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Can the Kentucky Consumer Ever Forget Caveat Emptor and Find True Happiness?

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CAN THE KENTUCKY CONSUMER EVER FORGET CAVEAT EMPTOR AND FIND TRUE HAPPINESS?

The political personality of the modern marketplace can best be characterized as mass-produced flags and assembly-line apple pie, the enormity of the economic entities dominating each major industry being matched only by the vigor with which their corporate executives and trade associations extol the virtues of individual initiative. Thus, although a bill which would give an agency of state government the responsibility and legal weaponry to protect the consuming public would appear at first glance to have a corner on virtue since its beneficiary is middle class Americans, it is equally balanced by the appeal of possible opposition to the Pavlovian political reactions engendered by such terms as "free enterprise" and "big government."[1] However, a careful examination of the premises for and provisions of legislative attempts to eradicate fraudulent trade practices will show that they are truly designed to protect both business and consumer interests, and that their effect on the free market system is one of restoration rather than destruction. This note undertakes such an analysis by considering the monetary and legal problems confronting today's buyer with a view toward deriving the type of remedial state legislation required. Then, concluding that the statutory solutions attempted by several states form a generally appropriate mold, the note uses the proposal recently promulgated by the Kentucky Attorney General's Consumer Protection Council[2] as a convenient touchstone for a comparative analysis of the components of the various laws.

FREE ENTERPRISE AND THE MODERN MARKETPLACE

Classic maxims of economics and traditional axioms of civics both assert that the most reliable method to achieve the most efficient allocation of the nation's wealth is a free market.[3] The theory holds that:

> Given a free flow of information, reasonably equal bargaining positions, and a product with a generally elastic demand, the

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[1] That even the appeal of a bill whose direct beneficiaries are "the people" could be negated by the fact it might enlarge the government is illustrated by this somewhat jocular, but nevertheless apt, description of the American electorate:

> The attitude of a successful democracy's citizen toward their government is a strange alloy of affection and suspicion, of confidence and of fear. It is said proudly that government is of, by and for the people, but it is added quickly that the less of it there is the better. Wirtz, *Government By Private Groups*, 13 LA. L. REV. 440 (1953).

[2] The Kentucky Business and Consumer Protection Act was drafted by the Legislation Committee of the Kentucky Attorney General's Consumers' Council. Louisville Courier-Journal, Sept. 20, 1969, § B, at 1, col. 4.

[3] Barber, *Government and the Consumer*, 64 MICH L. REV. 1203, 1222 (1966), and sources cited therein.

> interchange works to provide an adequate supply to meet demand at any given price level. As long as the bargaining process is maintained, a competitive market is assured and no intervening forces are necessary.[4]

While this may have enduring applicability to the contemporary scene as a theory, it certainly is not descriptive of the modern marketplace, and therein lies both the strength of the proposed Act and the weakness of raising "free enterprise" in objection to it. It is to say the obvious to refer to the immense disparity in the bargaining positions of corporation and consumer as an elementary illustration of the difference between economic theory and reality. Further differences are similarly obvious.[5] Mass marketing and advertising have replaced the formerly personal relations between retailer and buyer. Modern packaging not only prevents the consumer from determining the amount of his purchase, but also prevents price per quantity comparison[6] and inspection of the wares. And, even were inspection possible, "[t]oday's average consumer is in little position to know whether claims made for an automobile, drug, house, synthetic fabric or prepackaged food are accurate."[7] The increasing complexity of consumer goods requires the purchaser "to be a combination of chemist, tester, accountant, engineer, designer and merchandiser . . ." to properly evaluate them.[8]

These deficiencies are further compounded by the fact that the consumer is dependent upon advertising to obtain the information necessary to enable him to sift through this technological maze and make the intelligent choice that classical theorists presuppose. Yet, advertising is precisely the medium by which industry frustrates such a choice and focuses attention on differentiations on the basis of trade names and meaningless puffery rather than quality and price competition. Since such misleading representations of value are not actionable while misrepresentations of fact are, it is natural that advertisers take the safest option by eliminating facts from their commercial inducements and present only "uninformative superlatives."[9] But, such

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[4] Note, *Consumer Protection Under the Iowa Consumer Fraud Act*, 54 IOWA L. REV. 319, 320 (1968), *citing* A. BERLE, THE AMERICAN ECONOMIC REPUBLIC 81-85, 91-96 (1963), *and* J. GALBRAITH, AMERICAN CAPITALISM: THE CONCEPT OF COUNTERVAILING POWERS 10-24, 708-34 (rev. ed. 1956).

[5] *See* Barber, *supra* note 3, at 1219-29.

[6] *Id.* at 1208.

[7] O'Connell, *Consumer Protection in the State of Washington*, 39 STATE GOV'T 230, 231 (1966).

[8] *Id.*; 54 IOWA L. REV., *supra* note 4, at 324.

[9] Travers, *The New Kansas Buyer Protection Act*, 38 KAN. B. ASS'N J. 11 (1969).

valueless information is used for offensive as well as defensive purposes.

> The sale of soap and other cleaning products offers a good illustration of the role which advertising plays in the market process. For example, liquid household bleach is a 5.25 percent sodium hydroclorite solution, regardless of the trade name it bears. However, by a deluge of advertising, sellers have succeeded so well in differentiating one trade-named bleach from another that sales of a particular product are largely governed by the size of the seller's advertising expenditures. As a result of the strong consumer identification of the best known brands of liquid bleach, like Clorox and Purex, it has been possible to sell them at prices above those of lesser-known brands possessing identical chemical properties.[10]

In addition to allowing tradenames to be priced more expensively than their unheralded equals, advertising also allows the seller to totally abandon price competition and employ deceptive pricing by either claiming reductions from a fictitious former price or using odd quantities to frustrate price per quantity comparisons with competitors or with various sizes of the same product.[11] In such circumstances, "it is fiction to talk of the allocative efficiencies of the price system."[12]

Admittedly, most of this data is best employed as a rationale for the type of informational legislation recently on the Congressional docket.[13] However, there are serious weaknesses in focusing on infor-

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[10] Barber, *supra* note 3, at 1223-24.

[11] The problem of deceptive pricing has been well described as follows: Prices, supposedly the common denominator in a free economy, are no longer stated clearly. Packages marked 'five cents off regular price' tell the buyer very little, since there is no 'regular price.' Moreover, even when a price is not stated ambiguously, it frequently cannot be compared with prices for other brands of the same product since physical characteristics of the products may be unknown and since advertising accentuates the supposed differences among products rather than revealing their physical similarities. Indeed, the stated prices for various package sizes of the same product are often very difficult to compare. For example, it would be hard for a typical shopper to select the best price-per-ounce size from among the following packages of the same brand of cookies: one pound for forty-nine cents, eleven ounces for thirty-five cents, and 6.5 ounces for twenty-five cents. In many cases it is cheaper to buy two smaller units of a given product than one 'giant economy size.' When prices cannot be directly compared, it is fiction to talk of the allocative efficiencies of a price system. Barber, *supra* note 3, at 1226.

[12] *Id.*

[13] *See* PRES. COMM. ON CONSUMER ISSUES 7 (1966); Hart, *Can Federal Legislation Affecting Consumers' Economic Interests Be Enacted?*, MICH. L. REV. 1255 (1966); Travers, *supra* note 9, at 11. *See generally Hearings on S. 985 and H. R. 15440 Before the House Committee on Interstate and Foreign Commerce*, 89th Cong., 2nd Sess. (1966) (fair packaging and labelling). *See also* Kinter, *Federal Trade Commission Regulation of Advertising*, 64 MICH. L. REV. 1269 (1966).

mation as a panacea, most notably both its failure to provide for the lower class consumer who is oblivious to the dissemination of such information[14] and its inability to cope with the truly fraudulent peddler who will persist in utilizing misinformation if there are inadequate penalties and enforcement.[15]

Moreover, the dependence of the consuming public on advertising and the confusion in the marketplace which has resulted, reveals more fallacies in the contemporary applicability of the liberal model than informational problems. It reveals the consumer as a debilitated commercial force hardly adequate to fulfill his role in the free market[16] and exceptionally easy prey for the fraudulent deceiver. This ineptitude is amply illustrated by a study in which college-trained, married and experienced shoppers, when *instructed* to select the best buys, failed 43 percent of the time resulting in the overexpenditure of 10 percent of the total cost.[17] It is not surprising, then, that the annual losses of the consuming public to the true commercial racketeers, exclusive of losses to the simple decep-

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[14] The plight of the poor consumer can be excerpted from an excellent student note as follows:

> The most significant new legislation proposals have been informational. The truth-in-lending bills. . . . Truth-in-packaging proposals. . . .
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> Generally, the law presupposes a consumer equipped to deal with the business community on at least equal terms. . . .
>
> Informational legislation does not question the general accuracy of this model, but assumes a very particular sort of destination: the absence of a specific sort of knowledge needed to make 'best buys.' Once provided, that information will by itself return consumers to their rightful place as all-powerful sovereigns of the retail market. . . .
>
> Whatever its validity for the middle-class, this model is almost always inapplicable to the purchases of the poor. . . .
>
> . . . [T]he typical low income consumer is not a hardened penny pincher employing all his skill and inegenuity to stretch his meager income as far as he can. . . .
>
> In sum, the new wave of informational legislation will be of little help to the poor because it presupposes values, motivation and knowledge which do not generally exist among them. . . . As one merchant in New York put it: 'People do not *shop* in this area. . . . It is just up to who catches him.' (Emphasis original). Note, *Consumer Legislation and the Poor*, 76 YALE L. J. 745, 747-49, 754 (1967), *citing* D. CAPOVITZ, THE POOR PAY MORE 19 (1963).

[15] *See* Rice, *Remedies, Enforcement Procedures and the Duality of Consumer Transaction Problems*, 48 BOSTON U. L. REV. 559 (1968); *see also* Spanogle, *The U3C—It May Look Pretty, But Is It Enforceable?*, 29 OHIO STATE L. J. 642 (1968).

[16] A recent study cited by Senator Cotton revealed that the modern consumer in many instances no longer even shops in such places as supermarkets, choosing 32 of the 8,000 available items in 15-18 minutes. That rate allows approximately 1/9 second per available item. 112 CONG. REC. 12090, 12094 (1966).

[17] 112 CONG. REC. 12766, 12805 (1966). Since approximately $500 billion is spent annually on personal consumption expenditures, this inability to function would cost the consuming public a sizeable sum each year. FTC ANNUAL REPORT 5 (1968).

tions in advertising and pricing already discussed, runs into the billions. Home improvement frauds, a well known example of the principal rackets, cost an estimated $1 billion annually.[18] Losses from counterfeit brandname goods were assessed at $2 billion annually over a decade ago.[19] These and the other billions lost each year to similarly well known frauds constitute losses not only individually to the consumers, but also collectively to the honest businessmen who would have received this money in purchases had the deceptive practices of their unfair competitors been illegalized and eliminated.[20]

Thus, the disparity in the bargaining positions of business and consumer which has rendered the buyer impotent and the market imbalanced results in an enormous waste of resources to both business and consumer. To promulgate an approach calculated to buttress the role of the consumer would, therefore, not only solve these symptomatic weaknesses, but also tend to restore viability to the market structure.

THE ROLE OF GOVERNMENT

To rectify the imbalance of power in the marketplace, the consumer interest must be represented by an entity comparable to the monoliths which foster and protect the views of the producer. Yet, while business, labor and agriculture are organized to achieve their purposes, it is impractical, if not impossible, for the consumer to be similarly organized because the class, "by definition, include(s) us all."[21] The only organization the consumer can turn to is the one which, in view of that definition, is distinctively his, the government.[22]

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[18] Testimony of Attorney General of Wisconsin Bronson C. LaFollette, *Hearings on H. R. 7179 Before a Subcomm. of the House Comm. on Government Operations*, 89th Cong., 2nd Sess., at 84-85 (1966); PRES. COMM. ON CONSUMER INTERESTS, *supra* note 13, at 42.

[19] Note, *Translating Sympathy for Deceived Consumers Into Effective Programs for Protection*, 114 U. PA. L. REV. 395, 395-96 (1966) and sources cited therein.

[20] *See* Dixon, *Federal State Cooperation to Combat Unfair Trade Practices*, 39 STATE GOV'T. 37, 38 (1966); 54 IOWA L. REV., *supra* note 4, at 319.

[21] 108 CONG. REC. 4167, 4263 (1962) (message of President John F. Kennedy).

[22] This will, of course, incur the propaganda ploy of cries of 'big government.' However, what merit there is to such an objection lies in the concept of increased direction of one's private affairs. The consumer and his advocates are to be reminded that the focus of legislation herein discussed will *decrease* the direction of one's affairs by business. The power is equally noxious whether it flows from corporate or governmental sources.

> The distinction is . . . between the controls resulting from the deliberative decisionmaking of representatives vested by the people with the power to write their decisions into binding law, and controls which represent only the results of the interplay of competitive forces in the marketplace. Wirtz, *supra* note 2, at 450.

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Of course, the involvement of the government to protect the consumer could hardly be innovative. "For at least seven hundred years the hand of authority—church, guild or state—has played a role in regulating the affairs of the market. . . ."[23] The federal government is currently employing a multi-faceted—which may be synonymous with confused—approach to consumer problems, with hundreds of endeavors being scattered "to the point where nearly every agency performs some sort of consumer service either directly or indirectly."[24] These include the traditional activities of such departments as Agriculture, Commerce[25] and the Post Office[26] and of such regulatory bodies as the Federal Communications Commission.[27] Also included are the recent attempts to coordinate such activities through groups advising the President,[28] whose efficacy and efficiency have been properly criticized because of the weakness inherent in "advisory" bodies.[29]

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Furthermore, the organized producing groups never hesitate to utilize the government to their advantage. Whether by eliciting action or inaction, they induce governmental support in achieving price bases, subsidies, monopoly markets, "fair price" laws, eliminating of wholesale competition with retail prices, etc. *See* Barber, *supra* note 3, at 1219-21.

[23] Barber, *supra* note 3, at 1205.

[24] PRES. COMM. ON CONSUMER INTERESTS, GUIDE TO FEDERAL CONSUMER SERVICES 1 (1967) (a 140 page list of federal activities).

[25] Barber, *supra* note 3, at 1210-11.

[26] *See* PRES. COMM., *supra* note 24, at 85-87; Note, *The Regulation of Advertising*, 56 COLUM. L. REV. 1018, 1043-45 (1956); 114 U. PA. L. REV., *supra* note 19, at 440-42.

[27] See PRES. COMM., *supra* note 24, at 33-37; 56 COLUM. L. REV., *supra* note 26, at 1045-48.

[28] U. PA. L. REV., *supra* note 19, at 438-39.

[29] The state of affairs at this level of the federal government has been described by one critic as follows:

> This conglomeration of councils, committees and special assistants that supposedly represent consumers at the federal government's highest policy-making levels resembles the disorganized and random assortment of activities that are carried out by the thirty-five principle departments and agencies. Groups and individuals have been hurriedly assembled to meet a vaguely felt need, but there is no clear sense of purpose. Although both a Committee on Consumer Interests and a Consumer Advisory Council exist, it is difficult to determine the separate functions which they serve. The Committee's responsibility is to 'consider' federal 'policies and programs of primary importance to consumers,' while the Council has been directed to 'advise the Government on issues of broad economic policy of immediate concern to consumers.' Both groups are served by the same staff, which in turn reports directly to the Special Assistant, and the holder of that office is chairman of the Committee and an ex officio member of the Advisory Council. If the Committee implemented programs developed by the Council and approved by the President, its function would be understandable. However, the Committee's job is not to implement, but rather to advise, and that is a responsibility also of the Advisory Council. The point at which one ends and the other begins is a puzzle, like so much governmental activity in the consumer area.
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> Perhaps the single most important weakness in the entire scheme is the

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Yet, proposals for a Department or Office of Consumer Affairs have been unavailing[30] and have even been opposed by consumer advocates.[31]

In the foreground of the federal effort is the Federal Trade Commission (FTC), which, since the Wheeler-Lea Amendment of 1936, has jurisdiction over deceptive acts and practices in interstate commerce.[32] While the FTC has made substantial progress in the protection of the consuming public, its limitations of jurisdiction, budgetary restrictions, inefficiency and lack of initiative not only leave ample room for improvement, but also create a void in the protection of the consumer which must be filled by state governments.[33]

First, the range of problems the FTC can even attack is narrow by operation of both law and circumstances. Its jurisdictional purview is limited to acts in commerce, not the broader term of affecting commerce which is employed in many other endeavors.[34] "This narrower jurisdictional grant is satisfied only by the actual involvement in interstate commerce"[35] of the allegedly deceptive practice, leaving the partially interstate as well as the wholly intrastate practices to state officials. Moreover, the requirement that all FTC actions be in the public interest,[36] coupled with the practical problems of budget and staff necessitate a screening of the wholly interstate problem areas "to give priority to the most significant."[37] If the states do not act on the vast area that remains, consumer protection is left to "only the willingness (and self-interest) of reputable businessmen to comply"

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lack of authority noticeable in both the Council and the Commission, as well as the Special Assistant. Each organization is charged with the responsibility of 'advising,' 'reviewing,' or 'consulting,' but none has the power to modify, execute or instigate any program of its own. Existing programs designed to aid the consumer are in a state of disarray and reveal many deficiencies, but the Advisory Council and the Committee can do no more than hope that their recommendations will induce the President and Congress to take corrective action. Barber, *supra* note 3, at 1214-15.

[30] *See generally Hearings, supra* note 18.

[31] Louisville Courier-Journal, Sept. 21, 1969, § B, at 10, col. 1.

[32] 56 COLUM. L. REV., *supra* note 26, at 1022. *See generally Kinter, Federal Trade Commission Regulations of Advertising*, 64 MICH. L. REV. 1269 (1966); Millstein, *The Federal Trade Commission and False Advertising*, 64 COLUM. L. REV. 439 (1964); Weston, *Deceptive Advertising and the Federal Trade Commission, Decline of Caveat Emptor*, 24 FED. B. J. 548 (1964).

[33] 54 IOWA L. REV., *supra* note 2, at 322-23.

[34] FTC v. Bunte, 312 U.S. 349 (1941); *Hearings, supra* note 18, at 286 (testimony of Paul Rand Dixon, Chairman of the Federal Trade Commission).

[35] 56 COLUM. L. REV., *supra* note 26, at 1023, *citing* Canfield Oil Co. v. FTC, 274 F. 571 (6th Cir. 1921).

[36] *Id.* at 1024-25, and sources therein.

[37] FTC ANNUAL REPORT 1 (1967).

with existing trade regulations,[38] with adjustment of those regulations to meet new problems being impossible.

Compounding the fact that the restrictive scope of FTC activities would frustrate an agency totally composed of zealous consumer protectors equipped with adequate legal weaponry is the fact that the Commission cannot be so described. Its present operational procedure is to rely upon complaints rather than to ferret out frauds,[39] and when a case arises it takes approximately "a year to reach the Commission level for issuance of a complaint."[40] If the respondent does not then consent to cease and desist the questioned practice, it will often involve, "three to five years between issuance of the complaint and the time when a cease and desist order becomes final through exhaustion of the last opportunity for appeal."[41] The "classic example" is the legendary *Holland Furnace Company* case which took approximately thirty years to satisfactorily terminate.[42] While such delays reveal the necessity of such institutional reforms as temporary injunctions,[43] they also reveal a questionable attitude toward enforcement which makes it doubtful if such tools would be utilized if available. Ralph Nader's findings,[44] recently buttressed by the report of a distinguished Presidential panel of the Bar Association,[45] were that these "problem areas can be traced to purposeful delay to protect certain interests. . . ."[46] Both reports concluded this was due to "cronyism"[47] and because the FTC "has acquired and

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[38] *Id.*

[39] N. Y. Times, Sept. 16, 1969, at 1, col. 1.

[40] 114 U. PA. L. REV., *supra* note 19, at 444, and sources cited therein.

[41] *Id.*; *see also* Weston, *supra* note 32.

[42] The Holland salesmen posed as inspectors to dismantle furnaces and then, by alarming the consumer of the supposed danger involved, high-pressured the consumers into purchasing new heating units. The first complaints arose in the early 1930's. CONSUMER BULL., Apr. 1965, at 25. The company later agreed to cease and desist certain practices. 24 F. T. C. 1413-14 (1936). There were still numerous complaints thereafter. CONSUMER BULL., Apr. 1965, at 25-26. Yet, it was 18 years later before the FTC filed another complaint and it didn't result in another cease and desist order for four more years. 55 FTC 55 (1958). In two appeals, this order was upheld. Holland Furnace Co. v. FTC, 269 F.2d 203 (7th Cir. 1959), *cert. denied*, 361 U.S. 932 (1960), and Holland Furnace Co. v. FTC, 295 F.2d 302 (7th Cir. 1961). Thereafter, the Commission's imposition of heavy fines for violations of the 1958 order was upheld. *In re* Holland Furnace Co., 341 F.2d 548 (7th Cir. 1965), *cert. denied*, 381 U.S. 924 (1965). *See* PRES. COMM., *supra* note 13, at 45-46; Rice, *supra* note 15, at 606; Weston, *supra* note 32, at 566; 114 U. PA. L. REV., *supra* note 19, at 444-45.

[43] PRES. COMM., *supra* note 13, at 47.

[44] *See* BUS. WEEK, Jan. 11, 1969, at 34; CHANGING TIMES, April, 1969 at 17; NEWSWEEK, Jan. 13, 1969, at 68; TIME, Jan. 17, 1969, at 18; TIME, Sept. 13, 1968, at 23.

[45] "The study group's report bore a striking resemblance in content—and even, to some degree, in language—to the report on the trade commission . . . by 'Nader's Raiders.' . . ." N.Y. Times, *supra* note 39, at 1, col. 1.

[46] NEWSWEEK, Jan. 13, 1969, at 68, quoting the report of "Nader's Raiders."

[47] TIME, Jan. 17, 1969, at 18, quoting Nader's report.

elevated to important positions a number of staff members of insufficient competence."[48] The result is that the FTC is characterized by "failure to establish priorities, excessive preoccupation with trivial matters, undue delay and . . . has exercised little leadership in the prevention of retail market frauds."[49] It is therefore evident that the FTC is failing to adequately protect the consumer even within the narrow limits of its reach.

Consequently, there is left to the states a vast area of consumer problems into which it must thrust an agency if its consuming citizenry is to be adequately protected. Since the consumers are amateurs vying with the professionals, they need not only coordinated laws for their protection, but also state action to offset this disparity while providing statewide supervision of the enforcement of the new legal framework.[50] To avoid both the waste involved in duplication of effort[51] and the confusion to consumers from shuffled jurisdictions,[52] while providing a reliable source of consistent guidance for the complying businessman,[53] this protective function must be centralized in a single agency.

However, the solons should be careful not to vest these duties in a new bureaucratic office, for "[i]ndustry domination of its administrative agency is a well known phenomenon."[54] Whether accomplished

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[48] N. Y. Times, Sept. 16, 1969, at 29 (excerpts from the Bar Panel's report).
[49] *Id.*
[50] Rice, *supra* note 15, at 595-97; Spanogle, *supra* note 15, at 625-26; 114 U. PA. L. REV., *supra* note 19, at 429-33.
[51] Rice, *supra* note 15, at 597.
[52] *Id.* at 599.
[53] Spanogle, *supra* note 15, at 629.
[54] *Id.* at 626, *citing* Huntington, *The Marasmus of the I.C.C.: The Commission, The Railroads and the Public Interest*, 61 YALE L. J. 467 (1952); *Hearings*, *supra* note 18, at 83 (testimony of Bronson C. LaFollette). A colorful and graphic presentation of this point of view is that of Kurt Hanslowe:

> *Effective* regulation necessarily seems to imply a position of dominance on the part of the regulators. . . .
>
> The history of regulation, however, demonstrates an evolution in quite the opposite direction—namely, one of industry dominance over the regulators.
>
> . . . .
>
> These experiences may be especially acute because of the particular device which we have chosen as our main means for accomplishing regulation, the so-called independent, quasi-judicial administrative agency or commission. This particular tool of government started out as a rather ingenious hybrid of our constitutional system. Acting pursuant to powers delegated to it by the legislature, and performing alike some legislative, executive and judicial functions, the typical administrative agency at the outset is especially designed to perform some particular regulator job which none of the traditional branches seems capable of discharging adequately.
>
> Due to the particular locus in our constitutional scheme of such agencies, they seem characteristically to undergo a life cycle which cul-

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by political chicanery or simply by the appointment of an industry representative to be the commissioner:

> [I]t is unlikely that such a commissioner would be an aggressive 'ombudsman' representing the consumer, thus reducing the consumer's protection to a minimal or illusory level. The consumer needs more than the enforcement of those provisions of the statute which are clear against violations which are equally clear. He also needs protection against questionable conduct . . . which requires test cases where the statute is unclear, or even silent, and the . . . conduct is ambiguous. It also requires the development of new theories supporting action, and this may be accomplished only by those who view the transactions as consumers.[55]

Clearly, the preferable alternative is to place the duty of protecting the consuming public upon an elected official who is thereby directly responsible to the people. Since the duty will involve mediating and evaluating consumer complaints with an eye toward the possibility of litigation in the public interest, it should obviously be borne by the state's legal staff, the Office of the Attorney General.[56] Since this approach to consumer matters will require the full cooperation of the defrauded consumers,[57] it is preferable that the state

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minates in a static condition of ineffectuality. That is to say, they have neither the political sensibility of the legislative branch, nor the political power of a dynamic executive branch, nor the independent strength of the judiciary.

As a consequence, the typical agency emerges from a gestation period when the reform pressures which caused its creation were enthusiasm in which the agency, though beginning to be removed from the causative political forces, vigorously seeks to administer its regulator policies both in the field and in the inevitably ensuing litigation.

Then comes maturity, accompanied by bureaucratization, regularity and routine, professionalization, judicialization (because of the abrasions of seeking judicial acceptance in the earlier stages), and an increasingly smoother modus vivendi with the regulated group. 'Politically isolated, lacking a firm basis of public support, lethargic in attitude and approach, bowed down by precedent and backlogs, unsupported in its demands for more staff and money, the commission finally becomes a captive of the regulated group.'

There follows a period of debility and decline. Identification by the administrative agency with the interests of the regulated sector becomes virtually complete. The agency becomes a capstone for a particular industry, serving more as its protector than its regulator. Personnel moves [sic] readily from agency to industry. In fact, the agency, by its increasingly automatic approval of what the industry wants, serves as legitimizer of what the industry does. The regulated sector becomes insulated from—regulation! Hanslowe, *Regulation By Visible Public and Invisible Private Government*, 40 TEX. L. R. 88, 114-16.

[55] Spanogle, *supra* note 15, at 627.

[56] Rice, *supra* note 15, at 601-02.

[57] Mindell, *The New York Bureau of Consumer Frauds and Protection—A Review of its Consumer Protection Activities*, 11 N. Y. L. FORUM 603-04, 617-18, 621-22 (1965).

official involved be the holder of such a traditional, respected office rather than a new part of governmental bureaucracy by its nature too often distrusted. Furthermore, since Kentucky's Attorney General already has an operative Division of Consumer Protection, its expansion would entail less cost and none of the delay involved in establishing a new agency. It is also important to note that since about twenty-seven of the thirty states with such an agency locate it in their Attorney General's Office,[58] the Commonwealth can best benefit from the experience of her sister states by utilizing the same office. Kentucky has already become involved in the National Association of Attorneys General's activities serving as a forum for the exchange of ideas and a fulcrum for interstate cooperation.

The only rationale for giving preference to a special agency is its ability to acquire particular expertise in the subject matter,[60] an argument that loses some validity when one considers the political overtones of appointments to and conduct of such offices.[61] Furthermore, the expertise argument is most applicable to those agencies involved in daily regulatory functions, whereas in the administration of consumer protection laws, "the focus would be upon the handling of complaints"[62] and the mediation or litigation of them. And finally, whatever expertise which nevertheless may be necessary can be as easily obtained by a Division within the Department of Law as by an agency somewhere in the morass of the administrative branch of state government.

In sum, then, the imbalance in the market between seller and buyer and the immense cost to both resulting from the schemes of the unscrupulous make it imperative that government act as the con-

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[58] A 1968 student research project concluded that twenty-five of twenty-eight states placed principal authority for consumer matters in the Office of the Attorney General. S. Douglas, State Attorney General Consumer Protection Programs, June 1, 1968. Since then, at least two additional state enactments place the authority in the Attorney General's Office. N. C. Gen. Stat. § 75.1-1 et. seq. (Supp. VII, 1969); Colo. H. B. 1030 (1969).

[59] Kentucky's Attorney General was host to such a National Seminar on Consumer Protection in October, 1969, under the auspices of the National Association of Attorneys General (N.A.A.G.). It was a successor to a similar Seminar held in Baltimore, Maryland in May of 1969. The Seminar in Baltimore was arranged during a meeting of the Southern Region of N.A.A.G. in Lexington, Kentucky in April of 1969. Thereafter, the National Conference of N.A.A.G., meeting in the Virgin Islands in June of 1969, officially resolved itself that such meetings should become a continuing program of the Association. The Louisville Seminar was the first in this continuing program. Interview with Assistant Attorney General Robert V. Bullock, Chief, Consumer Protection Division, Kentucky Dept. of Law, Sept. 8, 1969. *See also* Louisville Courier-Journal, Sept. 30, 1969, § A, at 15, col. 1.

[60] Rice, *supra* note 15, at 600.

[61] *See* notes 44-49 and 54 *supra*, and accompanying text.

[62] Rice, *supra* note 15, at 603.

sumer protector. Furthermore, whether or not the federal government discharges the share of the duty it has undertaken, a large area will be left to state efforts, which can best be directed by the Attorney General.

INADEQUACIES OF PRESENT KENTUCKY LAW

To detail the plight of the Kentucky consumer, it is helpful to view an illustrative example of well known frauds and the inability of the victims to obtain redress. Although this example is purely imaginary, it represents a typical consumer's experience.

On Sunday, the following advertisement appeared in John Wilson's hometown newspaper:

> Repossessed 1969 "Brand-Name" zig-zag sewing machine. Limited number available! No down-payment! Brand name machines at 60% off![63] No gimmicks. No extras. Machine for $90. Call now—State Sewing Machine, Inc.[64] 299-0055.

John read the ad several times. Although he was nearing retirement age[65] with a barely adequate income,[66] he decided to look into such a bargain for his wife.

The following afternoon John stopped by State Sewing Machine on his way home from work. The salesman told John the machines advertised were no longer in stock, all of them having been sold that morning, and that "they were not that good anyway." He suggested that John purchase a "quality machine that had not been "used," priced at "only" $199.95.[67] When John hesitated, the salesman

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[63] 114 U. PA. L. REV., *supra* note 19, at 398 n.25
The question is 60% of what? This is normally 60% off a high inflated price. *Id.*

[64] "Many small and 'fly by night operations' adopt a name that sounds very impressive and resembles, perhaps, one which has a high standing and reputation, often including words such as 'International,' 'U.S.' . . . or the name of a state, which seems to give them size and stature, or suggests a large and responsible organization." CONSUMER BULL., March, 1964, at 39.

[65] The National Better Business Bureau had included as one of the ten most serious consumer frauds the deceiving of the elderly.
No. 8, Victimizing the Aged: Appeals made to the insecurity, dwindling mental alertness and loneliness of the aged, to separate them from their life savings, retirement and insurance income. O'Connell, *supra* note 7, at 231-32.

[66] The consumer should not make financial commitments which will be hard or impossible to meet. A member of the buying public should make sure that he knows the entire cost of each transaction he makes including credit. KY. DEP'T OF LAW, TEN DANGER SIGNALS IN BUYING (1969).

[67] John has just been "baited and switched." Bait advertising has been defined as:
. . . not a bona fide offer, but an alluring offer to sell something which

(Continued on next page)

reminded him that he need not make a down-payment and that he could afford the small interest charge of less than a dollar a week. Even though John had never heard of this brand sewing machine and although it carried no written guarantee, the salesman persuaded John that it was a "superior" product and that he would "personally" guarantee it for one year. Relying upon the oral representation of the salesman, John signed the contract.[68]

While John had been purchasing the sewing machine, a young lady had come to the Wilson's home telling Mary Wilson that she was taking a survey for a nationwide firm concerning the types of appliances the average family owned. Mary supplied the information she requested.[69] A few days later, a young man appeared at the Wilson's home and announced that Mary had won a wonderful prize,[70] a "Health-O-Matic" vacuum cleaner. He stated it was so effective in reducing the dust level in the area cleaned that it was a boon to anyone with a respiratory affliction.[71] Mary, who suffered from hay fever, was thrilled at the thought of her great fortune. However, having gained entrance, the salesman then disclosed that actually there would be a "small fee" of approximately $250.00 for the vacuum,[72] a type that has a unit installed in every room.[73] But, he explained that

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the advertiser does not sincerely want to sell or tries not to sell or deliberately avoids selling. Its purpose is to get the customer into the store or a salesman into the home so as then to sell something else instead, usually at a higher price or on a basis more advantageous to the advertiser. Comment, Mindell, *supra* note 57, at 612.

[68] Kentucky consumers are warned by a publication of the Attorney General's Office that oral guarantees are of no value, but are used by salesmen to induce the consumer to purchase an inferior product. The consumer is legally bound by what the contract says, not what a salesman tells him. KY. DEP'T OF LAW, *supra* note 66.

[69] Companies that specialize in door-to-door sales often use the survey method to determine if the consumer would be interested in their product. It can be seen that on its face that this tactic is extremely deceptive. *Id.*

[70] Unsolicited salesmen use gimmicks such as "you have won a prize" or a "bond of friendship" to gain entrance into residences to enable them to give their sales pitch. This, as shown by the text, is also deceptive on its face. Companies figure that if they can gain entrance to the dwelling there is a good chance they can make a sale. *Id.*

[71] The National Better Business Bureau has estimated that health gimmicks account for well over a billion dollars annually.

> No. 9. Health Quackery: Reducing pills, bust developers, hair restorers, 'virility pills,' cancer and arthritis cures—well over a billion dollars annually. O'Connell, *supra* note 7, at 231-32.

[72] As with guarantees, oral estimates are no assurance that the consumer will receive the bill he expected. The consumer should get a written assurance that no additional charges, over and above those in writing on a contract, will be made without his consent. KY. DEP'T OF LAW, *supra* note 66.

[73] The fact that the vacuum had a unit installed in every room qualified it as a home improvement. According to the National Better Business Bureau, losses due to home improvement schemes amount to $500 million a year.

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this would be covered through a new sales plan. The company would pay Mary $25 per month for a year for using her home as a demonstration model, enabling her not only to pay for the cleaner, but also to make a profit.[74] Since the monthly payments Mary would receive would cover the cost of the machine, the terms of the agreement were discussed as mere formalities and she signed the blank contract given her by the salesman.[75]

A few days later, John and Mary received a letter from a finance company which, in part, stated:

> Dear Friends:
>
> In view of your fine credit rating and excellent character references, the Friendly Finance Company, Inc. has agreed to finance your recent purchase of a sewing machine from the State Sewing Machine Company and a vacuum cleaner from Health-O-Matic Industries.
>
> You have signed two instruments, one for the sewing machine which provides for 36 monthly payments at $6.20 per month. . . . First payment due October 1.
>
> The second instrument for the vacuum cleaner which provides for 36 monthly payments of $10.40 per month. . . . First payment due October 15.

Though not mentioning the fee Mary was to receive for use of the house as a "Model Home," the terms were correct, so the [illegible] paid little attention to the letter.[76] It was not until several weeks later that the vacuum was delivered. When it was finally installed, Mary

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No. 2 Home Improvement Swindles: Hidden trust deeds executed without knowledge or consent of homeowners; phony bargains, tricky financing, guarantees not honored, materials misrepresented and performances exaggerated. Losses estimated at $500 million a year. O'Connell, *supra* note 7, at 231-32.

[74] Dealers induce the consumer to purchase their product by making the representation that it will enable him to earn some money and thereby pay for the product. The National Better Business Bureau includes this scheme in its ten most serious consumer frauds.

No. 10. Work at Home Gyps: Gimmick ads to sell overpriced and shoddy equipment that fails to earn the income represented. *Id.*

[75] Blank contracts or contracts with blank spaces therein are used by dishonest salesmen. The salesman orally agrees to one set of facts but after the deal is closed he inserts into the contract terms more advantageous to him, or omits oral representations the buyer has relied on. As stated before, the consumer is bound by what the contract says not what the fraudulent salesman tells him. KY. DEP'T OF LAW, *supra* note 66.

[76] Mary has just fallen prey to a blank contract and an oral estimate. The contract Mary signed contained nothing about a fee she would receive for use of her home and the sum of the monthly payment of $10.40 per month was considerably more than the oral estimate of $300. *Id.*

discovered that the walls where the outlets were made had been damaged.

The next day John wrote to Health-O-Matic Industries. Two weeks passed and the Wilsons had not received a reply. During this time the sewing machine had proved to be defective. John went to State Sewing Machine to see the salesman that had sold him the machine, but was told that he no longer worked for the company. Furthermore, the company stated that the machine was not guaranteed.[77]

Since it would be impossible to use the house as a "Model Home" until the walls were repaired and since the sewing machine was defective, John refused to make the first payments when they became due. The finance company sent a courteous note asking for payment and stating that appropriate action would be taken if John did not pay. John telephoned Health-O-Matic, but the company denied any responsibility, claiming the damage was done by ABC Installation Company who installed the machine, and refused to alter the price. The next day John learned that ABC was no longer in business.

By now another payment was past due and the finance company was becoming more insistent. When John went to the finance company, he was told he would have to pay, that the finance company was a "holder-in-due-course" and that his only recourse was against the sewing machine and vacuum cleaner companies.[78] John had heard of the term "holder-in-due-course" before, but he had not imagined that he would have to pay the finance company if the products were defective. In spite of this, he refused to pay unless the companies satisfied his demands.

The finance company then notified him that it would sue on the debt he owed the company and levy against his house if he did not pay the entire balance immediately.[79]

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[77] Oral guarantee discussed note 68 *supra.*

[78] 114 U. PA. L. REV., *supra* note 19, at 414.

> The factor singled out . . . as the largest problem in the consumer fraud area—'the mask behind which fraud hides' is the ability of financial agencies, absent regulation in retail sales acts, to purchase installment contracts free from responsibility for fraudulent practices perpetrated by dealers. *Id.*
>
> The Uniform Commercial Code protects a financial institution that buys negotiable consumer paper as a holder in due course, unless the consumer can prove: (1) that the holder had notice that . . . the instrument is overdue or has been dishonored or of any defense against or claim to it on the part of any person; or (2) that the consumer signed the note under such misrepresentation that he had 'neither knowledge nor reasonable opportunity to obtain knowledge of its characer or essential terms.' *Id.* citing UNIFORM COMMERCIAL CODE § 3-302, 3-305.

[79] KY. REV. STAT. [hereinafter cited as KRS] § 288.580 (1960).

John had been told that the Better Business Bureau could help consumers in situations such as his. Upon contacting the Bureau, and after the companies had denied responsibility, he was informed that complaints such as his were forwarded to the Consumer Protection Division of the Office of the Attorney General of Kentucky.[80]

Shortly thereafter, he received a letter from the Attorney General's Office acknowledging receipt of his complaint and informing him that the office would take appropriate action and he would be notified of the companies' response. A few days later, he received another letter from the Attorney General's Office advising him that that office was not empowered to undertake any further action on his complaint and that he should contact his local prosecutor or a private attorney.[81] The letter explained that if there is a private dispute between the parties as to the facts of the matter, the complaint is classified as a private controversy and that the office was not permitted to intervene into what the courts have termed private controversies. The letter further disclosed that the Attorney General has the authority to enforce only three statutes that are relevant to "consumer protection": (1) the "Advertising and Wholesale Act"[82] which protects the public from those retailers who misrepresent their goods as being sold at wholesale price; (2) the "Going Out of Business Act"[83] which protects the public from misleading advertising concerning going-out-of-business, lost-our-lease, fire-sales, and the like, and (3) the "Chain Merchandising Act"[84] which protects the public from referral selling.

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[80] This is the usual practice in central Kentucky. Since the forming of the Consumer Protection Division of the Office of the Attorney General of Kentucky, the Better Business Bureau has forwarded complaints to that division. Letters on file in the Office of the Attorney General of Kentucky.

[81] This is the normal procedure in the Attorney General's Consumer Protection Division. A letter is sent out acknowledging the consumer's complaint and informing him that he will be notified of the company's response. A second letter is sent to the complained-of company, relating the facts of the complaint to them and asking for their position in the matter. If the respondent company denies responsibiliy or replies that the complainant stated the facts incorrectly, the complaint is a "private controversy" and the consumer is told that he should contact his local prosecutor or a private attorney. Letters on file in the Office of the Attorney General of Kentucky.

[82] KRS § 365.490 (1966) prohibits the use of the word "wholesale" in the advertisement of merchandise that is being sold to the general public.

[83] KRS § 365.415 (1966) requires a merchant to acquire a license before conducting a "going-out-of-business," "lost-our-lease," or "fire" sale.

[84] KRS § 436.360 (1944) prohibits lotteries, gift enterprises and chain merchandising in the Commonwealth.

Chain merchandising has been interpreted to include the scheme known as referral selling. Commonwealth v. Allen, 404 S.W.2d 464 (Ky. 1966).

Referral selling is a sales-scheme through which the consumer is induced to purchase a product by the offer that he will receive a set amount of money if and only if a demonstration is given or a sale is made to a prospective buyer

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Unless the activity of which the consumer complains falls within the boundaries of one of the above-mentioned statutes, the Attorney General's Office can only offer its services in mediation and hope for voluntary cooperation by the respondent company. This lack of statutory power and the smallness of the staff have severely limited the efforts of the Consumer Protection Division to assist the public. In 1968 and through August, 1969, the Attorney General's Consumer Protection Division (C.P.D.), which is staffed by one full-time attorney and one full-time secretary and has no separate budget, saved the consumers of Kentucky only approximately $4,200. However, this sum does not include those instances where intervention by the C.P.D. has resulted in such accommodations as delivery, repair and return of merchandise and cancellation of some unconscionable contracts.[85]

In other states that have "Consumer Protection Acts" similar to the proposal herein discussed and whose consumer protection divisions are better staffed and financed, the amount of savings for the consumer has been substantially larger. In Illinois, for example, the Attorney General's Consumer Fraud Division has, since 1961, returned $1,500,000 to the consumer through mediation and $600,000 by litigation. In Iowa, where in 1965 the legislature adopted a "Consumer Fraud Act" similar to the Kentucky proposal, the Attorney General's Consumer Protection Division estimated that $10,000 to $12,000 was returned to consumers each year by litigation alone, not including mediation. In Maryland, in ten months, $125,000 was returned to consumers. In Missouri, $15,000 by litigation.[86]

Due to his reluctance and relative inability to pay a private attorney, John turned first to the local prosecutor. After listening to his complaint, the prosecutor telephoned the representatives of the respective companies who again denied responsibility. In the prosecutor's opinion, there was no criminal sanction under which John could obtain relief. He informed John that Kentucky, as do most states,[87] has a "Printers' Ink Statute"[88] which makes it a misdemeanor to

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he refers to the company. It is doubtful that the plan under which Mary Wilson purchased the vacuum cleaner would constitute referral selling because Mary was not required to refer any prospective customers.

[85] Letter from John B. Breckinridge, Attorney General of Kentucky, October 3, 1969, on file in University of Kentucky Law Library.

[86] Douglas, *supra* note 58, at 11-13, 16.

[87] 56 COLUM. L. REV., *Supra* note 26, at 1058; Note, *Deceptive Advertising*, 80 HARV. L. REV. 1005, 1123 (1967); Note, *State Consumer Protection: A Proposal*, 53 IOWA L. REV. 710, 716 (1967).

[88] KRS 434.270 (1942): Any person who,
directly or indirectly, displays or exhibits to the public in any manner,
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engage in false or misleading advertising. However, he stated that it was rarely if ever used[89] due to the burden of proof required in enforcing criminal statutes and the restrictive interpretations given the statute by many courts. The prerequisites for criminal prosecution, namely knowledge of the falsity of the statements made and intent to deceive make it difficult to obtain a conviction under a criminal statute such as "Printers' Ink."

The original "Printers' Ink Model Statute,"[90] after which Kentucky Revised Statute [hereinafter cited as KRS] Section 434.270 and most state statutes prescribing a penal sanction for false advertising are modeled, did not require the elements of knowledge or intent in order to obtain a conviction.[91] However, Kentucky was among the states which, in the course of enactment, added the requirements of scienter, *i.e.* that the advertiser had both knowledge of the falsity of his statements and an intent to deceive.[92] These substantial evidentiary

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whether by handbill, placard, poster, picture, film or otherwise; inserts or causes to be inserted in any publication; issues, exhibits or in any way distributes or disseminates to the public; or delivers, exhibits, mails or sends to any other person any false or misleading statement, representation or advertisement, with intent to sell, barter or exchange any goods, wares or merchandise or any thing of value; or to deceive or mislead any other person to purchase, discount or in any way invest in or accept as collateral security any bonds, bill, share of stock, note, warehouse receipt or any security; or to make any loan upon or invest in any property of any kind; or uses any of such advertising methods with the purpose of deceiving or misleading any other person to employ, for a valuable consideration, the services of any person advertising such services, shall be fined not more than five hundred dollars, or be imprisoned for not more than sixty days, or both. If a corporation violates this section, it shall be fined not more than five hundred dollars, and its president, or other officers who are responsible for the management of the corporation, shall be imprisoned for not more than sixty days.

[89] No appellate decision has ever been handed down concerning KRS § 434.270. KRS ANN. § 434.270 (Baldwin 1968).

Concerning Printers' Ink Statutes it has been stated that:

. . . [M]ost jurisdictions have never used the statutes at all, and that only a few have initiated more than a handful of prosecutions. 56 COLUM. L. REV., *supra* note 26, at 1063.

[90] The "Printers' Ink Model Statute" was drafted in 1911 for an advertising journal of that name. 56 COLUM. L. REV., *supra* note 26, at 1058.

[91] "The Printers' Ink Model, which carries the penal sanction of a misdemeanor, requires proof of only three elements: (1) an intent to sell, dispose of, or increase the consumption of, goods or services; (2) the placing before the public, with such intent, of any type of advertising; and (3) the existence in such advertising, of a statement or representation of fact which is untrue, deceptive or misleading. Its purpose is to make the advertiser absolutely liable for what he says, without requiring the often difficult proof of reliance by the actual purchaser, intent to deceive, or actual knowledge of the improper character of the advertisement by the defendant." *Id.*

[92] It is evident on the face of the Kentucky statute that intent is required. The relevant provisions of the statute state:

KRS § 434.270 (1942):

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barriers to conviction have seriously undermined the effectiveness of the statute.[93]

However, if the elements of knowledge and intent were not required, the statute would still be totally inadequate. Of course, as under all criminal statutes, the general requirement that guilt must be proved beyond a reasonable doubt is applicable.[94] Along with this, criminal provisions must be strictly construed and the activity must be clearly within the boundaries of the prohibition.[95] A consequence of this latter requirement is, for example, the widespread feeling that the prohibitions of "Printers' Ink" do not apply to "bait and switch advertising."[96] The strict construction given the statute by the courts limiting its substantive coverage to false representation of fact has resulted in defenses based on a distinction between fact and opinion.[97] "There is some authority that neither opinion nor promissory statements are embraced by the statute."[98] Thus if a merchant makes a representation that is considered to be merely his opinion or his promise, he is not liable for its veracity.

The restrictive interpretations given criminal statutes by many courts have also been felt in the realm of the false pretense statute.[99] It is generally held that to constitute a false pretense there must be a misrepresentation of an existing or past fact.[100] Thus, false pretense statutes do not cover false promises concerning future acts, even if the promise was made with no intent to perform.[101] This is the ac-

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> . . . with intent to sell, barter or exchange any goods, wares or merchandise or any thing of value; or to deceive or mislead any other person to purchase. . . .

See 56 COLUM. L. REV., *supra* note 26, at 1060-61; Note, *Deceptive Advertising*, 80 HARV. L. REV. 1005, 1123 (1967); Note, *State Consumer Protection: A Proposal*, 53 IOWA L. REV. 710, 716 (1967).

[93] Mindell, *supra* note 58, at 616; Note, *Commercial Nuisance: A Theory of Consumer Protection*, 33 U. CHI. L. REV. 590 n.5 (1966); 56 COLUM. L. REV., *supra* note 26, at 1060-61; Note, *Deceptive Advertising*, 80 HARV. L. REV. 1005, 1123 (1967); Note, *State Consumer Protection: A Proposal*, 53 IOWA L. REV. 710, 716 (1967).

[94] Note, *Deceptive Advertising*, 80 HARV. L. REV. 1005, 1123 (1967); Note, *State Consumer Protection: A Proposal*, 53 IOWA L. REV. 710, 716 (1967).

[95] Note, *Commercial Nuisance: A Theory of Consumer Protection*, 33 U. CHI. L. REV. 590, 591 n.5 (1966); Note, *Deceptive Advertising*, 80 HARV. L. REV. 1005, 1123 (1967).

[96] 56 COLUM. L. REV., *supra* note 26, at 1063; Comment, 35 N.D. L. REV. 164, 165 (1959).

[97] 56 COLUM. L. REV., *supra* note 26, at 1061; Note, *Desceptive Advertising*, 80 HARV. L. REV. 1005, 1123 (1967).

[98] 56 COLUM. L. REV., *supra* note 26, at 1061.

[99] Note, *State Consumer Protection: A Proposal*, 53 IOWA L. REV. 710, 717 (1967); 114 U. PA. L. REV., *supra* note 19, at 424-25.

[100] 53 IOWA L. REV., *supra* note 99, at 717; 114 U. PA. L. REV., *supra* note 19, at 424-25.

[101] 53 IOWA L. REV., *supra* note 99, at 717: 114 U. PA. L. REV., *supra* note 19, at 424-25.

cepted construction given to KRS 434.050, Kentucky's "False Pretense Statute."[102]

Another weakness of criminal legislation is that these statutes do not permit local prosecutors to make a direct assault upon widespread deceptive practices, but requires them to resort to a multiplicity of actions in isolated cases as the means of enforcement. It has been stated:

> . . . [T]he determination in criminal proceedings that a practice is deceptive has no binding effect in subsequent proceedings. If the county attorney wishes to halt a widespread deceptive practice he must prosecute all subsequent violations by the businessman in individual actions. Therefore, the sanctions imposed in the isolated case must be sufficient alone to deter future violations. . . .[103]

But, as previously noted, most criminal statutes of this nature provide only nominal sanctions.[104]

Yet, even if the overworked[105] prosecutor believes that a particular activity falls within the prohibitions of a statute, he rarely prosecutes. This is due to both a generally held belief that, except in the most flagrant circumstances, businessmen should not be treated like criminals[106] and to the political repercussions inherent in prosecuting local businessmen for what may seem to be no worse than an excess of capitalistic enthusiasm.[107] He simply chooses to prosecute more serious crimes, leaving deceptive advertising unregulated.[108]

In any event, most consumers are not sufficiently outraged by deceptive advertising to take the time to file a criminal complaint

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[102] *See, e.g.*, Commonwealth v. Tidwell, 162 Ky. 114, 172 S.W. 102 (1915); Commonwealth v. Warren, 94 Ky. 615, 23 S.W. 193 (1893); Commonwealth v. Moore, 89 Ky. 542, 12 S.W. 1066 (1890). The rule developed by the line of cases yields the following conclusion:

> In summary, it is our opinion that a mere false promise to do something in the future unaccompanied by any misrepresentation of present of past fact, will not sustain a conviction under KRS § 434.050, whereas a false promise, coupled with a false representation as to a present or past fact, is sufficient to sustain a conviction under the statute, the other elements of the offense being present. 67 OP. ATT'Y GEN. 209 (1967).

[103] 53 IOWA L. REV., *supra* note 99, at 717.

[104] The sanctions provided in KRS § 434.270 (1942) are as follows:

> . . . shall be fined not more than five hundred dollars, or be imprisoned for not more than sixty days, or both.

[105] 56 COLUM. L. REV., *supra* note 26, at 1064; 80 HARV. L. REV., *supra* note 97, at 1123.

[106] Note, *Commercial Nuisance: A Theory of Consumer Protection*, 33 U. CHI. L. REV. 590, 591 n.5 (1966); 80 HARV. L. REV., *supra* note 97, at 1123; 114 U. PA. L. REV., *supra* note 19, at 426-27.

[107] 80 HARV. L. REV., *supra* note 97, at 1123.

[108] 56 COLUM. L. REV., *supra* note 26, at 1064; 80 HARV. L. REV., *supra* note 97, at 1123; 53 IOWA L. REV., *supra* note 99, at 716; 114 U. PA. L. REV., *supra* note 19, at 426-27.

and testify at trial,[109] especially since the prosecutor cannot get their money back.[110] Thus, it is apparent that criminal legislation does not adequately protect the consuming public.

The prosecutor advised John to see a private attorney for advice on the question of civil remedies. When he finally contacted an attorney, the result again was disappointing. The lawyer told him that he could bring an action for deceit against the companies for falsely representing their products in an advertisement or at the time of sale.[111] However, he stated that the difficulty of proving the elements of this action made it too cumbersome to effectively protect consumer interests. At common law it was generally held that:

> In order to recover in deceit, the consumer was required to show that he had reasonably relied on a misrepresentation of fact knowingly made by a merchant with the intent to deceive. Not only was it extremely difficult for the consumer to prove the merchant's intent to deceive, but it was also difficult for him to establish that his reliance on the misrepresentation was reasonable. Even if these difficulties were overcome, the consumer still was required to show that a verifiable fact had been misrepresented and that the representation was not privileged as mere puffing.[112]

Today, however, the courts are gradually becoming more liberal as to what is required to establish an action in deceit. In some jurisdictions neither scienter nor intent is any longer required, thus allowing restitution to be granted when the merchant has made an unintentional misrepresentation without knowledge of the falsity of his statement.[113]

In Kentucky, however, the rule is well settled that intent and scienter are still required for deceit.[114] Hence, the present Kentucky rule, found in *McGuffin v. Smith*,[115] is simply the old rule which other states have modified. In *McGuffin*, the court held that in order to constitute actionable deceit, the plaintiff must prove:

> (1) That the defendant made a material misrepresentation; (2) that it was false; (3) that when he made it he knew that it was false, or made it recklessly, without any knowledge of its truth, and as a positive assertion; (4) that he made it with the

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[109] 80 HARV. L. REV., *supra* note 97, at 1123; 53 IOWA L. REV., *supra* note 99, at 717.

[110] 80 HARV. L. REV., *supra* note 97, at 1123; 114 U. PA. L. REV., *supra* note 19, at 424.

[111] 53 IOWA L. REV., *supra* note 99, at 717.

[112] *Id.* at 712-13.

[113] Comment, 44 KY. L. J. 112, 113 (1955).

[114] *Id.*

[115] 215 Ky. 606, 286 S.W. 884 (1926).

> intention that it should be acted upon by the plaintiff; (5) that the plaintiff acted in reliance upon it, and (6) that he thereby suffered injury.[116]

In addition to the modifications in deceit, most courts today recognize the doctrine of equitable rescission by which the consumer may have a contract rescinded without proving knowledge, recklessness, nor intent to deceive.[117] In fact, "Kentucky is practically the only state which requires proof of an intent to deceive" and scienter, *i.e.* knowledge "before an equitable rescission can be secured."[118] In refusing to rescind the contract allegedly procured by fraud, the court in the leading case of *Livermore v. Middlesborough Town-Lands Company*[119] held:

> To establish actionable fraud, or fraud against which equity will relieve—and, as we have seen, the same rule applies in Kentucky to both classes of cases—it must appear that the misrepresentation was of a matter of material fact (as distinguished from opinion), at the time or previously existing (and not a mere promise for the future); must be relied upon by the person whose action is intended to be influenced; and must be made with knowledge of its falsity, or under circumstances which did not justify a belief in its truth.[120]

The attorney told John that the easier rule upon which he could have sued the sewing machine company, breach of warranty, was unavailable in his case because the contract he signed contained a disclaimer clause.[121] Although the Uniform Commercial Code, as adopted in Kentucky, has abolished the requirement of privity of contract in an action for breach of warranty,[122] and even though it has expanded the concept of breach of warranty from its common law definition,[123] it has not proved to be a sufficient consumer remedy due to the fact that many warranties may be disclaimed if the requirements of the Code are met.[124]

In addition to the strictly "legal" inadequacies of the civil reme-

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[116] *Id.* at 612, 286 S.W. at 886.
[117] 44 KY. L. J., *supra* note 113, at 115.
[118] *Id.* at 114.
[119] 106 Ky. 140, 50 S.W. 6 (1899).
[120] *Id.* at 163, 50 S.W. at 13.
[121] The attorney had called the sewing machine company that stated that the contract John Wilson had signed contained a disclaimer clause. Note 75 *supra* discusses blank contracts.
[122] KRS § 355.2-318 (1958).
[123] KRS §§ 355.2-314-15 (1958). At the common law not only was "privity" required for breach of warranty, but "dealers talk—puffing" was privileged and the consumer had to prove his reliance on the representation given him by the businessman. 53 IOWA L. REV., *supra* note 99, at 713.
[124] KRS § 355.2-316 (1958).

dies for the consumer, there are also some practical drawbacks. Most of the time the consumer will have no personal knowledge of the illegality of the activity that he believes to be unfair.[125] This is especially true of such groups as the poor and the minorities who are hit the hardest by the fraudulent operators.[126] Even to those aware of an applicable legal remedy, the cost of the litigation will be more than the small stakes he will recover in a successful action.[127] All of these elements—the small stakes usually involved in individual consumer actions, the expense of the litigation and the consumer's lack of legal knowledge—add up to the discouragement of litigation.[128]

At the suggestion of his attorney, John then went to the legal aid society as a last effort to obtain help but was informed that since his income was in excess of the maximum allowed, he could not be represented by legal aid.[129]

The result of John's experience was a bill for $597.60, a defective sewing machine, a house with damaged walls, and a conclusion that "nobody is helping the consumer."

THE KENTUCKY BUSINESS AND CONSUMER PROTECTION ACT

The legislative enactment which the Attorney General's Consumer Council proposed to alleviate these barriers to legal redress for defrauded consumers can best be commented upon by sections.[130]

Section 2. Declaration of Purpose

The purpose of this Act shall be to protect business and consumers from misrepresentation and deceptive practices in the conduct of any trade or commerce in part or wholly within this Commonwealth.

Section 3. Definitions

As used in this Act—unless the context otherwise requires

(a) "Advertisement" means the attempt by publication, dissemination, solicitation or circulation to induce, directly or indirectly,

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125 Spanogle, *supra* note 15, at 639; 53 IOWA L. REV., *supra* note 99, at 715.

126 Rice, *supra* note 15, at 569.

127 O'Connell, *supra* note 7, at 231; 33 U. CHI. L. REV., *supra* note 106, at 590; 53 IOWA L. REV., *supra* note 99, at 715-16; 114 U. PA. L. REV., *supra* note 19, at 409.

128 U. CHI. L. REV., *supra* note 106, at 595.

129 114 U. PA. L. REV., *supra* note 19, at 403.

130 All citations to and sections reprinted of the Kentucky Business and Consumer Protection Act are to the draft which was announced to the public on September 19, 1969. *See* note 2 *supra.*

any person to enter into any obligation, or acquire any title or interest in any merchandise or service;

(b) "Merchandise" includes any objects, wares, goods, commodities, intangibles, real estate, or anything offered, directly or indirectly, to the public for sale;

(c) "Service" means any maintenance, repair, advice, counsel, or treatment by any person in the conduct of any occupation;

(d) "Person" means any domestic or foreign individual, corporation, government, or governmental subdivision or agency, business, estate, trust, partnership, unincorporated association, two or more of any of the foregoing having a joint or common interest, or any other legal or commercial entity;

(e) "Sale" means any sale, rental or distribution, offer for sale, rental or distribution, or attempt directly or indirectly to sell, rent or distribute any merchandise or service for cash or on credit.

The relative uniqueness for this type law of a declaration of purpose[131] is surprising in view of its importance and utility.

> Like other regulatory and protective legislation, consumer laws are couched in broad, inclusive language in order to preclude loopholes that permit either exoneration of practices intended to be outlawed or allowance of enforcement procedures and outright harassment which the legislature wished not to authorize. The very comprehensiveness may boomerang, however, and every provision that seeks to close a loophole may have the effect of increasing ambiguity and confusion. Consequently, in order to guide administrative and judicative application of a consumer fraud law, a 'purpose and construction' section is useful.[132]

Like all similar consumer protection statutes, this proposal for Kentucky has quite liberally-framed definitions to insure the broad application requisite to be effective in assisting the consuming public.[133]

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[131] Apparently only two other states have included a declaration of purpose section in the basic consumer protection statute. N. C. GEN. STAT. § 75-1.1(b) (Supp. VII, 1969); VT. STAT. ANN. tit. 9, § 2451 (Supp. 1969).

[132] Memorandum from Dean Robert M. Viles, Chairman, to the Legislation Committee of the Attorney General's Consumer Protection Council, April 7, 1969.

[133] Twenty-three states have a basic statutory prohibition of deceptive practices which can be called a consumer protection law. ARIZ. STAT. ANN. § 44-1521 *et. seq.* (Supp. May 1967); CONN. GEN. STAT. § 42-111 *et. seq.* (Supp. 1967); DEL. CODE ANN. tit. 6 §§ 2511-2537 (Supp. 1968); HAWAII REV. LAWS §§ 480-1 *et. seq.* (1968); ILL. ANN. STAT. ch. 121-1/2 §§ 261-271 (Smith-Hurd Supp. 1969); IOWA CODE § 713.24 (1966); KAN. STAT. ANN. §§ 50-601 *et. seq.* (Supp. 1968); MD. CODE ANN. art. 83, §§ 19-27 (Supp. 1969); MASS. ANN. LAWS ch. 93A, (Supp. 1968); MINN. STAT. ANN. §§ 325.78-.80 (1966); MO. ANN. STAT. §§ 407.010-.130 (Vernon Supp. 1969); N. J. STAT. ANN. § 56:8-1 *et. seq., as amended,* (Supp. 1969); N. M. STAT. ANN. Ch. 49-15-1 *et. seq.* (Supp. 1969);

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Taken together, the definitions of advertisement and sale extend the reach of the Act to almost every conceivable transaction, or stage of a transaction, in which the consumer could be defrauded. This is accomplished, first, by defining advertisement as an attempt, not necessarily successful, directly or indirectly, to induce any type of positive act by the consumer. Secondly, by including "rental or distribution," as well as attempt or offer to sell, any narrow view of sale is avoided. The combined effect of these two definitions is as extensive a coverage as is provided by most such statutes today. However, each one separately could be improved by the addition of various innovations scattered among a few states.

The definition of advertisement could insure the broadness of its coverage by providing that the enumerated methods of advertising are covered whether the medium utilized is "visual, oral or written,"[134] "including labelling."[135] Similarly, the inducement "not to enter"[136] an obligation should be covered as well as the affirmative act. In addition to inducements to acquire merchandise or services, those "to increase the consumption thereof"[137] should also be within the ambit of the law. While all these facets may be covered by definitional clauses like that in the present Kentucky proposal,[138] these suggestions are meritorious if only to avoid litigation to prove that point.[139]

(Footnote continued from preceding page)

N. Y. EXEC. LAW § 63 (12) (McKinney Supp. 1969); N. C. GEN. STAT § 75.1-1 *et seq.* (Supp. VII, 1969); N. D. CENT. CODE ANN. ch. 51-15 (Supp. 1969); PENN. STAT. tit. 73, §§ 201-1 *et. seq.* (Purdon Supp. V, 1968); R. I. GEN. LAWS tit. 6, ch. 6-13.1, (Supp. II, 1968); TEX. REV. CIV. STAT. art. 5069, ch. 10 (Vernon Supp. 1969), *as amended,* ch. 452, Tex. Sess. Law Serv. (1969); VT. STAT. ANN. tit. 9 §§ 2451-2462 (Supp. 1969); WASH. REV. CODE. ch. 1986 (Supp. 1967); Colo. H. B. 1030 (1969). In addition, four states have deceptive advertising statutes with provision for injunctive relief which, while considerably narrower in scope than those laws cited above, do provide the state with some legal weaponry for protecting the consumer. ALAS. STAT. §§ 45.50.470.510 (1962); CAL. BUS. AND PROF. CODE §§ 17530-17535 (West 1964); MICH. COMP. LAWS ANN. § 445.801-809 (1967); WIS. STAT. ANN. § 100.18.20 (1957).

[134] The Colorado definition of advertisement, otherwise identical to that proposed for Kentucky, adds the phrase "visual, oral or written." Colo. H. B. 1030 § 1(6) (1969). Two other states insert the phrase "oral or written." MD. ANN. CODE art. 83, § 20(a) (Supp. 1969); ARIZ. REV. STAT. ANN. § 44-1521-1 (Supp. 1967).

[135] Only Maryland specifically includes labelling in its definition of advertisement. MD. ANN. CODE art. 83, § 20(a) (Supp. 1969).

[136] Only New Jersey specifies inducements "not to enter" obligations in the definition of advertisement. N. J. STAT. ANN. § 56:8-1 (a) (1967).

[137] The New Jersey consumer protection act alone includes the phrase "or increase the consumption thereof" in the definition of advertising. N. J. STAT. ANN. § 56:8-1(a) (1967).

[138] At least three state statutes define advertisement in language identical to that in the Kentucky proposal. DEL. CODE ANN. tit. 6, § 2511 (Supp. 1968); IOWA CODE § 713.24 (1)(a) (1966); MO. ANN. STAT. § 407.010(1) (Supp. 1967). The definition is similarly worded in the corresponding statues of two other

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The proposed definition of sale is the most extensive such definition among corresponding legislation. Other than this Kentucky proposal, only the New Jersey statute incorporates "rental or distribution."[140] The one flaw which the Kentucky proposal may share with seven other states is that the limiting terms "for cash or on credit" could omit the transaction by barter.[141] This possibility could be prevented by following the lead of three states and substituting the term "for any consideration" for the phrase "cash or on credit."[142]

While the language defining advertisement and sale incorporates almost any transaction, the definitions of merchandise and service

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states except that they append a clause specifically including advertisements printed to resemble invoices, etc. ILL. ANN. STAT. ch. 121-1/2, § 261(a) (Smith-Hurd Supp. 1967); KAN. STAT. ANN. § 50-601(a) (Supp. 1968). At least seven states whose entire statute generally follows the Council of State Governments' suggestion don't define advertisement at all. They are: Connecticut, Massachusetts, New Mexico, Pennsylvania, Rhode Island, Texas and Washington. See COUNCIL OF STATE GOVERNMENT, SUGGESTED STATE LEGISLATION 1967 [hereinafter cited as S.S.L. 1967] at 71. Minnesota neither follows S.S.L. 1967 nor defines advertisement.

139 In addition to the suggestions in the text, comparable logic would suggest the incorporation of the word "endorsement" among the synonyms meaning solicitation. *See* N. J. STAT. ANN. § 56:8-1(a) (1967). It would also suggest structuring the paragraph as "Advertisement includes any [thing] . . . which tends to induce. . . ." N. J. STAT. ANN. § 56:8-1(a) (1967); MD. ANN. CODE art. 83, § 20(a) (Supp. 1969). Such an approach appears to be advantageous in flexibility as compared to the present Kentucky proposal "Advertisement means the attempt . . . to induce. . . ." Such suggestions are in keeping with the philosophy of this type legislation that inflexibility is to be avoided in every facet. Incorporating all these suggestions, the definition of advertisement would read as follows:

> Advertisement—*includes* any publication, dissemination, solicitation, *endorsement,* or circulation, *visual, oral or written, including labelling, which tends* to induce, directly or indirectly, any person to enter *or not to enter* into any obligation, or acquire any title or interest in any merchandise or service *or increase the consumption thereof.* (Alterations emphasized).

140 N. J. STAT. ANN. § 46:8-1(e), *as amended,* (Supp. 1969). Five states define sale in language identical to that of Kentucky and New Jersey except for the omission of the words "rental or distribution." DEL. CODE ANN. tit. 6, § 2511(d) (Supp. 1968); IOWA CODE § 713.24 (1)(d) (1966); ILL. ANN. STAT. ch 121-1/2, § 261(d) (Smith-Hurd Supp. 1969); KAN. STAT. ANN. § 50-601 (d) (Supp. 1968); MO. ANN. STAT. § 407.101(4) (Supp. 1967). The language in Maryland's corresponding provision is very similar, but not identical, to that of these five states. MD. ANN. CODE art. 83, § 20(e) (Supp. 1969). The eight states which don't define advertisement, don't define sale either; Connecticut, Massachusetts, Minnesota, New Mexico, Pennsylvania, Rhode Island, Texas and Washington.

141 Corresponding statutes of at least seven other states use the term "for cash or on credit" in the definition of sale. DEL. CODE ANN. tit. 6, § 2511(d) (Supp. 1968); IOWA CODE § 713.24 (1)(d) (1966); ILL. ANN. STAT. ch. 121-1/2, § 261(d) (Smith-Hurd Supp. 1969); KAN. STAT. ANN. § 50-604(d) (Supp. 1968); MD. ANN. CODE art. 83, § 20(e) (Supp. 1969); MO. ANN. STAT. § 407.101(4) (Supp. 1967); N. J. STAT. ANN. § 56:8-1(e), *as amended,* (Supp. 1969).

142 The three states using the phrase "for any consideration" are Arizona, Colorado and Minnesota. ARIZ. REV. STAT. ANN. § 44-1521-5 (Supp. Mav 1967); MINN. STAT. ANN. § 325.78(2) (1966); Colo. H. B. 1030 § 1 (12) (1969).

reach almost any conceivable subject for such a transaction. The definition of merchandise, like that of sale, follows the New Jersey version.[143] Its superiority lies in the addition of "or anything offered, directly or indirectly, to the public for sale" to the otherwise fairly common language.[144] If enacted, the proposal will not only be but the third such statute to define service,[145] but will also be the strongest of the three. Its terms extend beyond the normal services like repair and, quite properly and equitably, encompass even legal and medical services, though the effect is limited by the exemptions of Section 5 of the proposed Act.[146] In providing with great clarity the broadness of scope required for effective consumer protection, these definitions of merchandise and service show superior draftsmanship.

The final term, person, is also defined in the manner of only one other state. But this time the state is Connecticut[147] and the provision is not clearly superior to its counterparts. While the inclusion of "government, or governmental subdivision or agency" is a unique broadening of the definitional scope, its failure to include the agent of the various commercial entities named is a serious deficiency. Such a provision in the corresponding laws of fourteen other states makes them comparatively stronger on this point.[148]

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[143] N. J. STAT. ANN. § 56:8-1(c), *as amended*, (Supp. 1969).

[144] Those statutes defining merchandise identically to the Kentucky and New Jersey language except for the omission of the clause "or anything offered, directly or indirectly, to the public for sale" include at least three. MD. ANN. CODE art. 83, § 20(b) (Supp. 1969); MINN. STAT. ANN. § 325.78(2) (1966); MO. ANN. STAT. § 407.101(2) (Supp. 1967). Two other states have enacted language identical to that of these three except that the word service is added since they do not separately define it. ARIZ. REV. STAT. ANN. § 44-1521-3 (Supp. May 1967); DEL. CODE ANN. tit. 6, § 2511(b) (Supp. 1968). Two other corresponding definitions are identical to those of Arizona and Delaware except that they limit the term real estate by modifying it with the clause "situated outside the state." ILL. ANN. STAT. ch. 121-1/2, § 261(b) (Smith-Hurd Supp. 1969); KAN. STAT. ANN. § 50-601(b) (Supp. 1968). Another corresponding statute utilizes the Arizona and Delaware language except that it unnecessarily includes securities, bonds, debentures, etc. IOWA CODE § 713.24(1)(b) (1966). Colorado defines property rather than merchandise. Colo. H. B. 1030 § 1 (11) (1969). Vermont's definition simply refers to definitions elsewhere. VT. STAT. ANN. tit. 9, § 2454(c) (Supp. 1969). Several statutes which substantially duplicate S.S.L. 1967 don't define merchandise at all, including: Connecticut, Massachusetts, New Mexico, Pennsylvania, Rhode Island, Texas and Washington.

[145] The other two comparable statutes defining service are those of Maryland and Vermont. MD. ANN. CODE art. 83, § 20(c) (Supp. 1969); VT. STAT. ANN. tit. § 2454(c) (Supp. 1969).

[146] *See* notes 202-03 *infra* and accompanying text.

[147] CONN. GEN. STAT. § 42-111(5) (Supp. 1967). The definition of person in the recent Colorado enactment is identical to that of Connecticut and the Kentucky proposal except that it doesn't preface individual with "domestic or foreign" and doesn't include the phrase "government, governmental agency or subdivision." Colo. H. B. 1030 § 1(b) (1969).

[148] Fourteen states have adopted a substantially similar definition of person which includes the agents clause. ARIZ. REV. STAT. ANN. § 44-1521-4 (Supp. May

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> The intention here seems to be to prevent evasion of the Act's prohibitions by denying to a defendant the defense that his agent or employee had no authority to engage in the behavior objected to. . . . Under this definition, the state need only show that the actor served the defendant in one of the enumerated capacities; it will not be incumbent upon the state to show that the actor was operating within his orders from the defendant. This means that on occasion, a defendant will be held responsible when an employee in fact exceeded his authority. Given the nature of the remedies granted by the Act, this will ordinarily not work a hardship on the defendant, but will provide an incentive for sellers to police their salesmen and copywriters to insure against repetitions.[149]

Accordingly, the definition of person would be strengthened by simply substituting this provision, modified to encompass the Connecticut innovation.[150] This would then complement the other definitions in being as broad as presently imaginable to afford the fullest protective coverage possible to the consumer.

Section 4. Unlawful Practice

(a) The act, use or employment by any person of any deception, fraud, false pretense, false promise, or misrepresentation in connection with the sale or advertisement of any merchandise or service is an unlawful practice.

This basic prohibition of consumer fraud is the principal provision of the Act and is very similar to the best of the three types of such clauses which other states have adopted.

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1967); ILL. ANN. STAT. ch. 121-1/2, § 261(c) (Smith-Hurd Supp. 1969); IOWA CODE § 713.24(1)(c) (1966); KAN. STAT. ANN. § 50-601(c) (Supp. 1968); MD. CODE ANN. art., § 20(e) (Supp. 1969); MASS. ANN. LAWS ch. 93A, § 1(a) (Supp. 1968); MINN. STAT. ANN. § 325.78(3) (1966); MO. ANN. STAT. § 407.010(3) (Supp. 1968); N. J. STAT. ANN. § 56:8-1(4) (1969); N. M. STAT. ANN. § 49-15-2A (Supp. 1969); PENN. STAT. tit. 73, § 201-2(2) (Purdon Supp. V, 1968); R. I. GEN. LAWS § 6-13.1-1(a) (Supp. II, 1968); TEX. REV. CIV. STAT. art. 5069, § 10.01(c) (Vernon Supp. 1969), *as amended*, ch. 452, Tex. Sess. Law Serv. (1969); WASH. REV. CODE § 19.86.010(1) (Supp. 1967).

[149] Travers, *supra* note 9, at 13.

[150] By combining the language of those fourteen statutes cited at note 148 *supra* with that of Connecticut and the present proposal, person would be defined as follows:

> Person—includes any natural person or his legal representative, any domestic or foreign individual, corporation, government, governmental subdivision or agency, business, estate, trust, partnership, incorporated or unincorporated association, two or more of the foregoing having a joint or common interest, any other legal or commercial entity and any agent, employee, salesman, partner, officer, director, member, stockholder, associate, trustee, or cestui que trust thereof.

One alternate version, adopted by five states, may be called a "Little FTC Act."[151] It simply employs the central phrase of the FTC's consumer protective jurisdiction:

> Unfair methods of competition and unfair or deceptive acts or practices in the conduct of trade or commerce are hereby declared unlawful.[152]

Usually appended to this prohibitory clause is a proviso that its interpretation shall follow FTC administrative rules and case law,[153] the factor which is considered its strength by its proponents.[154] However, the fact that it gives both the regulated businessman and the

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[151] HAWAII REV. STAT. § 480-2 (1968); MASS. ANN. LAWS ch. 93A, § 2(a) (Supp. 1968); N. C. GEN. STAT. § 75.1-1 (Supp. VII, 1969); VT. STAT. ANN. tit. 9, § 2453(a) (Supp. 1969); WASH. REV. CODE § 19.86.020 (Supp. 1967).

[152] The language is from Alternate 1, Section 2 of the legislation forwarded by the FTC to the Council of State Governments for inclusion in SUGGESTED STATE LEGISLATION 1970 [hereinafter cited as F.T.C.-S.S.L. 1970] The proposed legislation was accompanied by an explanatory report [hereinafter cited as F.T.C.-S.S.L. REP. (1970)]. The materials were released by the FTC on April 23, 1969. The language is patterned after the Federal Trade Commission Act. 15 U.S.C. § 45(a)(1) (1968). It "is the form preferred by the Federal Trade Commission." F.T.C.-S.S.L. REP. 1 (1970) (on file, University of Kentucky Law Library).

[153] The 1967 model specified simply that any actions permitted under laws administered by any state or federal regulatory body were exempted from coverage. S.S.L. 1967 § 3. Three states have adopted the same or similar language. CONN. GEN. STAT. § 42-115(f)(1) (Supp. 1967); N.M. STAT. ANN. § 49-15-6 (Supp. 1969); TEX. REV. CIV. STAT. art. 5069, § 10. 03(a) (Vernon Supp. 1969). The 1970 model stipulates that it is the legislative intent that "due consideration and great weight" be given to the interpretations of the FTC Act by both the FTC and the federal courts in interpreting the state provision. F.T.C.-S.S.L. 1970 § 3(a). Five states already had the same or similar verbage. N. M. STAT. ANN. § 49-15-4 (Supp. 1969); R. I. GEN. LAWS tit. 6, § 6-13.1-3 (Supp. II, 1968); TEX. REV. CIV. STAT. art. 5069, § 10.02(b) (Vernon Supp. 1969), *as amended*, ch. 452, Tex. Sess. Law Serv. (1969); VT. STAT. ANN. tit. 9, § 2453(b) (Supp. 1969); WASH. REV. CODE § 19.86.920 (Supp. 1967). Six states exempt any activity which is "subject to and complies with" the rules and regulations of the FTC. ILL. ANN. STAT. ch. 121-1/2, § 262 (Smith-Hurd Supp. 1969); KAN. STAT. ANN. § 50-602 (Supp. 1968); MD. CODE ANN. art. 83, § 21 (Supp. 1969): MO. ANN. STAT. § 407.020(1) (Vernon Supp. 1969): N. J. STAT. ANN. § 56:8-2 (Supp. 1969); TEX. REV. CIV. STAT. art. 5069, § 10.03(d), *as amended*, ch. 452, Tex. Sess. Law Serv. (1969). Such a rule may be mere surplusage in view of applicable constitutional principles of federal preemption. *See* Rice, *supra* note 19, at 605; 56 COLUM. L. REV., *supra* note 26, at 1073-75; 54 IOWA L. REV., *supra* note 4, at 323. Massachusetts, for example, employs roughly the same rule and specifies procedures for state action in such cases only when the FTC has not acted, placing the burden for proving the complete defense of compliance upon the alleged violator. MASS. ANN. LAWS ch. 93A, § 3 (Supp. 1968). The most inflexible rule is that of Iowa. It does not limit its application only to those activities subject to FTC jurisdiction, nor does it establish merely a rule of construction. It patently exempts all trade practices complying with FTC rules, which simply extends the jurisdiction of the FTC over all commerce in Iowa, delegating enforcement as to intrastate commerce to state officials. IOWA CODE § 713.24(12) (1966).

[154] Mindell, *supra* note 57, at 618-20; Dixon, *supra* note 20, at 40.

enforcement agency a sixty-seven volume interpretive manual[155] is only as meritorious as are the contents of those volumes. It must be remembered that this rule not only binds state law and intrastate commerce to federally promulgated administrative and judicial rules, but, if adopted by every state, would also place every facet of consumer protection in the nation under the policy determinations of an agency currently receiving extremely critical scrutiny for its failure to deal vigorously with marketing fraud.[156]

Furthermore, even were the "Little FTC" prohibitory phrase adopted without this limitation on construction, it is quite likely that the courts would nevertheless be guided by the current and past interpretations given by the FTC and the courts.[157] It can be argued that rather than limiting the state's initiative, this guarantees that state efforts will not become stymied by the interpretations of an industry-dominated state enforcement office, for arguably, the agency more likely to become dominated by those it regulates is the one at the state level. However, if the state official becomes a pawn of business, his failure to apply the law will not be deterred by how it would be interpreted if it were applied. Moreover, this rationale is less applicable if the state's enforcement officer is the elected Attorney General, especially in view of doubts created by recent allegations concerning the FTC.[158] Even if the FTC were flawless today, the very risk that state hands could be tied by federal trade regulations not abreast of the most recent deceptive tactics in the particular state is sufficient reason to applaud the rejection of this statutory approach.

A second alternate version adopted by six states may be called a "Deceptive Trade Practices Act" since it restrains the "Little FTC" Act's prohibition of "unfair or deceptive acts or practices,"[159] by defining it as twelve specific practices in terms derived from the Uniform Deceptive Trade Practices Act.[160] This definition includes the

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155 Six volumes, and three supplemental volumes, of court decisions reviewing FTC orders are available from the Government Printing Office. STATUTES AND DECISIONS, FEDERAL TRADE COMMISSION. Decisions of both the Commission and the courts are indexed in loose-leaf services available from commercial publishers in a sixty-one volume set. Dixon, *supra* note 20, at 40.

156 *See* notes 39-49 *supra* and accompanying text.

157 The New York false advertising statute, though not requiring it, has been construed according to FTC standards. Mindell, *supra* note 57, at 617-18.

158 *See* notes 39-49 *supra* and accompanying text.

159 S.S.L. 1967 § 2.

160 This promulgation by the National Commissioners on Uniform State Laws was designed for enforcement by the aggrieved individuals. UNIFORM DECEPTIVE TRADE PRACTICES ACT § 3. At the suggestion of the FTC, the Council of State Governments published the hybrid statute which is the model for the state laws herein called Deceptive Trade Practices Acts. S.S.L. 1967. Texas uses

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principal standards which had evolved from the FTC Act at the date it was written.[161] Consequently, while the "Little FTC Act" defines its terms as being the FTC rules and case law at the time it is invoked, the "Deceptive Trade Practices Act" defines them as only part of what those standards were in 1967. Accordingly, although the version of this alternative proposed by the FTC appends one additional flexibly worded definitional clause,[162] even the FTC admits that the approach is "somewhat narrower in scope"[163] than the other two. The inherent weakness of permitting all consumer frauds not specified makes this legislation of little avail against the imagination of the proverbial flim-flam man.

The alternative to which the Kentucky proposal is most similar can be called a "Consumer Fraud Law." Rather than by being drafted by a federal agency or national association, it has been adopted by ten states as simply a paragraph that will fill the gaps in the present legal structure.[164] The generality with which the prohibition is phrased was properly designed ". . . so that the law would be flexible enough to cope with novel practices or with variations on old practices, which sharp operators might invent to eliminate competition unfairly or to cheat the public."[165] The removal of the common law burdens of

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this format with the twelve definitional clauses, adding a thirteenth encompassing fraudulent business-closing sales. TEX. REV. CIV. STAT. art. 5069, § 10.01(b), *as amended*, ch. 452, Tex. Sess. Laws Serv. (1969). Two other states delete the twelfth clause in the model's definitions. One of these appends an additional clause covering referral sales schemes. PENN. STAT. tit. 73, § 201-2(4) (Purdon Supp. V, 1968). The other has additional clauses encompassing the fake recruitment of salesmen to solicit customers, bait and switch advertising, failure to give written copies of installment sales contracts, and flood-damaged goods. Colo. H.B. 1030 § 2(1) (1969). Still another state statute of this type deletes the ninth and tenth clauses of the model which relate to bait and switch type advertising practices. CONN. GEN. STAT. ANN. § 42-112(a) (Supp. 1967). The 1970 version of the model adds the thirteenth clause, which is an attempt to lend this alternative some elasticity. F.T.C.-S.S.L. 1970 § 2, Alt. 2, (13). Two state statutes already contained all thirteen clauses. N. M. STAT. ANN. § 49-15-2C (Supp. 1969); R. I. GEN. LAWS § 6-13.1-1(d) (Supp. II, 1968). The recently amended Texas statute goes even further in this direction, while retaining the multi-faceted definition of deceptive practices, by adding the terms false and misleading to its prohibitory clause and allowing them to remain undefined. TEX. REV. CIV. STAT. art. 5069, § 10.02(a), *as amended*, ch. 452, Tex. Sess. Law Serv. (1969).

[161] *See* Kintner, *supra* note 13, at 1281-83.

[162] F.T.C.-S.S.L. 1970 § 2, Alt. 2. *See* note 160 *supra.*

[163] F.T.C.-S.S.L. REP. 2 (1970).

[164] ARIZ. REV. STAT. ANN. § 44-1522 (Supp. May 1967); ILL. ANN. STAT. ch. 121-1/2, § 262 (Smith-Hurd Supp. 1969); IOWA CODE § 713.24(2)(a) (1966); KAN. STAT. ANN. § 50-602 (Supp. 1968); MD. CODE. ANN. art. 83 § 21 (Supp. 1969); MINN. STAT. ANN. § 325.79 (1966); MO. ANN. STAT. § 407.020 (Vernon Supp. 1969); N. J. STAT. ANN. § 56:8-2 (Supp. 1969); N. Y. EXEC. LAW § 63(12) (McKinney Supp. 1969); N. D. CENT. CODE ANN. § 50-15-02 (Supp. 1969).

[165] Dixon, *supra* note 20, at 41. The statement was made as to the FTC language, but viewed without any strictures on interpretation, is applicable to both Little FTC Acts and Consumer Fraud Laws.

proof of reliance and damage[166] allows the state to act before consumers are defrauded rather than necessitating that someone be victimized as an element of illegality.

Similarly, the element of scienter is apparently removed,[167] as it is from the other two statutory prototypes,[168] on the premise that the state of mind of the wrongdoers is irrelevant to the question of whether he should be enjoined from continuing the wrong.[169] However, the draftsmen apparently were of the view that scienter was retained[170] by the phrasing of the "Consumer Fraud" laws of other states:

> The act, use or employment by any person of any deception, fraud, false pretense, false promise, misrepresentation, *or the concealment, suppression, or omission of any material fact with intent that others rely upon such concealment, suppression or omission,* in connection with the sale or advertisement of any merchandise, or service, whether or not any person has been misled, deceived or damaged thereby, is an unlawful practice.[171] (Emphasis added.)

This is the probable explanation for the deletion from the Kentucky proposal of the portion emphasized above. However, such a view overlooks the fact that the placement of the intent requirement is such that it is applicable only to the practice of "concealment, suppression or omission of a material fact. . . ." It may be, however, that

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[166] Travers, *supra* note 9, at 14.

[167] *Id.* at 51 commenting upon the similar Kansas provision. KAN. STAT. ANN. § 50-602 (Supp. 1968). *But see* 54 IOWA L. REV., *supra* note 4, at 326 commenting upon the Iowa provision which is identical to that of Kansas. IOWA CODE § 713.24(2)(a) (1966). The statutes of two states clearly retain the element, but are obviously different than those of Kentucky, Kansas or Iowa.

> The act, use or employment by any person or any *deceptive act or practice,* fraud, false pretense, false promise or misrepresentation, with the intent that others rely thereon in connection with the sale *or advertisement* of any merchandise, whether or not any person has in fact been misled, deceived or damaged thereby. . . . (Emphasis added.) N. D. CENT. CODE ANN. § 51-15-2 (Supp. 1968).

The Minnesota statute is identical to that of North Dakota except that it omits the emphasized section. MINN. STAT. ANN. § 325.79 (1966).

[168] FEDERAL TRADE COMMISSION, REPORT ON DISTRICT OF COLUMBIA CONSUMER PROTECTION PROGRAM, Attachment, at c (June 1968).

[169] "Whether or not the advertiser knows the representation to be false, the deception of purchasers and the diversion of trade from competitors is the same. The purpose of the statute is protection of the public. not punishment of the wrongdoer." Gimbel Brothers v. F.T.C., 116 F.2d 578, 579 (2nd Cir. 1941).

[170] In a memorandum, the Chairman told the Legislative Committee of the Kentucky Attorney General's Consumer Protection Council, "The first two elements, misrepresentation and scienter, are retained." Viles, *supra* note 132, at 4. The statement is followed by the consumer fraud law language, the phrase "with intent that others rely" being underscored. This would indicate a reading of the phrase as if it applied to the deception clause as well as to the concealment clause. By grammatical structure, this is an unnecessary, if not erroneous, interpretation.

[171] DEL. CODE ANN. tit. 6, § 2513(a) (Supp. 1968).

the clause was removed so that concealment could be approached as a "deception" or "misrepresentation" and intent would not be an element in enjoining the practice. It is undoubtedly true that the ". . . factor that most frequently renders an advertisement misleading is not the character of the statements that it contains, but rather the information that is omitted."[172] Similarly, to be consistent with the policy that protective injunctions should not necessitate a showing of scienter,[173] it may be that the intent requirement should be removed despite the distinguishing factor that concealment is not an overt deceptive act unless intended. However, it would be unrealistic to impose a duty to disclose everything a buyer might want to know, and unnecessary since it is only when a material fact is suppressed that the practice becomes deceptive.[174] Furthermore, the deletion of the entire clause could render the Act inapplicable to concealment altogether since it is not unusual for courts to hold that where the legislature enacts language identical to that of several other states except for the deletion of a phrase, that action must have been a calculated rejection of that policy. The Act would, therefore, be greatly strengthened if either the entire clause were restored or only the intent phrase were omitted.

A further weakness in the language by which deceptive practices are proscribed lies in the lack of a specific clause dealing with the conduct of the seller after the transaction. Manifestly, the lack of deception prior to or during the sale does not place the consumer ". . . beyond the ambit of peril. . . . Numerous problems may set in at the performance level. They may range from non-delivery of merchandise through delivery of substitute goods, delivery of defective goods, refusal to make repairs or to perform promised services. . . ."[175] Such practice, especially the more blatant, could probably be reached under the broad terms of Section 4 (a) of the principal proposal. However, to remove any questions of application, a specific clause such as was added to the New Jersey consumer fraud law would be advisable.[176]

In addition to the general proscriptive clause, many states append prohibitions of specific acts.[177] While such enactments are generally

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[172] Barber, *supra* note 3, at 1208.

[173] *See* note 169 *supra* and accompanying text.

[174] Travers, *supra* note 9, at 53.

[175] Rice, *supra* note 15, at 563.

[176] By amendment, New Jersey added "or with the subsequent performance of such person as aforesaid" to merchandise and services as items covered. N. J. STAT. ANN. § 56:8-2, *as amended,* (Supp. 1968).

[177] Illinois has utilized this approach much more extensively than any other state, incorporating an even dozen such clauses. Included are rules on chain

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beyond the scope of this note, one such provision is vital since it is "the largest problem in the consumer fraud area."[178] This particular "mask behind which fraud hides"[179] is the Holder-in-Due Course Doctrine which will

> . . . permit a vendor to sell shoddy or defective goods, which sometimes are not even delivered, coax, wheedle, or coerce the buyer into signing a negotiable instrument, disappear or dissipate the funds, and, by assigning the instrument, prevent the deceived or defrauded consumer from asserting his legitimate defenses in an action on the note.[180]

It has, therefore, become the lifeblood of the modern flim-flam man, who simply negotiates a contract born of deception to a sales finance company at a discount[181] and thereby eliminates the consumer's sole

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referral sales, rescinding peddlers' contracts, returning down payments, holder-in-due-course, repeated violations of regulatory laws, willful violation of lending laws, collusive deficiency judgements, collection from spouse or employer, truthful credit advertising, motor vehicle warranties. ILL. ANN. STAT. ch. 121-1/2, § 262 A-L (Smith-Hurd Supp. 1968). Iowa also includes a provision on chain merchandising and contains clauses on going out of business sales and subdividing realty. Iowa Code § 713.24 (2) (b)—(d) (1966). Kansas' lone additional provision prohibits chain referral sales. KAN. STAT. ANN. § 50-603 (Supp. 1968). Pennsylvania also specifically incorporates referral sales, PENN. STAT. tit. 73, §§ 201-2(4) (vii) (Purdon Supp. V, 1968), as well as providing for rescinding contracts made with door-to-door peddlers. PENN. STAT. tit. 73, § 201-7 (Purdon Supp. V, 1968). Vermont's consumer protection act incorporates clauses for rescinding contracts for merchandise on grounds of non-delivery, holder-in-due-course abolition, voiding confessions of judgement, and prohibiting bait and switch advertising. VT. STAT. ANN. tit. 9, §§ 2454-2457 (Supp. 1969).

[178] 114 U. PA. L. REV., *supra* note 19, at 414.

[179] *Id.* The doctrine was "[d]eveloped to promote commerce by assuring the free flow of commercial instruments . . . and in transactions between merchants and commercial enterprises it serves a useful purpose and should be retained. The reasons for the doctrine do not apply, however, when non-commercial parties are involved." Comment, *Home Improvement Frauds and the Texas Consumer Credit Code*, 47 Tex. L. Rev. 463, 468, 475 (1969).

[180] FEDERAL TRADE COMMISSION, *supra* note 168, at 17. That this is still the prevailing law in Kentucky was reaffirmed during the last term of the Court of Appeals in a case where the consumer had, by form contract, waived his defenses and the assignee finance company was held entitled to collect the deficiency after repossession and sale, although the automobile sold for new was allegedly used. Jennings v. Universal C. I. T. Credit Corp., 442 S.W.2d 565 (Ky. 1969). *See generally* Littlefield, *Good Faith Purchase of Consumer Paper: The Failure of the Subjective Test*, 39 S. CAL. L. REV. 48 (1966).

[181] An investigation by the Texas Consumer Credit Commissioner revealed that the discounts are usually from 50-80% of the face value of the notes and that 80% or more of the assignees of such notes are sales finance companies. 47 TEX. L. REV., *supra* note 179, at 467. Some courts are becoming ". . . increasingly reluctant to confer holder in due course status in cases where they find that the connection of the actual sales transaction is too close or that the assignee has knowledge or should have known of the dealer's misconduct." FEDERAL TRADE COMMISSION, *supra* note 168, at 17, *citing* Norman v. Worldwide Distrib. Inc., 202 Pa. Super. 53, 195 A.2d 115 (1963). The practicality of this approach as a solution to the misuse of the doctrine is faulty on several grounds. First, it is

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lever for extracting performance of his promises. Nevertheless, the consumer must pay the assignee in full despite faulty goods or even complete non-performance.

Of the three primary statutory approaches to this problem, the clearly preferable alternative is simply to make the assignee subject to all the claims and defenses the consumer had against the seller.[182] An alternative proposed in the Uniform Commercial Credit Code (UCCC)[183] and adopted by several states[184] allows the consumer a brief period subsequent to his notification of the assignment in which to preserve all his claims by notice to the assignee. Such a provision

> . . . [i]s deemed clearly unacceptable because it is unrealistic to expect low-income consumers or others not versed in the law to be apprised of their rights under the law and to defend themselves against the holder-in-due-course doctrine.[185]

Neither is this approach remedied by requiring notice to the consumer of his right to press the claims during the specified period and of the consequences for failure to do so,[186] since "the roof never leaks before this time has been long gone anyway."[187] A second alternative proposed by the UCCC would limit the validity of the consumer's claims to defenses in an action by the assignee.[188]

> This would allow continuation of threats to and impairment of a consumer's credit rating which result from harassing collection

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". . . dulled by ignorance of the law on the part of attorneys . . . 'you can count the ones that know about the *Norman* case on your fingers.'" 114 U. PA. L. REV., *supra* note 19, at 416 (quoting an attorney for a finance company). Second, Kentucky has yet to adopt the *Norman* rationale. Third, were Kentucky to adopt the rule and all lawyers made aware of it, the consumer would still have the difficult and expensive burden of proving knowledge except where the assignee's involvement is obvious. And finally, such precedental developments are unlikely since lending institutions, aware of the judicial trend, are eager to settle legal difficulties with the few consumers represented by counsel with similar awareness. 114 U. PA. L. REV., *supra* note 19, at 416.

182 *See* MD. ANN. C°45 art. 83, § 147 (1957); MASS. GEN. LAWS ch. 255, § 12(c) (1961); PENN. STAT. ANN. tit. 69, § 615(G) (1965) (motor vehicle sales and revolving charge accounts); VT. STAT. ANN. tit. 9, § 2455 (Supp. 1969); F.T.C.-S.S.L. 1970 § 9.

183 UNIFORM COMMERCIAL CREDIT CODE § 2.404 Alt. B.

184 *See* DEL. CODE ANN. tit. 6, § 4312 (Supp. 1968); HAWAII REV. STAT. § 476-18 (1968); ILL. ANN. STAT. ch. 121-1/2, § 262 D (Smith-Hurd Supp. 1968); N. Y. PERS. PROP. LAW § 403 (1), (3) (McKinney 1962); PENN. STAT. ANN. tit. 73, § 500-207, 208 (Supp. 1967) (home improvement); TEX REV. CIV. STAT. ch. 5069, § 6.07 (Vernon Supp. 1969).

185 F.T.C.-S.S.L. REP., 5 (1970).

186 *See e.g.*, ILL. ANN. STAT. ch. 121-1/, § 262 D (Smith-Hurd Supp. 1969).

187 114 U. PA. L. REV., *supra* note 19, at 417 (quoting an attorney for a finance company).

188 UNIFORM COMMERCIAL CREDIT CODE § 2.404 Alt. A. Apparently California's enactment of this approach stands alone. CAL. CIV. CODE § 1804.2 (West Supp. 1968).

> tactics sometimes used without any actual litigation being undertaken against the consumer.[189]

Thus, the only adequate method for dealing with this tool of the unscrupulous is simply to terminate its operation as to consumer paper.

The obvious result of the abolition of this doctrine will be that the bulk of the burden of investigating the dealer's reliability will fall upon the financing institution. This is an advantageous approach not only because the finance company is better able to ferret out the fraudulent, but also because it can require a repurchase agreement for possible buyer defaults.[190] A resulting reduction in the prevalence of perpetually fraudulent business concerns will be inevitable. It is hardly a detrimental possibility that the resulting investigation costs would be passed on to the credit consumer, since he is already paying the bill for the deceptions financed by the holders-in-due course. Similarly, the spurious nature of the argument of the financial community that the cost of such a law would "destroy the credit boom" is belied by the nonexistence of such an occurrence in those states having such laws.[191] Apparently, the only severe harm is incurred by those marginal financing agencies who do not check their dealers and are, therefore, the best allies of the "blue suede boys."[192]

In sum, the Kentucky proposal is adequate to remove the present legal barriers to reaching deceptive practices and, therefore, is an extremely important development in protecting the Kentucky consumer. However, its exclusion of language expressly covering deception by concealment, its failure to include a phrase explicitly covering the subsequent performance of the seller, and its failures to deal with the financial lifeblood[193] of consumer frauds, the holder-in-due-course

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189 F.T.C.-S.S.L. REP. 5 (1970).

190 114 U. PA. L. REV., *supra* note 19, at 417-18.

191 *See* note 182 *supra.*

192 114 U. PA. L. REV., *supra* note 19, at 418.

193 Arguably, another shortcoming of this proposed statute is the failure to empower the Attorney General to issue rules and regulations interpreting the prohibitory language of Section 4(a). *See, e.g.,* F.T.C.-S.S.L. 1970 § 3(b). Such a provision is helpful to adequately inform the businessman who wishes to comply. It removes the excuse of confusion from the one who doesn't. While it is true that the Attorney General may be able to partially accomplish this by advisory opinions and public pronouncements, neither can be tested short of conduct which violates the statute if the agency's view is upheld. Spanogle, *supra* note 15, at 629-30. For the businessman "conscious of consumer good will" an alternative short of "deliberately violating the statute" would be much preferred. *Id.* By this rationale, the grant of power to the Attorney General to issue interpretative regulations would be clearly preferable. However, if such a provision were used extensively, it could keep the Attorney General's limited staff in court litigating its rules, leaving no time for enforcing them. Conversely, if it were utilized infrequently, the purposes and expectations underlying its provision would be un-

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doctrine, leave the proposal short of adequately remedying the plight of the consumer.[194]

Section 4. Unlawful Practice

(a) . . . .

(b) Section 4 (a) of this Act shall not apply—to the owner or publisher of newspapers, magazines or publications wherein such advertising appears, or to the owner or operator of a radio or television station which disseminates such advertisement when the owner, publisher or operator has no knowledge that such advertisement may be in violation of Section 4 (a) of this Act.

Section 5. Function of Other Agencies Not Impaired or Limited

(a) This Act shall not be construed to impair or limit the func-

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fulfilled. Furthermore, a primary purpose for putting supervision of the statute in the Office of the Attorney General is that its enforcement should be by the "public legal counsel" rather than an agency with regulatory powers and duties. The power to make interpretative rules is the power to daily supervise industry without the necessary expertise as well as the power to mollify the rigor of the law with all its attendant inducements. *See* notes 54-62 supra and accompanying text.

[194] By restoring the concealment clause of the typical consumer fraud law without restoring the intent requirement usually appended thereto (*see* notes 169-71 *supra* and accompanying text) and by adding the New Jersey method of including the seller's performance (*see* note 176 *supra*), as well as eradicating the holder in due course problems by making the consumer's defenses applicable to the assignee (*see* notes 172-84 *supra* and accompanying text), this portion of the Kentucky proposal would read as follows:

> 4(a) The act, use or employment by any person of any deception, fraud, false pretense, false promise or misrepresentation or the concealment, suppression or omission of a material fact, in connection with the sale or advertisement of any merchandise or service or with the subsequent performance of such person aforesaid, is an unlawful practice.
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> 4(c) If any contract for sale of consumer goods or services on credit entered into between a retail seller and a retail buyer requires or involves the execution of a promissory note or instrument or other evidence of indebtedness, such note, instrument or evidence of indebtedness shall have printed on the face thereof the words "consumer paper" and such note, instrument or evidence of indebtedness with the words "consumer paper" printed thereon shall not be a negotiable instrument within the meaning of K.R.S. § 355.3 and the subdivisions thereof [Uniform Commercial Code-Commercial Paper]. [F.T.C.-S.S.L. 1970 § 9(a).]
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> 4(d). Notwithstanding the absence of such notice on a note, instrument or evidence of indebtedness arising out of a sale, an assignee of the rights of the seller is subject to all claims and defenses of the buyer against the seller arising out of the sale. Any agreement to the contrary shall be of no force or effect in limiting the rights of a consumer under this Section. Failure to imprint the words "consumer paper" on such note, instrument or evidence of indebtedness shall be deemed a deceptive practice within the meaning of subsection (a) of this Section. [*See* F.T.C.-S.S.L. 1970 § 9(b).]

tioning of other agencies of this Commonwealth with jurisdiction over matters covered by this Act.

(b) The Attorney General shall cooperate with any governmental agency of the Commonwealth which has statewide licensing jurisdiction over a subject matter covered by this Act to avoid duplication of investigation or remedial action.

The exemption for the media created by Section 4 (b) has become a somewhat standard clause in consumer protection legislation.[195] Although applicable constitutional principles would make harassment of the press nevertheless preventable,[196] this provision is a useful safeguard for avoiding the problem altogether. Its provisions, however, extend beyond practical or constitutional necessity. By the present wording, if the advertisement were on behalf of the medium itself, or written for someone by an agent of the medium,[197] or, perhaps, prepared on behalf of another business interest of the medium's owner, a showing of knowledge of the deception would apparently be required to overcome the exemption.[198] Furthermore, the knowledge requirement being a subjective standard, it not only eliminates any reason for the press to investigate advertisements which appear to be deceptive, but actually discourages any such endeavor which might confer the necessary knowledge.[199] While any duty extending beyond those messages the publisher should have known were deceptive might be an excessive burden,[200] the investigative costs can certainly be more easily borne by those who profit from the enterprise than by shifting it to the taxpayers as the state budget for consumer protection or to the consumer as the cost of successful frauds. Section 4(b) should, therefore, be rephrased so that any advertisement for the media, or prepared by its agents, or which

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[195] The consumer protection laws of at least fourteen states include such a clause. ARIZ. REV. STAT. ANN. § 44-1523 (Supp. May 1967); CONN. GEN. STAT. § 42-115 (f)(2) (Supp. 1967); HAWAII REV. STAT. § 480-2 (1968); ILL. ANN. STAT. ch. 121-1/2, § 262 (Smith-Hurd Supp. 1969); IOWA CODE § 713.24 (12) (1966); KAN. STAT. ANN. § 50-602 (Supp. 1968); MD. ANN. CODE art. 83, § 21 (Supp. 1969); MINN. STAT. ANN. § 325.79 (2) (1966); MO. ANN. STAT. § 407.020 (1) (Vernon Supp. 1969); N. J. STAT. ANN. § 56:8-2 (Supp. 1969); N. M. STAT. ANN. § 49-15-14 (Supp. 1969); TEX. REV. CIV. STAT. art. 5069, § 10.03(h) (Vernon Supp. 1969), *as amended*, ch. 452, Tex. Sess. Law Serv. (1969); VT. STAT. ANN. tit. 9, § 2452 (Supp. 1969); Colo. H. B. 1030 § 3(1) (c) (1969).

[196] *See e.g.*, Near v. Minnesota, 28s U.S. 697 (1931).

[197] While it could be plausibly argued that in writing the advertisement, the individual would acquire knowledge of the potential deception, the standard is subjective and therefore not necessarily satisfied.

[198] F.T.C.-S.S.L. REP. 3 (1970).

[199] *See* Travers, *supra* note 9, at 53.

[200] *Id.*; 54 IOWA L. REV., *supra* note 4, at 336.

should have been known to be deceptive, is not exempted from the coverage of the act.[201]

In contrast to the exception for the press, Section 5 is an astutely fashioned provision that neither the Attorney General nor any other state agency can nullify or duplicate the authority of the other, but that the Attorney General may assert his jurisdiction when a regulatory body fails to act.[202] This section also avoids the weakness permitted by some states of exempting anything in compliance with the regulations of the FTC, which is simply a backdoor method of delegating interpretation of the state law to the federal agency and courts and thereby making the Attorney General's staff part of the FTC enforcement mechanism.[203] Section 5, therefore, is quite exemplary.

Section 6. Investigation

(a) Whenever the Attorney General has reason to believe that a person has engaged in, or is engaging in, any practice declared by this Act to be unlawful, and when he believes it to be in the public interest, he may conduct an investigation to ascertain whether a

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[201] Borrowing from the FTC proposal to incorporate the additions hereinabove suggested, [F.T.C.-S.S.L. 1970 § 4(b)] the exclusion for the media would read as follows:

> 4(b). Section 4(a) of this act shall not apply—to the owner or publisher of newspapers, magazines or publications wherein such advertising appears, or to the owner or operator of a radio or television station which disseminates such advertisement—except when the owner, publisher or operator *or agent, employee, salesman or officer thereof has prepared the advertisement, or has or should have* knowledge that such advertisement may be in violation of Section 4(a) of this Act *or the owner, publisher or operator has a financial interest in the sale or distribution of the advertised merchandise or service.* (Additions emphasized.)

[202] In view of limitations on budget and staff, the Attorney General could hardly desire or be able to utilize this power except in cases of severe dereliction of duty by the agency, precisely the cases in which such power is needed. Otherwise, the Department of Law can be expected to rely on such agencies for cooperative assistance to ease its own workload. Many state statutes are simply silent on this subject, which may or may not enable the consumer counsel to intervene when necessary. On the other hand, some states flatly exempt certain state agencies. While inferring that those not mentioned are within the ambit of the law, such an approach grants to those named an immunity from being prodded to better protect the consumer. MO. ANN. STAT. § 407.020(2) (Vernon Supp. 1969) (Supt. Savings & Loan, Comm's Insurance and Finance); TEX REV. CIV. STAT. art. 5069, § 10.02(e) (Vernon Supp. 1969) (insurance). However, even that is better than flatly exempting anything subject to a state regulatory board on the excuse that the extent of duplication makes enumeration too cumbersome. Conceivably, this approach even exempts such agencies as "barber and beautician" type boards whose concern for protection relates to the trade rather than to the consumers. MASS. ANN. LAWS ch. 93A, 3(a) (Supp. 1968); N. M. STAT. ANN. § 6-13.1-4 (Supp. II, 1968); TEX. REV. CIV. STATS. art. 5069, § 10.02(a) (Vernon Supp. 1969).

[203] *See* notes 153-58 *supra* and accompanying text. *But see* Travers, *supra* note 9, at 54.

person in fact has engaged in, or is engaging in, any practice declared by this Act to be unlawful.

(b) To accomplish the purposes of Section 6a of the Act, the Attorney General shall first seek voluntary cooperation of persons. If the Attorney General has probable cause to believe that a violation has occurred, he may thereafter apply to a circuit court having jurisdiction or the Franklin County Circuit Court for permission to issue subpoenas duces tecum and/or ad testificatum to any person, and administer an oath or affirmation to any person, require any such person to file, on such forms as the Attorney General prescribes, a statement or a report in writing under oath or otherwise as to the facts and circumstances concerning the transaction or transactions in question, and such other data and information as he may deem necessary, or conduct hearings in aid of any investigation or inquiry. Such motion shall state in writing the grounds which the Attorney General believes constitute probable cause.

Upon refusal by any person to comply with a subpoena as set out in this Act, provide an oath or affirmation, or cooperate in hearings in aid of any investigation or inquiry, the Attorney General may apply to a circuit court in the Commonwealth of Kentucky for an order of contempt, and such circuit court shall issue an appropriate order if it finds that to do so is in the public interest.

(c) Whenever the Attorney General has probable cause to believe that information will not be obtainable pursuant to Section 6 (b) during the course of any investigation, he may apply to a circuit court ex parte for an order impounding any record, book, document, account, paper or sample of merchandise, material to such practice under investigation. Such motion shall state in writing the grounds which the Attorney General believes constitute probable cause.

The circuit court shall specify by order the length of time for copy or inspection.

Section 7.

Any book, record, paper, memorandum or other documentary information produced by any person pursuant to the Act, or any copy thereof, shall not, unless otherwise ordered by a court of this Commonwealth for good cause shown, be disclosed to any person other than the Attorney General or his authorized agent or representative or other governmental agency, unless the consent of the person producing the same is obtained, or such documentary in-

formation is filed as a matter of record in the circuit court having jurisdiction in the action.

Section 8.

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

Section 9. Service of the Subpoena

To the fullest extent permitted by the Constitution of the United States, service of a subpoena or demand pursuant to Section 6 of this Act may be had in the manner prescribed by the Kentucky Rules of Civil Procedure.

Section 10. Destruction or Falsification of Evidence

(a) Any person with actual notice that an investigation has begun or is about to begin pursuant to Section 6 of this Act who intentionally conceals, alters, destroys or falsifies documentary material is subject to a fine of not less than one hundred dollars nor more than five thousand dollars.

(b) Any person who in response to a subpoena or demand as provided in Section 6 of this Act who intentionally falsifies or withholds documents, records, or pertinent materials that are not privileged, is subject to a fine as provided in Section 10 (a) of this Act.

Allowing the Attorney General broad investigatory power is a necessary step in obtaining effective and meaningful consumer protection. If such power is not granted, either the businessman or the consumer or both can be harmed by the results, for the Attorney General then has only four options in protecting the consumer from the uncooperative suspect: (1) he can 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; or (4) he can appropriate the bulk of his budget to hiring investigators even though the money comes from the same people being defrauded by those under investigation, the public. The necessity of permitting power of investigation is, therefore, clear.

Understandably, the business community may be reluctant to support a proposal which is potentially a tool of harassment. However, the Kentucky proposal is drafted to eliminate such a possibility. First, Section 6 (b) requires the Attorney General to seek voluntary cooperation of the businessman before petitioning the court for a subpoena. This recognizes that the honest businessman is always prepared to cooperate with the investigation for the same reason he will give a refund for the wrong size shirt—he is in business for return business. Secondly, the provisions of Section 8 of the proposal protect the party being investigated from an unreasonable search[204] by permitting a court order relieving the movant therefrom. It has been held under a statute similar to this proposal that a subpoena duces tecum was an unreasonable search if it called for documents that are utterly irrelevant to any proper inquiry or if its futility to uncover anything legitimate is inevitable.[205] Therefore, these sections protect the businessman from pure harassment by the state while not unduly limiting the scope of the investigation.

However, other sections of the proposal are so strict in limiting the power of investigation that protection of the consumer is similarly limited. Section 6 permits the Attorney General to conduct an investigation if he believes someone *has engaged in, or is engaging in* a violation of the Act. This is sufficient as far as it goes, but the more realistic approach adopted by many states allows him to investigate if he believes that someone *is about to engage in* a violation of the Act,[206] thereby allowing the state to nip the scheme in the bud instead of having to wait until the consumer has been injured.

Similarly, only if the Attorney General can show *probable cause* would the proposal allow him, in the absence of voluntary cooperation, to apply to a circuit court for permission to issue a subpoena, administer an oath, require a statement, or conduct a hearing in aid of any investigation. This is more extensive investigatory power than that of many state laws which are limited to the production of documentary material relevant to the investigation, excluding oaths,

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[204] The provisions of several state statutes are similar:
DEL. CODE ANN. tit. 6, § 2517 (Supp. 1968); MO. ANN. STAT. § 407.040 (Vernon Supp. 1969); R. I. GEN. LAWS tit. 6, § 6-13.1-7g (Supp. II, 1968); WASH. REV. CODE § 19.86.110(4) (Supp. 1967).

[205] La Belle Creole International, S.A. v. Attorney General, 10 N.Y.2d 192, 176 N.E.2d 705, 219 N.Y.S.2d 1 (1961).

[206] ILL. ANN. STAT. ch. 121-1/2, § 263 (Smith-Hurd Supp. 1969); IOWA CODE § 173.24 (1966); KAN. STAT. ANN. § 50-604 (Supp. 1968); N. J. STAT. ANN. § 56:8-3, *as amended,* (Supp. 1969); N.D. CENT. CODE ANN. 51-15-04 (Supp. 1969).

statements, and hearings.[207] However, the requirements that the Attorney General have probable cause and that he apply to the court definitely make the Kentucky proposal weaker and more restrictive than many state laws which allow the Attorney General to issue an administrative subpoena without applying to the court.[208] An administrative subpoena may be issued on mere suspicion, while a court subpoena generally can issue only in a case or controversy or upon a showing of probable cause.[209] Thus, the alteration of this section to substitute administrative for judicial orders is necessary to allow a more realistic standard of proof for the undertaking of a civil investigation. Furthermore, the purpose of a hearing being to explore potential areas of concern, the requirement of a court order upon probable cause shown must be eliminated for this mechanism to have any utility at all. These alterations would create the wider scope of investigation needed to protect the consumers from flim-flam men, while the retention of Sections 6 (b) and 8 would still allow judicial intervention to thwart any harassing administrative tactics.

In fact, the provisions of Section 7 would keep the administrative investigation confidential, whereas the necessary court proceedings in the present proposal will entail public records which could result in damaging the reputation of an innocent firm. Section 7 states that information produced by a person pursuant to the Act cannot be disclosed to anyone other than representatives of governmental agencies except by court order for good cause shown or by consent of the person producing the information. Several states have non-disclosure clauses like the Kentucky proposal,[210] but others specifically state that any information obtained by the Attorney General pursuant to the Act cannot be used in any criminal prosecution.[211] The latter would seem to be the best idea for it avoids the possibility of using any fifth amendment self-incrimination arguments to quash the subpoena. How-

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[207] DEL. CODE ANN. tit. 6, § 2514 (Supp. 1968); MO. ANN. STAT. § 407.040 (Vernon Supp. 1969); R. I. GEN. LAWS tit. 6, § 6-13.1-7a (Supp. II, 1968); VT. STAT. ANN. tit. 9, § 2460(a) (Supp. 1968); WASH. REV. CODE § 19.86.110(1) (Supp. 1967).

[208] CONN. GEN. STAT. § 42-112 (Supp. 1967); ILL. ANN. STAT. ch. 121-1/2, § 264 (Smith-Hurd Supp. 1969); IOWA CODE § 713.24 (1966); KAN. STAT. ANN. § 50-605 (Supp. 1968); N.J. STAT. ANN. § 56:8-3, *as amended*, (Supp. 1969); N.Y. EXEC. LAW § 63(12) (McKinney Supp. 1969); N.D. CENT. CODE ANN. § 51-15-05 (Supp. 1969).

[209] Comment, 50 CAL. L. REV. 532, 533, (1962), *citing* United States v. Morton Salt Co., 338 U.S. 632 (1950).

[210] MO. ANN. STAT. § 407.060 (Vernon Supp. 1969); R.I. GEN. LAWS tit. 6, 6-13-1-7f (Supp. II, 1968); VT. STAT. ANN. tit 9, § 2460(a) (Supp. 1969); WASH. REV. CODE § 19.86.110(6) (Supp. 1967).

[211] IOWA CODE § 713.24 (1966).

ever, such a limitation should be drafted to insure that the Attorney General is not prevented from informing a local prosecutor of the existence of a violation of the penal laws and that the prosecutor is not prevented from using such evidence as he may obtain by his own investigation.

The weakest portion of the proposal's investigation section lies in the extent to which the sanction for refusal to comply with an order can be applied to a corporation whose business affairs are arranged so that it is technically "not doing business in the state." Section 9, obviously designed for this problem, provides that a subpoena issued pursuant to Section 6 of the Act shall be valid to the fullest extent permitted by the Constitution of the United States. This provision is defective in two major respects.

First, this section also provides that the subpoena shall be served in the manner prescribed by the Kentucky Rules of Civil Procedure, which means that the only valid manner of service within or *without* the Commonwealth will be personal service as provided for in Rule 45.03 of the Kentucky Rules.[212] It would seem that a more feasible solution would be to specify the permissible manner of service in the statute itself as has been done by most other states.[213] If the statute were so worded, it could permit service by registered mail to the last known place of business, residence, or abode within or without the state of the person for whom the subpoena was intended,[214] and would not be bound by the limitations of Rule 45.03.

The second, and much more serious, weakness is that the whole of Section 9 is defeated by the failure to provide a sanction other than civil contempt for refusal to comply with investigative orders. The language of Section 9 has utility in insuring that the state can effectively serve a subpoena upon the corporation "not doing business" in the Commonwealth. This would incorporate the rule of the

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212 "A subpoena may be served by an officer by whom a summons might be served. It may also be served by any person over eighteen years of age, and his affidavit indorsed thereon shall be proof of service or the witnesses may acknowledge service in writing on the subpoena. Service of the subpoena shall be made by delivering or offering to deliver a copy thereof to the person to whom it is directed." KY. R. CIV. P. 45.03.

213 DEL. CODE ANN. tit. 6, § 2519 (Supp. 1968); ILL. ANN. STAT. ch. 121-1/2, § 265 (Smith-Hurd Supp. 1969); IOWA CODE § 713.24(5) (1966); KAN. STAT. ANN. § 50-606 (Supp. 1968); MO. ANN. STAT. § 407.040 (Vernon Supp. 1969); N. J. STAT. ANN. § 56:8-5, *as amended,* (Supp. 1969); R. I. GEN. LAWS tit. 6, § 6.13.1-7d (Supp. II, 1968); WASH. REV. CODE § 19.86.110(4) (Supp. 1967).

214 DEL. CODE ANN. tit. 6, § 2519 (Supp. 1968); ILL. ANN. STAT. ch. 12-1/2, § 265 (Smith-Hurd Supp. 1969); IOWA CODE § 713.24(5) (1966); KAN. STAT. ANN. § 50-606 (Supp. 1968); N. J. STAT. ANN. § 56:8-5. *as amended,* (Supp. 1969): R.I. GEN. LAWS tit. 6, § 6-13.1-7d (Supp. II, 1968); WASH. REV. CODE § 19.86.110(4) (Supp. 1967).

leading case, *La Belle Creole International, S.A. v. Attorney-General,*[215] which held "that not even the minimum contacts and fair play test of *International Shoe Co. v. Washington,*[216] which must be met to support a personal judgment, are necessary for the service of a subpoena"[217] issued by an Attorney General pursuant to such a state statute. However, if the out-of-state corporation did not fall within the jurisdictional requirements of the "minimum contacts test," the court would not have jurisdiction to grant an order of contempt as a sanction for failing to respond to a subpoena because the monetary penalty of a contempt citation, being analogous to a personal judgment, requires the "minimum contacts" for its imposition against a foreign corporation.[218] Thus, unless additional sanctions which can be imposed upon the corporation not "doing business" are incorporated, Section 9 will be totally ineffective despite the cunning of its draftsmanship.

The more effective statutes that provide sanctions for refusal to comply with an investigative order permit the Attorney General to apply to the court for an order enjoining the sale or advertisement of any merchandise by the person in the state, or dissolving a domestic corporation or suspending the certificate of authority to do business in the state of a foreign corporation.[219] The "minimum contacts test" would be inapplicable to this sanction because it is inherent within a state's powers to refuse to permit a foreign corporation to do business within its borders.[220] Accordingly, if Section 9 is to have any utility, such a provision must be appended to the proposal.

A similar problem arises because the Kentucky proposal, as does no other consumer law in the nation, requires the Attorney General, as his first step in combating fraud, to seek voluntary cooperation of the suspect. This seems rather noble but self-defeating in that it would give a disreputable merchant ample time to destroy evidence. Of course, the Kentucky proposal, like several other state statutes, allows the Attorney General to obtain an order from the court impounding records, books, documents or other materials to prevent the destruction of evidence.[221] The requirement of first seeking co-

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[215] 10 N.Y.2d 192, 176 N.E.2d 705, 219 N.Y.S.2d 1 (1961).
[216] 326 U.S. 310 (1945).
[217] 50 CAL. L. REV., *supra* note 209, at 534.
[218] *Id.* at 534-35.
[219] DEL. CODE ANN. tit. 6, § 2520 (Supp. 1968); ILL. ANN. STAT. ch. 121-1/2, § 266 (Smith-Hurd Supp. 1969); IOWA CODE § 713.24(6) (1966); KAN. STAT. ANN. § 50-607 (Supp. 1968); N.J. STAT. ANN. § 56:8-6, *as amended,* (Supp. 1969); N.D. CENT. CODE ANN. § 51-15-06 (Supp. 1969).
[220] 50 CAL. L. REV., *supra* note 209, at 534 and cases cited therein.
[221] DEL. CODE ANN. tit. 6, § 2518 (Supp. 1968); ILL. ANN. STAT. ch. 121-1/2, § 263 (Smith-Hurd Supp. 1969); KAN. STAT. ANN. § 50-604 (Supp. 1968); N.J. STAT. ANN. § 56:8-3, *as amended,* (Supp. 1969); N.D. CENT. CODE ANN. § 51-15-04 (Supp. 1969).

operation, however, would still provide the requisite time if the penalty is not a sufficient deterrent. Section 10 does fine anyone having actual notice of the investigation who destroys pertinent evidence. Although this provision would seem to be an effective sanction, and has been adopted by several states,[222] it faces the same jurisdictional test as the monetary contempt judgment.[223] Thus, the power to seek disfranchisement of a foreign corporation should be applicable to destruction and concealment of evidence as well as to the complete refusal to comply.

In sum, then, while the proposal recognizes the necessity of investigative powers to the effective protection of the consuming public, it fails to provide the scope of investigation required for the task. Both permission to investigate potential as well as past deceptive practices and the adoption of administrative rather than judicial investigative orders are necessary amendments. Also worthy of adoption is a prohibition on the admission of evidence gained therefrom into a criminal proceeding without impairing the Attorney General's duty to inform a prosecutor of any criminal acts coming to his attention. And most importantly, the addition of injunction and business ouster for refusal to comply with investigative demands and for destruction and concealment of evidence is absolutely essential to make these investigatory powers effectively applicable to the worst of the "blue suede boys," those corporations willfully engaging in deceptive practices via the guise of independent contractors. While all these alterations would be beneficial to the consumer, none would be detrimental to the honest businessman due to those provisions wisely incorporated into the original proposal keeping all investigations within the judicial standards of reasonableness.[224]

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[222] Mo. ANN. STAT. § 407.080 (Vernon Supp. 1969); R.I. GEN. LAWS tit. 6, § 6-13.1-7h (Supp. II, 1968); VT. STAT. ANN. tit. 9, § 2460(b) (Supp. 1969); WASH. REV. CODE § 19.86.110(8) (Supp. 1967).

[223] *See* note 218 *supra*, and accompanying text.

[224] The investigatory sections of the Kentucky proposal, §§ 6-10, could be improved by modifying them to incorporate §§ 11(a), 12-14 of the model Consumer Protection Act. COUNCIL OF STATE GOVERNMENT, SUGGESTED STATE LEGISLATION 1970, at 141. Section 8 can remain the same. However, for §§ 6(a)-(b) of the Kentucky proposal there should be substituted § 11(a) and the first four lines of § 12 of the model proposal. COUNCIL OF STATE GOVERNMENTS, *supra* at 150-15. § 6(c) of the Kentucky proposal should be revised to reflect that the probable cause requirement applies to issuance by the court, not application by the state. Furthermore, §§ 7, 9-10 of the Kentucky proposal should be modified as hereafter shown.

Section 6.

(a). When it appears to the Attorney General that a person has engaged in, is engaging in, or is about to engage in any act or practice declared to be unlawful by this Act, or when he believes it to be in the public interest that an investigation should be made to ascertain whether

(Continued on next page)

Section 11. Affidavits of Discontinuance

At any time prior to the institution of a suit against a person for violation of Section 4 of this Act, the Attorney General may accept an Affidavit of Discontinuance from any person who is alleged to have engaged in an activity declared by this Act to be unlawful, providing for the immediate discontinuance of all prac-

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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. [*Id.*, at 150.]

(b). To accomplish the objectives and to carry out the duties prescribed by this Act, the Attorney General, in addition to the other powers conferred upon him by this Act, may issue subpoenas to any person, administer an oath or affirmation to any person, and conduct hearings in aid of any investigation or inquiry. [Compare *id.*, at 151.]

(c). *Upon showing* of probable cause to believe that information will not be obtainable pursuant to Section 6(*a*) *or Section 6(c)* during the course of any investigation, a circuit court *may grant an application ex parte by the Attorney General* for an order impounding any record, book, document, account, paper or sample of merchandise, material to such practice under investigation. Such a motion shall state in writing the grounds which the Attorney General believes constitute probable cause.

The Circuit Court shall specify by order the length of time for copy or inspection. (Alterations emphasized.)

Section 7.

Any book, record, paper, memorandum or other documentary information produced by any person pursuant to this Act, or any copy thereof, shall not, unless otherwise ordered by a court of this Commonwealth for good cause shown, be disclosed to any person other than the Attorney General or his authorized agent or representative or other governmental agency, unless the consent of the person producing the same is obtained, or such documentary information is filed as a matter of record in the Circuit Court having jurisdiction in the action. *No information obtained pursuant to this Act shall be used in a criminal prosecution, provided that this shall not be construed to prevent the Attorney General or his agent from informing any Commonwealth or County Attorney of the existence of a crime nor to prevent said Commonwealth or County Attorney from using the same or similar matters if otherwise obtained.* (Alterations emphasized.)

Section 9. Service of Subpoena

Service of subpoena or demand pursuant to Section 6 of this Act may be had to the fullest extent permitted by the Constitution of the United States.

Service of any notice, demand or subpoena under this Act shall be made personally within this State, but if such cannot be obtained, substituted service therefore may be made in the following manner:

(1) Personal service thereof without this State; or

(Continued on next page)

tices set forth in the Affidavit, and for such other action deemed necessary to correct the results of such practices. No proceeding shall be instituted thereafter by the Attorney General on the specific activities covered by such Affidavit, unless the provisions contained in the Affidavit appear to have been violated.

In specifically authorizing the use of affidavits of discontinuance, the proposal insures that the Attorney General will have this extremely useful method of protecting the consumer through the voluntary compliance of the seller.[225] The exigencies of time, money and personnel will require the disposition of the majority of the cases by informal agreement if the Act is to have a pervasive effect.[226] At the

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(2) The mailing thereof by registered or certified mail to the last known place of business, residence or abode within or without this State of such person for whom the same is intended; or

(3) As to any person other than a natural person, in the manner provided in the Kentucky Rules of Civil Procedure as if a complaint had been filed; or

(4) Such service as a circuit court may direct in lieu of personal service. [Compare *id.*, at 151.]

Section 10.

If any person fails or refuses to file any statement or report, or obey any subpoena or investigative demand issued by the Attorney General, or with actual notice that an investigation has begun or is about to begin pursuant to Section 6 of this Act intentionally conceals, alters, destroys, falsifies or withholds documentary material, the Attorney General may, after notice, apply to a circuit court and, after hearing thereon, request an order:

(1) Granting injunctive relief to restrain the person from engaging in the advertising or sale of any merchandise or the conduct of any trade or commerce that is involved in the alleged or suspected violation;

(2) Vacating, annulling, or suspending the corporate charter of a corporation created by or under the laws of this State or revoking or suspending the certificate of authority to do business in this State of a foreign corporation or 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; and

(3) Granting such other relief as may be required, until the person files the statement or report, or obeys the subpoena or investigative demand. Any disobedience of any final order entered under this Section by any court shall be punished as a contempt thereof. [Compare *id.*, at 151-52.]

[225] The proposed affidavit of discontinuance is another appellation for cease and desist agreements, assurance of discontinuance, etc. With a variety of names, at least thirteen states have included this tool in their consumer protection laws. Others may have such power by another statute or even without one. ARIZ. REV. STAT. ANN. § 44-1530 (Supp. May 1967); CONN. GEN. STAT. § 42-112 (Supp. 1967); DEL. CODE ANN. tit. 6, § 2521 (Supp. 1968); HAWAII REV. STAT. § 480-22 (1968); KAN. STAT. ANN. § 50-610 (Supp. 1968); MASS. ANN. LAWS ch. 93A, § 5 (Supp. 1968); MO. ANN. STAT. § 407.030 (Vernon Supp. 1969); N. Y. EXEC. LAW § 63 § McKinney Supp. 1969); R. I. GEN. LAWS § 6-13.1-6 (Supp. II, 1968); TEX. REV. CIV. STAT. art. 5069, § 10.05, *as amended*, ch. 452, Tex. Sess. Law Serv. (1969); VT. STAT. ANN. tit. 9, § 2459 (Supp. 1969); WASH. REV. CODE § 19.86.100 (Supp. 1967); Colo. H.B. 1030 § 7 (2) (1969).

[226] *See* Mindell, *supra* note 57.

same time, the persuasive presence of the state in the mediation process is further enhanced by the authority to make the agreement binding and enforceable by the state. Furthermore, the relative lack of expense and publicity are inducements to the businessman to act cooperatively.[227] While negotiation is an expedient and useful tool, if it is to be an adequate enforcement mechanism the agency must be able to act fairly in attempts to resolve every issue relevant to the public while it is negotiating the consent agreement.[228] Thus, it should be able to decide whether the relative clarity of the violation necessitates that the violator be required to admit it.[229] It should also be empowered to negotiate whether to require reimbursement of both defrauded consumers for their damages and the agency for its investigative expenses.[230] By skillfully affording this flexibility rather than making such alternatives either mandatory or prohibited, the language of Section 11 clearly shows superiority in both policy determination and draftsmanship.

Section 12.

(a) The Attorney General may enforce the provisions of Section 4 of this Act by civil action for injunctive relief in a circuit court of this Commonwealth. In such action to obtain said injunction, it shall be sufficient to allege and prove that a violation of this Act has occurred, and it shall not be necessary to allege or prove that any person has been misled or deceived thereby, or that any person

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227 Rice, *supra* note 15, at 589. Many corresponding clauses of other state statutes provide that the agreement "shall not be considered a violation for any purpose." *See e.g.*, MO. ANN. STAT. § 407.030 (Vernon Supp. 1969); R.I. GEN. LAWS § 6-13.1-6 (Supp. II, 1968); TEX. REV. CIV. STAT. art. 5069, § 10.05 (Vernon Supp. 1969); VT. STAT. ANN. tit. 9, § 2459 (Supp. 1969). This provides a further inducement to the businessman to settle since statements made at trial and possibly the judgment "could be used by a subsequent private plaintiff under the admissions exception to the hearsay rule." Travers, *supra* note 9, at 57, *citing generally* 4 J. WIGMORE, EVIDENCE § 1048059 (3rd. ed. 1940). However, such a rule also operates to prevent any utility of the state action in obtaining redress for a consumer defrauded by a planned deception unless the assurance can require it or the state litigates the whole matter. On the other hand, a rule that such an agreement must be prima facie evidence of a violation would frustrate mediation of the borderline case and force it to be litigated or dropped. The better rule is to allow this question to be negotiated as with other issues when the affidavit is being drafted. Rice, *supra* note 15, at 591-92. The provision in Section II of the Kentucky proposal permitting the affidavit to cover "other such action deemed necessary to correct the results of such practices" does this.

228 Spanogle, *supra* note 15, at 632-34.

229 *Id.* See note 228 *supra.*

230 Spanogle, *supra* note 15, at 632-34. The Massachusetts statute makes the conditioning of taking an agreement upon making redress to consumers permissible. MASS. ANN. LAWS ch. 93A, § 5 (Supp. 1968). The new Colorado enactment has this provision along with the apparently unique addition that the state can excise payment of its costs in the mediated assurance. Colo. H.B. 1030 § 7(2) (1969).

has been damaged or has sustained loss as a result of any violation of this Act.

(b) Such an action may be brought in any county of this Commonwealth where the alleged unlawful practice has been partially or completely performed or in that county in which the defendant has his principal place of business in this Commonwealth.

. . . .

Section 15.

If a circuit court after appropriate notice and hearing shall make a finding that a person has violated the provisions of any injunction or order issued pursuant to this Act, the circuit court may assess such civil contempt penalty as it deems appropriate.

Undoubtedly, this proposal is correct in requiring that before instituting court action, the enforcing agent must seek the voluntary compliance of one allegedly employing a deceptive practice. Similarly, the focusing of the Act on merely enjoining the offending businessman rather than convicting him of a crime as present law requires is a marked improvement for the protection of both consumers and business. Furthermore, coupling the injunctive relief with the elimination of the common law elements of intent, reliance and damage is highly laudable. This will allow the state not only to reach more fraudulent practices, but also to stop them without a protracted trial during which the harm can continue.

Nevertheless, the greatest weakness of this proposal lies in the paucity of sanctions provided in the above captioned sections. Admittedly, the elimination of common law and criminal elements requires that the penalty for an unknowing violation should be only an injunction. However, the present construction of the Act provides that even if a party has willfully violated the Act or has violated his affidavit of discontinuance, the only available remedy is injunctive. It is only when an injunction has been violated that a civil penalty may be levied, and then only through the mechanism of a second proceeding on contempt charges. Manifestly, the "thrust of this remedy is to inhibit retailers whose business location is permanent and . . ." who are therefore those most likely to voluntarily comply anyway. ". . .[It] scarcely deters the fly-by-night operator."[231]

If he is later ordered to stop, or even ordered to redress violations,[232] he has lost nothing more than his illgotten gains. Where

[231] 47 TEX. L. REV., *supra* note 179, at 469.

[232] He could be ordered to redress for violations under Section 14 of the Kentucky proposal.

> he has nothing to lose by violating the statute, he is less likely to be careful in observing the consumers' rights. Any system which depends upon stopping a course of prohibited conduct after it occurs is not effective at halting the first violations.[233]

An effective deterrent which should be included in the Act is a substantial civil penalty.[234] It is particularly appropriate for this type legislation since it is less stringent in standards of proof than criminal penalties,[235] notably in avoiding the element of intent.[236] Another possible penalty is business ouster, the dissolution of a domestic corporation, and the disfranchisement of a foreign corporation.[237] There is presently a Kentucky statute which empowers the Attorney General to seek ouster in the event a corporation abuses or misuses its corporate power, or otherwise "becomes detrimental to the interest and welfare of the state or its citizens."[238] The court could also impose ouster as "additional appropriate relief" pursuant to Section 14 of the proposed Act.[239] However, it does not follow that the court would undoubtedly agree that frequent or flagrant violation of the consumer protection act should invoke this penalty. Certainly the obvious severity of ouster requires that it be constrained to the role of "a remedy of last resort."[240] However, to insure that, if necessary to the effective protection of the public, this penalty will be available for the enforcement of the proposed Act, it should be specified in the Act. Therefore, to provide the deterrent effect necessary for adequate consumer protection while being careful to levy severe penalties only for acts of corresponding severity, a civil penalty should lie for a willful violation of the Act or any violation of an affidavit or injunction, while business ouster should be available only for substantial and willful violations of the Act, an affidavit or court order, or for persistently fraudulent business conduct.[241]

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233 Spanogle, *supra* note 15, at 633. *See generally* Rice, *supra* note 15, at 584-610.

234 *See* ARIZ. REV. STAT. ANN. § 44-1532 (Supp. May 1967); N. J. STAT. ANN. § 56:8-13 (Supp. 1969); R.I. GEN. LAWS § 6-13.1-8 (Supp. II, 1968).

235 Rice, *supra* note 15, at 594.

236 *Id.*

237 *See e.g.*, DEL. CODE ANN. tit. 6, § 2524 (Supp. 1968); ILL. ANN. STAT. ch. 121-1/2, §§ 267-68 (Smith-Hurd Supp. 1969); N. Y. BUS. CORP. L(ffi §§ 1101, 1303 (McKinney 1967).

238 KRS § 271.590 (1946).

239 *See* discussion of Section 14, Kentucky Business and Consumer Protection Act, *infra.*

240 Rice, *supra* note 15, at 594.

241 Borrowing from the New York statute [N.Y. BUS. CORP. LAW §§ 1101, 1303 (McKinney 1967)], and the FTC proposed model, [COUNCIL OF STATE GOVERNMENTS, *supra* note 225, at 151-52], the suggestions hereinabove discussed could be incorporated so that there would be added to Section 15 of the Kentucky proposal the following sections:

(Continued on next page)

Section 14. Additional Appropriate Relief

In addition to the aforementioned injunctive relief, in actions filed pursuant to this Act, the circuit court may grant such other relief as it deems necessary, including the award of court costs as well as damages to any persons who may have been injured by means of any practice declared to be unlawful by this Act.

The above noted section is satisfactory in that it permits the court, as part of the judgment in a state initiated action, to award damages to anyone who has been injured by any violations of the Act being litigated therein. Its significance lies in the fact that the costs of individual suits are often greater than the judgments being sought.[242]

In addition to the role of consumer counsel, this could be construed to allow the Attorney General to be appointed by the court as a receiver, in cases of flagrant violations of the Act, empowering him to sue for, collect, receive and take into his possession all the property derived by any practice declared illegal by the Act, and to sell, convey, and assign the same and hold and dispose of the proceeds thereof under the direction of the court for any person who

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15(b) Any person who violates the terms of an injunction or affidavit of discontinuance issued under Section 11 or 12 of this chapter shall forfeit and pay to the Commonwealth a civil penalty of not more than twenty-five thousand dollars ($25,000.00) per violation. For the purposes of this section, the Circuit Court issuing an injunction shall retain jurisdiction, and the cause shall be continued, and in such cases the Attorney General acting in the name of the Commonwealth may petition for recovery of civil penalties. [*Compare* COUNCIL OF STATE GOVERNMENTS, *supra,* at 152.]

15(c) In any action brought under Section 12 of this chapter, if the court finds that a person is willfully using or has willfully used a method, act or practice declared unlawful by Section 4(a) of this chapter, the Attorney General, upon petition to the Circuit Court, may recover on behalf of the Commonwealth, a civil penalty of not exceeding two thousand dollars ($2,000.00) per violation. [*Compare id.*]

15(d) If any person persistently engages in a course of conduct declared by Section 4(a) of this chapter to be unlawful, or is willfully using or has willfully used an act or practice which is in substantial violation of Section 4(a) of this chapter, the Attorney General may apply to the Circuit Court and, after hearing thereon, request an order vacating, annulling or suspending the corporate charter of a corporation created by or under the laws of this Commonwealth or revoking or suspending the certificate of authority to do business in this Commonwealth of a foreign corporation or revoking or suspending any other licenses, permits or certificates issued pursuant to law to such person which are being or have been used to further the unlawful act or practice. [*See id.* at 151-52; N.Y. BUS. CORP. LAW §§ 1101, 1303 (McKinney 1967).]

15(e) For the purposes of this section, a willful violation of Section 4(e) of this chapter occurs when the party committing the violation knew or should have known that this conduct was a violation of Section 4(a). [*Compare* COUNCIL OF STATE GOVERNMENT, *supra,* at 152.]

[242] *See* note 127 *supra,* and the accompanying text.

had been damaged as a result of the illegal practice and for general creditors.[243] However, it is doubtful that the Act would be so construed unless it expressly granted such power to the Attorney General, which it should do. This section also permits the court to award court costs to the Attorney General which will aid the consumer by preventing the Attorney General from having to finance the court costs out of his own budget, thereby enabling him to enforce the Act more frequently and effectively.

Despite the considerable merit of this section as it stands, it seems that the Act would be improved by allowing its enforcement by private individuals and by awarding court costs and attorneys' fees to such individuals. First, while it can be reasonably assumed that the Attorney General will be less likely to become a "captured regulator" than an administrative agency,[244] such an eventuality is not impossible.

> Even where the industry does not dominate the agency, there are necessary benefits from effective private enforcement. First, it allows the consumer to act on his own initiative, either to deter or seek cessation of violations and redress. He does not have to obtain the prior approval or cooperation of the agency, rely upon the quality of its staff, or overcome its inertia, red tape and conservatism. Secondly, it manifoldly increases the potential enforcement powers. Few agencies have sufficient funds or manpower to maintain adequate surveillance or to bring action against most violations discovered. Effective private enforcement would create thousands of additional investigators and the local bar would provide many additional prosecutors. Thirdly, it is more certain to provide appropriate redress to the individual. . . .[245]

Therefore, with the provisions of state action for receivership and individual action for damages and costs, this provision would be markedly improved.[246]

Section 13.

Whenever it appears that the public interest will be served by doing so, the Attorney General may authorize a Commonwealth Attorney or a County Attorney to institute an investigation or an action pursuant to the provisions of this Act.

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[243] The Attorney General has been given the power of receivership by the following state statutes: ILL. ANN. STAT. ch. 121-1/2, § 268 (Smith-Hurd Supp. 1969); IOWA CODE § 713.24(8) (1966); KAN. STAT. ANN. § 50-609 (Supp. 1968); N.J. STAT. ANN. § 56:8-9, as amended, (Supp. 1969).

[244] *See* notes 54-62 *supra* and accompanying text.

[245] Spanogle, *supra* note 15, at 627-28.

[246] Section 14 of the Kentucky proposal would be improved by substituting for it §§ 6-8 of the model Consumer Protection Act. COUNCIL OF STATE GOVERNMENTS, *supra* note 225, at 148-49.

Section 16.

To carry out the purposes of this Act, there is appropriated to the Department of Law out of the General Fund in the State Treasury the sum of $100,000 for the 1970 fiscal year and $100,000 for the 1971 fiscal year.

To adequately resolve what will probably be the major problem immediately following enactment of the principal proposal, budget and staff, it includes a farsighted provision for assistance by local prosecutors as well as reasonable budget. The involvement of local prosecutorial personnel is not a totally innovative feature, but this Act's well reasoned provision avoids the weaknesses of some corresponding state legislation. It does not disrupt the statewide coordination of enforcement which the honest businessman deserves by giving coordinate authority to local officials.[247] Neither does it fail to make full use of such assistance by limiting their role to reporting violations.[248] Rather, it provides for coordinated enforcement of all levels of government by utilizing both the observations and legal talents of Commonwealth and County Attorneys.[249]

Even with these many assistants at the local level, administration of this law will require expansion of the Attorney General's Consumer Protection Division. Not only will the prosecutors have very little time to devote to this area in view of their criminal prosecutorial duties, but also the present staff of one lawyer and his secretary is hardly adequate even without a law. The budgetary request of $100,000 annually is comparable to the sums allocated to the bureaus in neighboring states[250] and should be adequate to finance the effective protection of the consumer. While it may sound like a somewhat high figure at first blush, two factors should be considered. First, the expansion of the Attorney General's division is even less costly than the creation of a new agency. Secondly, since the taxpaying and consuming public is identical, this is one instance in which the man who pays the governmental piper not only calls the tune but also reaps the

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[247] KAN. STAT. ANN. § 50-614 (Supp. 1968); PENN. STAT. tit. 73, § 201-4 (Purdon Supp. V, 1968). *See* Travers, *supra* note 9, at 55-56; 54 IOWA L. REV., *supra* note 4, at 343 n.158.

[248] MASS. ANN. LAWS ch. 93A, § 4 (Supp. 1968); VT. STAT. ANN. tit. 9, § 2462 (Supp. 1969).

[249] HAWAII REV. STAT. § 480-2(a), (b) (1968); N.M. STAT. ANN. § 49-15-12 (Supp. 1969).

[250] The budgets two and three years ago of neighboring or otherwise comparable states included: Illinois, $250,000; Maryland, $70,000; Missouri, $100,500; Pennsylvania, $480,000; Washington, $137,688. Douglas, *supra* note 58, at 11-13, 16-18. In view of the age of these figures, they probably represent, at best, approximately two-thirds of the current budgets, respectively.

benefits. For the entire activity of such an agency enforcing this type law is to save the money the Kentucky consumer is currently losing to deceptive business practices so it can be channelled to reputable Kentucky businessmen.

CONCLUSION

The Business and Consumer Protection Act is a well reasoned legislative proposal addressed to one of the most significant problems of our time. In attempting to aid in the restoration of fair play in the marketplace by bolstering the consumer's ability to fulfill his theoretical role, the bill seeks to thwart the frauds which fleece the Kentucky consumer, and thereby the honest Kentucky businessman, of millions each year. In view of both the dismal lack of statutory or common law remedies available in Kentucky today and the legal and practical limits on federal assistance, no other proposal could rank higher on the General Assembly's agenda. While the protective shield the bill hopes to provide the consumer could be strengthened at various points, we are fully cognizant of the necessity of compromise to attain this much progress. In this instance, even the idealist can hardly fault the philosophy that "half a loaf is better than none." Particularly since the present plight of the Kentucky consumer can be characterized in comparable rhetoric by Marie Antoinnette's infamous epigram.

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