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# APPLICATION OF THE DISTRICT OF COLUMBIA CONSUMER PROTECTION PROCEDURES ACT OF 1976 TO RESIDENTIAL REAL ESTATE TRANSACTIONS: A CRITICAL LOOK AT *OWENS V. CURTIS*

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The Council of the District of Columbia enacted the District of Columbia Consumer Protection Procedures Act of 1976 (Act)[1] to accomplish the broad purposes of eliminating deceptive business practices and promoting fair practices throughout the community.[2] The Act established the Office of Consumer Protection (OCP),[3] a "mini-FTC," to investigate and adjudicate consumer complaints about unfair or deceptive trade practices,[4] and

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1. D.C. CODE ANN. § 28-3901 (1981).

2. D.C. CODE ANN. § 28-3901(b) (1981).

3. On March 31, 1983, the District of Columbia Office of Consumer Protection was dissolved and its functions transferred to the new District of Columbia Department of Consumer and Regulatory affairs (DCRA). *See* Mayor's Reorganization Order No. 1, 30 D.C. Reg. 374 (Jan. 21, 1983). DCRA has the responsibility for licensing numerous businesses in the District, including those in the real estate industry, and monitoring their compliance with District of Columbia regulations and statutes. Although the exact configuration of DCRA's consumer protection function has not been permanently structured at this time, the compliance and enforcement branches will police a merchant's conduct under the Act.

4. D.C. CODE ANN. § 28-3901(b) (1981). When a consumer files a complaint with OCP, any pending trial court action must cease until OCP has acted on the complaint. D.C. CODE ANN. § 28-3905(k)(4) (1981). OCP cannot award damages for personal injury of a tortious nature. D.C. CODE ANN. § 28-3903(c)(1) (1981). In all other circumstances, OCP may provide a remedy for the consumer's injury and also penalize a merchant for violations. OCP may fine a merchant $1,000 for each unlawful trade practice. D.C. CODE ANN. § 28-

created a supplementary private right of action.[5] The broad sweep of the Act's provisions gives OCP wide authority to investigate and eradicate unlawful trade practices. The OCP can prohibit or otherwise remedy trade practices contravening any of the provisions of the Act or violating any other statute, regulation, rule of common law, or other law of the District of Columbia.[6]

OCP used the Act's broad coverage to promote fair business practices in every category of consumer transaction until the District of Columbia Court of Appeals unexpectedly held in *Owens v. Curtis*[7] that the sale of residential real estate is not a consumer transaction within the scope of the Act. In *Owens*, a purchaser of a single family residence sued the prior owner under section 5 of the Act alleging that during negotiations she had misrepresented the condition of the basement of the house.[8] The court held that the Act did not apply to real estate transactions.[9] Without expla-

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3905(g)(4) (1981). The merchant may also be assessed OCP's investigation and litigation costs. D.C. CODE ANN. § 28-3905(i)(3) (1981).

Thus, the Council intended to empower OCP with broad jurisdiction and powerful enforcement tools forming in essence a "mini-FTC" to attain the Act's goals. *See* Council of the District of Columbia, Committee on Public Services and Consumer Affairs, Report on Bill 1-253, at 2 (Mar. 24, 1976) [hereinafter cited as Committee Report]; *see also* J. Rogers, Mayor's Comments on Bill 1-187, at 1 (Nov. 18, 1975) [hereinafter cited as Mayor's Comments]; M. Freeman, Memorandum to Council Chairman on Bill 1-187, at 6 (Dec. 4, 1975) [hereinafter cited as Memorandum to Council Chairman]. Bill 1-253 was initially introduced as Bill 1-187. Hearings were held on Bill 1-187. Bill 1-187 was vetoed by Mayor Washington because it required that the Director's position be filled by a District resident. Bill 1-253 deleted this requirement and was passed by the Council and approved by the Mayor without any additional hearings. *See* Committee Report at 1.

5. Additionally, the Act also creates an effective private right of action for consumers. D.C. CODE ANN. § 28-3905(k)(1) (1981). If the consumer is injured by a merchant's violation of District of Columbia law, he may sue for treble damages, injunctive relief, punitive damages, or any other appropriate relief, and reasonable attorneys fees. *See* Note, *D.C. Consumer Protection Procedures Act*, 27 CATH. U.L. REV. 642 (1978).

6. D.C. CODE ANN. § 28-3905(b)(2) (1981); *see also* D.C. CODE ANN. § 28-3903(a)(13) (1981). A trade practice is any economic act between a merchant and a consumer involving consumer goods or services. D.C. CODE ANN. § 28-3901(a)(6) (1981); *see* Committee Report, *supra* note 4, at 14. A merchant is defined as the direct or indirect supplier of the goods and services. D.C. CODE ANN. § 28-3901(a)(3) (1981); *see* Committee Report, *supra* note 4, at 13. The Act gives consumer goods and services an all-inclusive definition. Goods and services are broadly defined as any and all parts of the economic output of society including credit, franchises, business opportunities and services of all types. D.C. CODE ANN. § 28-3901(a)(7) (1981). When used as an adjective, "consumer" describes "anything, without exception" that is primarily for personal, household, or family use. D.C. CODE ANN. § 28-3901(a)(2) (1981).

7. 432 A.2d 737 (D.C. 1981).

8. *Id.* at 738.

9. *Id.* at 739. The court also barred recovery on an alternative theory of common law fraud because appellant had failed to prove reliance on the misrepresentations.

nation, the court simply concluded that the Act did not apply to sales of real estate because the adjective "consumer" does not include within its scope the purchase of real property used primarily for personal or family use. Unless narrowly construed, the *Owens* decision will remove the sale of residential property from the Act's purview, thereby depriving the consumer of the Act's protection in transactions involving the consumer's single largest purchase.

*Owens* should be read narrowly because the court's decision rests on an incomplete record that does not include information which is essential to an accurate interpretation of the actual intended breadth of the Act, i.e., the interrelationship of statutory language, the Act's legislative history and context, OCP's interpretation of the Act and considerations of public policy.[10] *Owens* should be narrowly limited to its facts by courts confronted with the issue of the Act's application to residential real estate sales, cooperative and condominium sales, home improvement contracts and mortgage credit. The facts in *Owens* did not raise the issue of the Act's application to these residential real estate transactions, but only the limited question of whether the Act applies to the one-time sale of residential real estate by one individual to another. *Owens* should be viewed as simply standing for the proposition that the Act does not apply to any nonmerchant transactions. *Owens* should not be extended to exclude sales of residential real estate, apartment sales, home improvement sales or mortgage credit when the goods or services are offered to the consumer by a merchant.

Although ignored by the court in *Owens*, an authoritative body of case law in the District of Columbia alters the traditional notion that a meaningful distinction exists between real and personal property. This customary distinction between real and personal property would prevent consumers involved in real estate sales from receiving the benefit of protections available under the laws governing other consumer contracts. In *Javins v. First National Realty Corp.*,[11] the United States Court of Appeals for the District of Columbia Circuit abrogated the rigid doctrines of traditional real property law, holding that under modern contract law a warranty of habitability is implied in all leases of urban dwellings. The District of Columbia Court of Appeals, building upon this holding, applied the law of products liability to the sale of a new cooperative apart-

10. The Court acknowledged that neither it nor the parties were able to locate materials which illuminated the intent of the Council of the District of Columbia. *Id.* at 738 n.1.

11. 428 F.2d 1071 (D.C. Cir. 1970).

ment in *Berman v. Watergate West, Inc.*[12] The *Berman* court found no meaningful difference between the mass production and sale of homes and the mass production and sale of other consumer merchandise.[13]

Recognizing the definitional language of the Act and interpreting this language under the trend established by *Javins* and *Berman*, the United States District Court for the District of Columbia has permitted consumers to seek protection under the Act in transactions involving residential real property. In *Kearney v. Met Realty, Inc.*, the court permitted a homeowner to amend her complaint to allege that the mortgage holder's enforcement of an undisclosed, balloon payment provision in a deferred purchase money mortgage was an unconscionable trade practice prohibited by the Act.[14] The court in *Greene v. Gibraltar Mortgage Investment Corp.*, awarded the homeowner attorney's fees under the Act when she successfully set aside a second mortgage which had been fraudulently denominated as a "business" loan.[15] Neither court questioned the modern judicial view applying consumer protection laws to real estate transactions.

In 1981, another panel of the District of Columbia Court of Appeals, in *Howard v. Riggs National Bank*, examined the Act's language and legislative history and, contemporaneously with the *Owens* court, interpreted the Act's unlawful trade practices section to apply only to merchants.[16] In *Howard*, appellant brought suit in the superior court, charging Riggs National Bank with violating the Consumer Act because the bank had made misrepresentations regarding a building contractor's reputation.[17] Since the bank did not meet the definition of merchant, in these circumstances

12. 391 A.2d 1351 (D.C. 1978). The *Berman* court repeatedly referred to Ms. Berman as a consumer.

13. *Id.* at 1359.

14. Civ. A. No. 80-1349, slip op. at 3 (D.D.C. Mar. 5, 1981).

15. 529 F. Supp. 186 (D.D.C. 1981), *aff'd*, No. 81-1391, slip op. (D.C. Cir. Jan. 19, 1982); *see also* Greene v. Gibraltar Mortgage Inv. Corp., 488 F. Supp. 177 (D.D.C. 1980). In 1981, the Virginia legislature attacked the fraudulent "business purpose" loan practice head-on by tightening its usury statute to eliminate the binding effect given to handwritten business certificates, VA. CODE § 6.1-330.44 (Supp. 1982), and clarified the consumer protection statute's application to deceptive practices involving mortgage credit. VA. CODE § 59.1-200(P) (1981); *see also* Shook v. Republic Nat'l Bank, 627 S.W.2d 741 (Tex. Civ. App. 1982).

16. 432 A.2d 701, 708 (D.C. 1980). The statute states that it is unlawful for "any person" to engage in an unlawful trade practice. D.C. CODE ANN. § 28-3904 (1981). "Person" is defined in the Act as an individual, firm, corporation, partnership, cooperative, association or any other organization, legal entity or group of individuals however organized. D.C. CODE ANN. § 28-3901(1) (1981); *see also* Committee Report, *supra* note 4, at 17. The "any person" language in the Act's unlawful trade practices section was very likely intended by the Council to clarify that the merchant's agents or co-conspirators are liable for violating the Act. Application of the Act to a merchant's agents or co-conspirators was not raised by the facts in *Howard*.

17. 432 A.2d at 705.

the court held that the Act did not apply.[18] Significantly, this panel of the court of appeals did not decide the issue on the grounds that home improvement transactions were outside the scope of the Act. With the exception of *Owens*, therefore, case law in the District of Columbia has eliminated the traditional distinction between real and personal property when consumers seek to remedy damage caused by a merchant.

Additionally, the Council of the District of Columbia enacted the Act consistent with the legal philosophy pronounced in *Javins* and gave OCP broad authority to eradicate unlawful trade practices.[19] The Council created the OCP because it was dissatisfied with a predecessor agency, the District of Columbia Office of Consumer Affairs (OCA). OCA was given broad authority to "promote fair business practices within the [District of Columbia] business community."[20] The jurisdiction of OCA's consumer education program was not limited to transactions involving personal properties, OCA had virtually no regulatory or enforcement authority except in the area of retail credit and consumer goods repair.[21] The primary purpose of the District of Columbia Consumer Protection Procedures Act of 1976 was to shift the emphasis of the District's consumer protection activities from merely a broad spectrum of consumer education to complaint-handling and law enforcement throughout this same spectrum under the new agency.[22]

The Council of the District of Columbia also intended to provide OCP with the jurisdiction afforded other state and local consumer protection agencies in the metropolitan area.[23] The consumer protection statutes of both Maryland and Virginia have uniformly confined the scope of their protection to purchases of goods or services that are "primarily for personal, household or family use."[24] These statutes, as well as the Federal

18. *Id.* at 709.

19. D.C. CODE ANN. § 28-3901(b)(2) (1981).

20. Commissioner's Order No. 73-225 (Oct. 3, 1973) *as amended* Commissioner's Order No. 74-156 (July 17, 1974).

21. Committee Report, *supra* note 4, at 5.

22. Committee Report, *supra* note 4, at 7. The new OCP was intended to be a mini-FTC with broad powers to investigate and punish unlawful trade practices. Committee Report, *supra* note 4, at 2; Mayor's Comments, *supra* note 4, at 1; Memorandum to Council Chairman, *supra* note 4, at 5. The Federal Trade Commission has broad authority to investigate all deceptive or unfair trade practices in commerce. 15 U.S.C. § 45(a)(1) (1976 & Supp. 1981). The FTC actively investigates and prosecutes deceptive practices involving sales of real estate to individuals for primarily personal, household, or family use. *See, e.g.*, Horizon Corp., 97 FTC 464 (1981); Cavanaugh Communities Corp., 93 FTC 559 (1979); GAC Corp., 84 FTC 163 (1974).

23. Memorandum to Council Chairman, *supra* note 4, at 3.

24. *See, e.g.*, Truth-in-Lending Act, 15 U.S.C. § 1602(h) (1980 & Supp. 1981); Mary-

Truth-in-Lending Act, apply to sales of residential real estate by merchants and to any other consumer transactions involving residential real estate—i.e., condominium and cooperative sales, apartment rentals, home improvements and mortgage credit[25]—as well as to the purchase of consumer goods and services. The application of these statutes to transactions involving real property was accomplished by various drafting methods. Maryland includes real property in its definition of sale. " 'Sale' includes any: (1) sales of . . . real property."[26] Virginia accomplishes the same result by defining goods to include tangible or intangible real or personal property or both.[27] On the other hand, the Federal Truth-in-Lending Act's application to real estate transactions was accomplished by a more indirect method. The definition of consumer refers simply to transactions involving the extension of unsecured credit or credit secured by an interest in property. This credit must be used primarily for personal, family, or household purposes.[28] In the exemption section, the drafters indicated that the term "property" was intended to include real estate as well as merchandise. This section excludes credit transactions in which the total amount to be financed exceeds $25,000, except where the transaction involves real property.[29]

In order to give the new OCP the necessary jurisdiction to carry out its mandate, the Council passed the District of Columbia Consumer Protection Procedures Act of 1976. The new legislation was drafted in a manner similar to the Virginia statute and the Truth-in-Lending Act. The Act contains a broad definition of goods and services including, by implication, transactions involving real property.[30] The exemption section excludes from OCP's jurisdiction the narrow category of landlord-tenant rela-

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land Consumer Protection Act, MD. COM. LAW CODE ANN. § 13-101(d) (1975); Virginia Consumer Protection Act, VA. CODE § 59.1-198(A) (1982).

25. *See, e.g.*, Beard v. Gress, 90 Ill. App. 2d 622, 413 N.E.2d 448 (1980); Nash v. Hoopes, 332 A.2d 411 (Del. Super. Ct. 1975). *See generally* Blumberg, *Application of State Consumer Protection Acts to Landlord Tenant Practices*, 15 Clearinghouse Rev. 399 (1981). The Blumberg article contains an appendix indicating whether each state's consumer protection statute applies to real estate transactions. In addition, the Federal Trade Commission has found that the sale of undeveloped residential lots purchased as an investment was "primarily for personal, household, or family use." *See* Horizon Corp., 97 F.T.C. at 467.

26. MD. COM. LAW CODE ANN. § 13-101(i) (1975 & Supp. 1982).

27. VA. CODE § 59.1-198(B) (1982). *See also* MONT. CTY. MD. CODE § 11.1 (1981); PR. GEO. CTY. MD. CODE § 2-142(a), (b) (1981).

28. 15 U.S.C. § 1602(h) (1976 & Supp. V 1981).

29. 15 U.S.C. § 1603 (1976 & Supp. V 1981).

30. Goods and services "means any and all parts of the economic output of society, at any stage or related or necessary point in the economic process, and includes consumer credit, franchises, business opportunities, and consumer services of all types. D.C. CODE ANN. § 28-3901(a)(7) (1981 & Supp. 1982).

tions.[31] Neither the Act's legislative history, nor its language, indicates any intention to limit the transactional jurisdiction of OCP beyond the specific exclusions mentioned in the Act. In fact, the broad definition of goods and services in the Act was intended by its drafters to be all-inclusive.[32] The drafters also gave OCP broad authority to remedy any unlawful business activity injuring consumers. The Act states that OCP can assert jurisdiction over a trade practice that violates "any statute, regulation, rule of common law, or other law of the District of Columbia."[33] Among the laws of the District of Columbia over which the drafters intended to extend OCP jurisdiction, are the usury statute, pertaining to mortgage credit laws,[34] the home improvement regulations and statutes governing real estate brokers.[35]

The Act's inclusion of residential housing transactions as goods and services is also supported by examining two other sections of the statute. The Council specifically excluded landlord-tenant relations from OCP's

31. The exclusion of landlord-tenant relations was intended to eliminate any regulatory overlap between OCP and District of Columbia housing agencies, such as the District of Columbia Rental Housing Commission. This language should not exclude business practices unrelated to landlord-tenant relations like false advertising and unconscionable practices. *See* Commonwealth v. Monumental Properties, Inc., 459 Pa. 450, 329 A.2d 812 (1974).

32. Simon, *Guide to the Consumer Protection Act*, 2 DISTRICT LAW. 45 n.2 (1977). Mr. Simon was legislative assistant to Councilmember John A. Wilson (D-Ward 2) and served on the Committee on Public Services and Consumer Affairs during the drafting, committee review and passage of the Act. He later became a member of OCP's legal staff. Mr. Simon indicates in his article that the definition of goods and services was drafted to encompass the definition of goods and services used by the Commerce Department to calculate the gross national product. The Commerce Department defines goods and services as any and all parts of the economic output of society, at any point in the economic process.

The value of residential real estate and residential rental property, as well as the value of other consumer services and merchandise, appears in the Commerce Department's calculation of GNP. Rents and the rental value of owner-occupied homes are included in GNP as personal consumption expenditures. U.S. DEP'T OF COMMERCE, HANDBOOK OF CYCLICAL INDICATORS 50 (1977).

While the extension of consumer credit does not create any new wealth, i.e., value, for inclusion in the GNP, the cost of obtaining residential mortgage financing appears in the GNP. Since the principal amount of the loan is not included in the GNP, the Act's definition of goods and services was drafted to include consumer credit specifically. The acquisition and building costs of new housing and the costs of major home repairs and renovations are also included in the GNP as private domestic investment. *Id.* at 51. This broad definition of goods and services is just one indication that the drafters intended to include residential real estate transactions within OCP's jurisdiction.

33. D.C. CODE ANN. § 28-3905(b)(2) (1981); *see also* D.C. CODE ANN.§ 28.3903(a)(13) (1981). A trade practice is any economic act between a merchant and a consumer involving goods and services. D.C. CODE ANN. § 28-3901(a)(6) (1981); *see* Committee Report, *supra* note 4, at 16-17.

34. *See* D.C. CODE ANN. § 28-3307 (1981); D.C. Reg. 74-21, 21 D.C. Reg. 285 (1974).

35. Simon, *Guide to the D.C. Consumer Protection Act*, 2 DISTRICT LAW. 46 (1977).

jurisdiction.[36] This exclusion must be necessary to the statutory structure or it would not appear.[37] Thus, where the Council meant to limit OCP jurisdicton, it did so expressly. Additionally, in 1979 the Council expressly gave OCP the jurisdiction to hear complaints under a statute regulating rental housing locators.[38] This recent legislation evidences the Council's continuing intention to include trade practices involving residential housing within the ambit of the Act.[39] These provisions, and the intention of the Act's drafters, led District of Columbia Corporation Counsel and OCP to conclude that consumer complaints against the real estate industry were within OCP's jurisdiction.

In addition to any legislative indication of an act's coverage, an executive agency's[40] interpretation of its seminal statute is entitled to a high degree of deference from the courts.[41] In the District, the interpretations of the Corporation Counsel and the OCP "are entitled to weight as construction of the District of Columbia Code unless plainly unreasonable or contrary to ascertainable legislative intent."[42]

The first OCP Director, Edith Barksdale Sloan, requested an opinion from Corporation Council about the Act's application to residential real estate transactions. Corporation Counsel, John R. Risher, Jr., advised her that OCP had jurisdiction over the "trade practices of the real estate industry."[43] Under this authority OCP took an active role in regulating the trade practices of the real estate industry[44] through enforcement proce-

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36. D.C. CODE ANN. § 28-3903(c)(2)(A) (1981). *See also supra* note 31 and accompanying text.

37. 2A C. SANDS & J. SUTHERLAND, STATUTES AND STATUTORY CONSTRUCTION § 46.06 (4th ed. 1973).

38. D.C. CODE ANN. § 28-3904(Z) (1981).

39. Anderson Bros. Ford v. Valencia, 452 U.S. 205 (1981). The Court reasoned that the 1980 amendments to the Truth-in-Lending Act were relevant to an interpretation of statutory language enacted in 1968. *See also* K. DAVIS, ADMINISTRATIVE LAW TREATISE § 7.14 (2d ed. 1979).

40. The OCP is an independent agency and not under the aegis of any other branch of the District of Columbia Government.

41. Ford Motor Credit v. Milhollin, 444 U.S. 555, 557 (1980) (Federal Reserve Board).

42. Williams v. W.M.A. Transit Co., 472 F.2d 1258, 1264 (D.C. Cir. 1972).

43. 1 Op. Corp. Counsel 485 (1977). The Corporation Counsel relied upon two sections of the statute: the broad definition of consumer, which describes *anything, without exception*, which is primarily for personal, household or family use, and the lack of an exclusion from OCP's jurisdiction to reach this conclusion. *Id.* This latter notion is supported by the fact that where the D.C. Council wished to limit OCP jurisdiction it did so expressly.

44. The second largest category of complaints received by OCP involves home improvement contractors, perhaps as many as one thousand each year. Conversation with Paul G. Ruiz, Home Improvement Advisor for District of Columbia Office of Consumer Protection. Extensive home improvements traditionally invoke the laws governing real, rather than personal property. *See* G. THOMPSON, COMMENTARIES ON THE MODERN LAW OF REAL PROP-

dures,[45] until the Court of Appeals' decision in *Owens v. Curtis*.[46]

In March 1978, Gloria Owens examined a single family residence owned by Mae S. Curtis and was told by Ms. Curtis that the loose tiles in the basement were due to the age of the floor.[47] Subsequently, Ms. Owens signed a contract and, after settlement, found that the damaged tiles were a result of flooding. After making this discovery, Ms. Owens sued Ms. Curtis for committing an unlawful trade practice.[48] The Superior Court, however, dismissed the action, deciding that the Act did not extend its protection to real estate transactions.[49]

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ERTY § Z-69 (1964 & Supp. 1980). *But see* Etta v. Seaboard Enterprises, Inc., 674 F.2d 913 (D.C. Cir. 1982) (whether home solicitation occurred in sale of carpet and contract for home repairs was a question of fact); McDonald v. Mobley, 555 S.W.2d 916, 920 (Tex. Civ. App. 1977) (seller's express warranty regarding carpet installation to home buyer is not sale of real property); Woods v. Littleton, 554 S.W.2d 662, 667 (Tex. Sup. Ct. 1977) (sewer repair by builder is separate from sale of real estate). *See generally* NATIONAL CONSUMER LAW CENTER, UNFAIR AND DECEPTIVE ACTS AND PRACTICES § 2.2.5 (Boston 1982).

OCP is understandably proud not only of its enforcement record in this complaint category but also of its legislative initiatives in this area. D.C. Office of Consumer Protection, 1980 Annual Report at 16-17 (Jan. 1981). In recognition of OCP's expertise in real estate transactions, Mayor Walter E. Washington designated OCP as the agency responsible for enforcement of limited warranties given to home buyers by real estate firms to avoid the "speculation" tax, an extremely high tax on the sale of residential real property held six months or less. 25 D.C. Reg. 2369 (1978) (statute has expired by its own terms); *see* D.C. CODE ANN. § 47-1419 (1981). OCP has been involved in a massive investigation of real estate firms which provided these warranties and reneged on their obligations to make repairs.

45. 1980 D.C. Office of Consumer Protection Ann. Rep. 4.

46. 432 A.2d 737 (D.C. 1981).

47. *Id.* at 738.

48. Ms. Owen's unlawful trade practice claim did not require her to prove that she relied on Ms. Curtis' material misrepresentation. "It shall be a violation of [the Act], *whether or not any consumer is in fact misled, deceived, or damaged thereby*, for any person to: . . . misrepresent as to a material fact which has a tendency to mislead." D.C. CODE ANN. § 28-3904(e) (emphasis added). Thus, a merchant commits an unlawful trade practice regardless of whether or not the consumer relies on the trade practice in making his purchase, or whether or not he is damaged by the trade practice. This language was adopted because sophisticated consumers, who can avoid incurring actual damages, often recognize unlawful business practices and complain. These consumers are permitted to enforce the Act for the benefit of less sophisticated consumers who may be injured when they fail to detect the unlawful practices. This standard also permits OCP to initiate investigations of deceptive practices which are detected by means other than the receipt of a complaint from a consumer. *See* D.C. CODE ANN. § 28-3907(a)(1) (1981).

These broad prohibitions in the Act pass constitutional scrutiny. *See, e.g.*, Pennington v. Singleton, 606 S.W.2d 682, 688-90 (Tex. Sup. Ct. 1980); *see generally* NATIONAL CONSUMER LAW CENTER, *supra* note 44, at § 7.5. FTC orders issued under its broad "unfair or deceptive acts or practice" standard have been upheld by the courts. *See* F.T.C. v. Colgate-Palmolive Co., 380 U.S. 374, 385-87 (1965); Spiegel, Inc. v. F.T.C., 540 F.2d 287, 293 (7th Cir. 1976).

49. *Owens*, 432 A.2d at 738.

Affirming the Superior Court decision, the Court of Appeals quoted section 2(a)(6) of the Act that defines a trade practice as "any act which [affected] . . . consumer goods or services."[50] The court further stated that "consumer good" describes "anything which is primarily for personal, household, or family use."[51] The court peremptorily concluded that the sale of real estate was not within the meaning of "primarily for personal, household or family use".[52] The *Owens* court departed from modern case law without adequately considering statutory language, the Act's legislative history, or the OCP's interpretation of the Act.

In *Javins*, the United States Court of Appeals for the District of Columbia Circuit discarded the ancient distinctions between residential real estate transactions and transactions involving other more conventional consumer goods and services.[53] Following *Javins*, the District of Columbia Court of Appeals in *Berman* held that products liability law was applicable to the sale of an apartment or cooperative.[54] Moreover, the court's decision in *Owens* departs from two recent federal district court decisions, *Greene* and *Kearney*. These cases applied the Act to homeowners' suits involving credit transactions.[55]

In addition, the court's definition of "consumer", as not including the sale of real estate, ignored the plain meaning of "consumer" as that term has been used in scores of remedial statutes in the last decade. Real estate transactions are protected under the Maryland, Virginia, and federal consumer protection statutes.

The court's decision is also inconsistent with the legislative history and subsequent agency interpretation of the Act. Legislative history indicates that the drafters intended to define broadly "goods and services" to include real estate transactions.[56] The drafters' intent is best evidenced by its pointed exclusion of only one category of real estate transactions: landlord-tenant relations.[57] The *Owens* court's holding that real property sales were not within the scope of the Act's coverage is also contrary to the Council's purpose of giving OCP broad authority.[58] Moreover, the *Owens* court did not ask Corporation Counsel or OCP whether it had construed the Act to include sales of residential property. If the court had requested

50. *Id.* at 739 (quoting D.C. CODE ANN. § 28-2(a)(6) (1978)).
51. *Id.* at 739 (quoting D.C. CODE ANN. § 28-2(a)(2) (1978)).
52. *Owens*, 432 A.2d at 739.
53. *Javins*, 428 F.2d at 1071.
54. *Berman*, 391 A.2d at 351.
55. *Greene*, 529 F. Supp. 186 (D.D.C. 1981); *Kearney*, Civ. A. No. 81-1349, slip op. at 3.
56. *See supra* notes 22-25.
57. *See supra* note 36-37 and accompanying text.
58. *See supra* note 14.

information from OCP, it would have been informed not only of its broad interpretation of the Act, but also of OCP's activities on behalf of individual homeowners.[59]

Since the court's decision rests on an incomplete record that did not include information essential to an accurate interpretation of the actual breadth of the Act, *Owens* should be narrowly limited to its facts. The facts in *Owens* did not raise the issue of the Act's application to real property sales, cooperative and condominium sales, home improvement transactions or mortgage credit offered by a merchant. Rather, the court decided only the limited question of whether the Consumer Act applies to the one-time sale of residential real estate by one individual to another. Thus, *Owens* should be viewed as simply standing for the proposition, as articulated by the court in *Howard*,[60] that the Act does not apply to any nonmerchant transactions. *Owens* should not be read to exclude sales of residential real estate, home improvement sales, or mortgage credit when the transaction involves a merchant. Such an application is inconsistent with modern case law, legislative history and OCP's interpretation of the Act.

In addition, public policy weighs heavily in favor of applying the Act to residential real estate sales, cooperative and condominium sales, home improvement and mortgage credit offered by merchants. A residential real property transaction is usually the single largest purchase a consumer will ever make. The effect of an unfair business practice involving real estate will cost the consumer more and its damaging effect will last longer than any other consumer purchase.[61]

In this free market environment, the real estate industry cannot present a convincing argument that an act which prohibits deceptive practices is an unnecessary governmental intrusion into the market. When deceptive practices are left unchecked, consumer demand is misallocated to unscrupulous businesses because consumers act on imperfect information. The real estate market is particularly susceptible to this market imperfection since most consumers are one-time customers in transactions involving large amounts of money. If OCP has jurisdiction over unlawful trade practices in the real estate industry and it acts to eliminate them through

59. *See supra* note 39 and accompanying text.

60. 432 A.2d 701 (D.C. 1981).

61. Based on a survey completed in 1977, 50% of the owner-occupied housing units in the Washington Standard Metropolitan Statistical Area (273,000 units) were purchased prior to April 1970; 25% of owner-occupied homes have been the residence of the present owner since 1960. *See* U.S. DEP'T OF COMMERCE, BUREAU OF CENSUS, ANNUAL HOUSING SURVEY: 1977, at A-03 (Mar. 1980).

enforcement and consumer education, then the free market system can operate properly and allocational efficiency will increase.

These strong public policy reasons for including real estate transactions in the Act's coverage are undermined by the court's decision in *Owens*. Even though OCP reads *Owens* as applying only to residential real estate sales and not to mortgage credit or home improvement, thirteen active investigations into real estate transactions have been dismissed as a result of the decision.[62] Therefore, even at this early date *Owens* has had a severe impact on OCP's effectiveness.

The *Owens* court's statement that the scope of the Act's coverage does not include the regulation of residential real estate sales is misguided. The record in *Owens* did not adequately present the Act's scope. Indeed, the court did not examine the language and interpretations of similar state and local statutes or modern real property cases in the District of Columbia.

62. Telephone interview with Michael S. Blaher, Legal Technician, Office of Consumer Protection (June 21, 1982). Mr. Blaher is now Legislative Analyst for the D.C. Department of Consumer and Regulatory Affairs. Also, few statutory schemes regulate the real estate industry and many consumer protections have been repealed or are threatened by pending legislation. For example, in the last two years mortgage credit regulation has become increasingly dependent on free market forces. Title V of the Depository Institutions Deregulation and Monetary Control Act of 1980 (DIDA), Pub. L. No. 96-221, 94 Stat. 132, 161 preempted state regulation of the interest rate which may be charged for credit secured by a first lien on residential housing. The statute was amended in 1982 to loosen disclosure requirements involving "creative" real estate financing arranged by real estate brokers. Garn-St. Germain Depository Institutions Act of 1982. Pub. L. No. 97-320, § 702, 96 Stat. 1469. Therefore, when a real estate broker arranges financing extended by an individual residential seller to a residential buyer, the buyer does not receive any disclosure of credit terms under the Truth-in-Lending Act. 47 Fed. Reg. 7391 (1982).

Federal mortgage regulators have also encouraged the origination of creative financing packages by providing a secondary market to purchase these packages. Since December 20, 1978, the Federal Home Loan Bank Board has initiated seven alternative mortgage instruments (AMIs). *See* 43 Fed. Reg. 59,336 (1978) (authorizes Variable Rate Mortgage, Graduated Payment Mortgage, and Reverse Annuity Mortgage); 45 Fed. Reg. 72,675 (1980) (authorizes Renegotiable Rate Mortgage); 46 Fed. Reg. 24,148 (1981) (Adjustable Mortgage Loan replaces VRM and RRM); 46 Fed. Reg. 37,625 (1981) (authorizes Graduated Payment Adjustable Mortgage); 46 Fed. Reg. 51,893 (1981) (authorizes balloon payment adjustable mortgages and home improvement loans). *See generally* 12 C.F.R. § 545.6 (1982). In addition, the United States Senate is considering legislation which may deregulate all mortgage interest rate ceilings and exempt all consumer credit transactions secured by residential real estate credit from federal disclosure requirements. The substance of this legislation was initially proposed in the 97th Congress as S. 1406. *See* 127 CONG. REC. S6627 (daily ed. June 22, 1981) (statement of Sen. Lugar). That bill never made it out of committee. Senator Garn reintroduced the cited portions of S. 1406 the following October. 127 CONG. REC. S11265-66 (daily ed. Oct. 5-16, 1981) (statement by Sen. Garn). Again, the portion of the bill eliminating rate ceilings died in committee. The remainder of the bill went into effect in October 1982. Garn-St. Germain Depository Institutions Act of 1982, Pub. L. No. 97-320, 96 Stat. 1469. The Council of the District of Columbia also has under consideration the elimination of interest rate ceilings on junior mortgage credit. *See* Bill 4-290 (Jul. 6, 1981).

Finally, the court did not even weigh considerations of public policy which may support applying the Act to residential real estate transactions.

Future interpretations of the Act should follow OCP's enforcement policy, giving *Owens* a narrow reading limited to the facts presented to the court. In any event, *Owens* should not exclude from the Act's protection consumer transactions incidentally related to the sale of residential real property. Home improvements, mortgage credit and apartment sales are consumer transactions distinct from the sale of real property. The consumer of residential real estate and related goods and services needs, and is entitled to, the protection of the District of Columbia Consumer Protection Act of 1976.