Act "shall be deemed to have thereby submitted themselves to the jurisdiction of the courts of the commonwealth. . . ."¹³⁹ There can be no doubt that the legislature has vested the Attorney General with full long-arm powers.

¹³¹ Its inclusion would no doubt raise the cry of "chilling effect" and the additional aid it would give is not worth endangering the statute.

¹³² KRS § 367.290(1).

¹³³ KRS § 367.290(2).

¹³⁴ KRS § 367.990(3), (4).

¹³⁵ KRS § 367.990(3).

¹³⁶ KRS § 367.990(4).

¹³⁷ KRS § 367.280.

¹³⁸ Note, *supra* note 7, at 370.

¹³⁹ KRS § 367.280(2).

Conclusion

Out of the disarray of the common law concept of *caveat emptor* has come the realization that it is time for legislators to do what the courts have failed to do: provide the modern day consumer with protections that render the marketplace reliable and responsive to his needs. The federal government has led the way in legislative action, but recently states have begun to enact necessary consumer laws. At present all but eleven states have some type of comprehensive legislation dealing with deceptive practices. The state laws are characterized by certain common elements:

1. The bulk of the enforcement responsibility is in the Attorney General's Office.
2. Consumer complaints are the major source used to discover violations.
3. The volume of complaints relative to the staff available obligates the states to set up a system of priorities.
4. Emphasis will be either on providing restitution or on preventing deceptive practices.

The Kentucky Consumer Protection Act is a significant step forward. It could, however, be improved in certain respects. A specific statement which includes acts occurring *after* a transaction within the provision of the statute would resolve possible ambiguity. The law provides strong sanctions to augment action by the Attorney General, and for this the General Assembly can be applauded. However, the Act is sorely deficient in the area of private remedies. Not only is there no encouragement for private suits, but there is actually a measure of discouragement. If the private litigant wins, he will recover at most only actual damages and attorney's fees. Should the private litigant lose, he must pay both attorneys' fees. This seems clearly to evidence a policy of almost total reliance upon the Attorney General's Office to implement the Consumer Protection Act. Following this policy will require a larger staff and more funds than presently have been allocated. In line with the heavy reliance on Attorney General enforcement, broad investigative powers have been delegated.

In summary, private action is essential to the successful curtailment of business malpractice. At this juncture it is improbable that the Attorney General will receive the funds or the staffing to meet important needs of the consumer. The proper safeguards for business can be designed to alleviate the fear of injuring the economy or unduly raising prices. We are on the road to an improved marketplace, but the "invisible hand" of Adam Smith remains an anomaly.

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