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Sandra S. Braden

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OHIO'S NEWEST CONSUMER PROTECTION: THE PREPAID ENTERTAINMENT CONTRACT ACT

INTRODUCTION

THE LATEST ADDITION to Ohio's consumer protection laws, the Prepaid Entertainment Contract Act (PECA)¹ expands the coverage of the Consumer Sales Practices Act² "to safeguard the public against deception and financial hardship" in long-term personal service contracts. PECA limits its coverage to "prepaid entertainment contracts", and defines such to mean contracts for the services of a dance studio, health spa, dating service, or martial arts studio for which the buyer pays or becomes obligated to pay in advance of the receipt or enjoyment of any part of those services.³ Consumer abuses involving unscrupulous sales practices⁴ in these industries are common,⁵ and the goal of this legislation is to eliminate the deceptive sales practices in a manner which will not place an undue burden upon the honest seller in these service areas,⁶ and to provide an effective protection measure for the unwary consumer. The Act provides for a "cooling-off" period⁷ which hopefully will give the consumer time to contemplate whether he has both the aptitude to actually gain something of value from the service and the financial ability to pay for it.

¹ OHIO REV. CODE ANN. §§ 1345.41 -.50 (Page Supp. 1976) (effective September 22, 1976).

² OHIO REV. CODE ANN. §§ 1345.01 -.13 (Page Supp. 1976). Generally, the Act prohibits deceptive and unconscionable sales practices by Ohio suppliers in connection with consumer transactions. See Buckley, *Recent Consumer Protection Legislation in Ohio*, 22 CLEV. ST. L. REV. 393 (1973); Tongren & Samuels, *The Development of Consumer Protection Activities in the Ohio Attorney General's Office*, 37 OHIO ST. L.J. 581 (1976).

³ OHIO REV. CODE ANN. § 1345.41(A)(1)-(4) (Page Supp. 1976). The Act specifically excludes from the definition of prepaid entertainment contracts those "contracts for services rendered by any public or private nonprofit school, college, or university; by the State or any of its political subdivisions; or by any nonprofit religious, ethnic, or community organization." *Id.*

⁴ Interview with Robert S. Tongren, Assistant Attorney General of Ohio, Consumer Frauds & Crimes Section, in Columbus, Ohio (Dec. 29, 1976) [hereinafter cited as Tongren Interview]. Mr. Tongren stated that the two prime abuses in the sale of long-term personal service contracts are high-pressure sales tactics and misrepresentation of services to be of a more personal, extensive, or beneficial nature than that which is actually provided.

⁵ See *Hearings on Sub. S.B. 157 Before the House Comm. on the Judiciary*, Ohio (January 20, 1976) (testimony of Robert S. Tongren, Assistant Attorney General, Consumer Frauds & Crimes Section) at 3 [hereinafter cited as Tongren Testimony].

⁶ Tongren Testimony, *supra* note 5, at 1.

⁷ OHIO REV. CODE ANN. § 1345.43(A) (Page Supp. 1976). Such right to cancellation only applies to those prepaid entertainment contracts which have a "purchase price in excess of two hundred dollars, or that extend[s] over a period exceeding one year." *Id.* For the definition of purchase price as used in the Act, see OHIO REV. CODE ANN. § 1345.41(B) (Page Supp. 1976). The Act also provides that where prepaid entertainment contracts between the same buyer and seller "are in effect at the same time, or the terms of which overlap for any period," they are to be viewed as one contract. *Id.* § 1345.42(A). For a discussion of the buyer's cancellation rights under PECA, see text accompanying notes 40-48 *infra*.

The Prepaid Entertainment Contract Act is not complex in its drafting and should be readily understandable by the consumer in informing him of his rights under a future service contract. There are, however, several aspects of PECA which will require clarification. First, the definition of "first service"⁸ will present problems in construction if a practical application of the Act is to be realized. Second, the extent to which a violation of this Act constitutes a per se deceptive act under the Consumer Sales Practices Act may require interpretation.⁹ Third, a proposed Trade Regulation Rule by the Federal Trade Commission concerning health spas is presently pending; if passed, the problem of possible federal preemption will have to be dealt with.¹⁰

ABUSES IN THE SALE OF FUTURE SERVICE CONTRACTS

The four industries covered by this Act share a significant similarity; they all offer services which are intended to enhance one's social or physical attractiveness or fitness. "Advertising and high pressure selling create expectations of improving one's attractiveness and social life which are often so irresistible that the high cost and long-term commitment do not dawn on the consumer until he is irrevocably committed to a binding contract."¹¹ The enticements presented through the slick sales techniques often employed promise more than the mere self-improvement benefits which realistically may be obtainable through the use of the particular service offered. The high-pressure, flattering, and deceptive sales schemes common to many of these businesses offer the inducement of happiness and hope,¹² excitement, confidence, or even, for example, the less nebulous promise of turning elderly women into professional dancers.¹³ Of course, when purchasing future services even a knowledgeable and relatively sophisticated person may be deceived. But the primary offensiveness of

⁸ OHIO REV. CODE ANN. § 1345.41(D) (Page Supp. 1976). See text accompanying notes 40-43 *infra*.

⁹ OHIO REV. CODE ANN. § 1345.48(A) (Page Supp. 1976) states that a failure to comply with the Prepaid Entertainment Contract Act "constitutes a deceptive act or practice in connection with a consumer transaction in violation of Section 1345.02" of the Consumer Sales Practices Act. See text accompanying notes 50-54 *infra*.

¹⁰ See text accompanying notes 62-66 *infra*.

¹¹ *Hearings on Sub. S.B. 157 Before the House Comm. on the Judiciary*, Ohio (January 13, 1976) (statement of David Headley, State Senator and prime sponsor of the bill).

¹² Tongren Testimony, *supra* note 5, at 2. See *Report on Sub. S.B. 157, House Comm. on the Judiciary*, Ohio (March 9, 1976) at 1-2, which states:

Statutory law has restricted the common-law freedom to contract and provided remedial methods in order to assure that buyers not be pressured under certain circumstances into contracts from which they will not derive the benefits they thought they would obtain. The Ohio Consumer Sales Practices [Act] is a recent example of legislation of this nature.

¹³ See, e.g., *Vokes v. Arthur Murray, Inc.*, 212 So. 2d 906 (Fla. Ct. App. 1968); *Syester v. Banta*, 257 Iowa 613, 133 N.W.2d 666 (1965).

unconscionable sales methods in the sphere of personal service contracts is that they are most effective upon those who are vulnerable because of feelings of loneliness, insecurity, emotional or physical inadequacy, or social naivete.¹⁴

Although the health spas and dance studios and, as they have become more numerous, dating service clubs and martial arts studios have reputations for dealing with consumers in a dishonest and duplicitous manner,¹⁵ many of the individual businesses are honest and provide desirable and beneficial services without resorting to artifice or misdealing. Due to extensive abuses in these areas, however, legislation is needed not only to provide the consumer with some measure of self-protection, but also to enable the reputable supplier of such services to have the opportunity to compete in a wholesome business environment.

The prevalence of unscrupulous suppliers of these services has been recognized by many states with the consequent numerous legal actions¹⁶ and the enactment of consumer-oriented legislation¹⁷ designed to diminish the harm done to credulous and uninformed purchasers. Prior to the enactment of the Prepaid Entertainment Contract Act, the purchaser, who may have been swept along momentarily by a high-powered sales pitch, often was placed in a position in which he was unable to obtain legal redress once he had signed the contract. While the purchaser might sue the seller claiming the commission of a deceptive or unconscionable practice under the Consumer Sales Practices Act (CSPA),¹⁸ such a suit would require a showing

¹⁴ See Tongren Testimony, *supra* note 5, at 4. See also cases cited note 13 *supra*.

¹⁵ See *People v. Arthur Murray, Inc.*, 238 Cal. App. 2d 333, 47 Cal. Rptr. 700 (1965), wherein the court discussed the widespread unethical and deceptive practices in the sale of health and dance studio services; Tongren Testimony, *supra* note 5, at 3.

¹⁶ See *Weil v. Arthur Murray, Inc.*, 67 Misc. 2d 417, 324 N.Y.S.2d 381 (1971); cases cited notes 13 & 15 *supra*; Annot., 28 A.L.R.3d 1412 (1969).

¹⁷ See e.g., CAL. CIV. CODE §§ 1812.50 -68 (Deering 1973), regulating dance studio lessons; CAL. CIV. CODE §§ 1812.80 -95 (Deering 1973), regulating health studio services; N.Y. GEN. BUS. LAW § 394-b (McKinney Supp. 1976).

¹⁸ OHIO REV. CODE ANN. §§ 1345.01 -13 (Page Supp. 1976). OHIO REV. CODE ANN. §§ 1345.02(A) (Page Supp. 1976) states: "No supplier shall commit a deceptive act or practice in connection with a consumer transaction. . . ." Section 1345.02(B)(1)-(10) enumerates a series of acts, proof of which shall be considered to be deceptive within the meaning of Section 1345.02(A). Section 1345.03(A) states: "No supplier shall commit an unconscionable act or practice in connection with a consumer transaction. . . ." Section 1345.03(B)(1)-(6) lists a series of circumstances [sales practices], proof of which "shall be taken into consideration" in determining whether the act or practice is unconscionable (emphasis supplied). Section 1345.01(A), which defines "consumer transaction," specifically includes a sale of services. Section 1345.05 empowers the Director of Commerce to adopt rules defining with specificity which acts or practices shall constitute violations of Sections 1345.02 and 1345.03. See *Liggins v. May Co.*, 44 Ohio Misc. 81, 337 N.E.2d 816 (C.P. Cuyahoga County 1975); *Brown v. Lyons*, 43 Ohio Misc. 14, 332 N.E.2d 380 (C.P. Hamilton County 1974); *Buckley, Recent Consumer Protection Legislation in Ohio*, 22 CLEV. ST. L. REV. 393 (1973);

of the common law elements of fraud and deceit unless the alleged practice constitutes a per se violation. The CSPA does facilitate consumers' ability to prevail in suits against suppliers in that, besides the Act's general prohibition against deceptive or unconscionable practices, ten specific practices are enumerated under Section 1345.02(B) which are per se deceptive. In addition, substantive rules adopted by the Director of the Department of Commerce and court decisions will designate further those specific acts or practices that constitute per se violations of Sections 1345.02 and 1345.03.

The consumer's chance of prevailing in such a suit under CPSA is weaker when, in conjunction, the bona fide error rule is considered.¹⁹ An Ohio Common Pleas Court has held, however, that to determine whether an act is deceptive under the Consumer Sales Practices Act the supplier's intent is not a necessary element. The Court states: "To violate the Consumer Sales Practices Act all that is necessary is for the supplier to make a representation that has no basis in fact . . . [A] deceptive act or practice is such as has the likelihood of inducing a state of mind in the consumer that is not in accord with the facts."²⁰ If this judicial interpretation is upheld, it would certainly be a significant benefit for the consumer who has been treated in an unfair and misleading manner.

Most consumer agencies in Ohio have a large volume of complaints on file relating to these industries. In the two years prior to the enactment of PECA, the Consumer Frauds & Crimes Section of the Ohio Attorney General's Office investigated 21 of the health spas located in Ohio; all had closed without notice, leaving hundreds of persons without services or

¹⁹ OHIO REV. CODE ANN. § 1345.11 (Page Supp. 1976) states:

In any case arising under sections 1345.01 to 1345.13 of the Revised Code, if a supplier shows by a preponderance of the evidence that a violation resulted from a bona fide error notwithstanding the maintenance of procedures reasonably adopted to avoid the error, no liability is imposed.

See generally Buckley, *Recent Consumer Protection Legislation in Ohio*, 22 CLEV. ST. L. REV. 393, 400-01 (1973), wherein the author states:

The premise for the Ohio bona fide error rule must be that when loss occurs and both the consumer and merchant are "innocent," the loss should be allocated to the consumer even when caused by the merchant . . . When the bona fide error rule is combined with the necessity of proving *scienter* even to make out a "circumstance" which a court can consider in determining unconscionability, the consumer's chances of prevailing are seriously reduced. *Id.* at 401.

²⁰ Brown v. Bredenbeck, 2 Ohio Op. 3d 286, 287 (C.P. Franklin County July 24, 1975). *But see* Brown v. Market Dev., Inc., 41 Ohio Misc. 57, 62, 322 N.E.2d 367, 371 (C.P. Hamilton County 1974) (dictum), wherein the court stated:

It is significant that it is the activity of the supplier that is pivotal in making the determination of unconscionability, and not the character or nature of a completed transaction with a consumer, nor the actual mental state of the consumer.

refunds.²¹ The use of bait advertising by the spas is a major complaint received by the Cincinnati Consumer Protection Division and the Better Business Bureau located there.²² The prospective purchaser is sent a free pass and, when he attempts to use it, is bombarded with smooth sales presentations offering "special" long-term contracts worth great savings if he signs immediately.²³ The personnel in the health studios frequently "make memberships appear to be a panacea which can be purchased on time",²⁴ and it is not until later that the unsuspecting purchaser realizes the extent of the long-term financial liability which he has undertaken. It is true that if an individual makes frequent use of the facilities the price charged may be a reasonable one. Yet, due to the misleading sales talks during which pressure to sign is exerted, many buyers have signed long-term service contracts with no real understanding of the nature, quality, or expense of the services being offered.

The Attorney General's investigation of dating services, more accurately described by PECA as social referral services, revealed that its office had received over 200 complaints in a two-year period and that nine dating services were being sued or investigated. Six services went out of business leaving 1700 customers with unfulfilled contracts.²⁵ A survey of two dating organizations disclosed that 190 out of 232 people who responded were totally dissatisfied and only twelve stated that they were satisfied; the total amount owed on the contracts was \$78,750.²⁶ The misrepresentations by these referral services invariably relate to the essential nature of the service which they provide to the consumer, that is, the matching of the client with members of the opposite sex who are selectively chosen to be compatible with the purchaser. Not only are personal contacts between the purchasers not guaranteed in the

²¹ Report, Office of the Attorney General, Ohio, Consumer Frauds & Crimes Section, at 1. Of 242 complaints received by consumer protection agencies in the Cleveland, Youngstown, Toledo and Columbus areas, over 50 per cent involved sellers who opened for business and subsequently left town without notice. Tongren Testimony, *supra* note 5, at 13. Rather than relying upon a solid capital structure for construction and operating expenses, many spas fail to open, or thereafter close, due to a substantial reliance upon revenues derived from membership sales. Tongren Interview, *supra* note 4.

²² Schwein, *Are You Sure You Know What You're Getting Into?* Cincinnati Enquirer, Mar. 29, 1976, § B, at 1, col. 1.

²³ Tongren Testimony, *supra* note 5, at 12-13, citing the case of a woman in Columbus, Ohio who decided to use a free thirty-day pass which she received from a local health spa. Immediately upon her arrival, a salesman proceeded into a sales pitch, emphasizing the benefits that would accrue to her if she signed a long-term contract. The salesman stressed that if she would relinquish her free pass and sign a note for almost \$400, she would obtain a \$90 discount.

²⁴ Schwein, *supra* note 22, at 1.

²⁵ Report, *supra* note 21, at 1.

²⁶ Tongren Testimony, *supra* note 5, at 8.

contract (the arrangement of actual meetings between purchasers is left to the individuals), but the referrals themselves, if received, are meager in number and have been checked and "matched" only in the most cursory manner.²⁷

Unlike the dating services which sell contracts costing approximately \$400 to many customers, most dance studios deal with a smaller number of people and often actively strive to extract thousands of dollars from individuals. The deceptive sales tactics used, including false praise and extreme flattery, are very effective on the lonely, impressionable person.²⁸ One such elderly and lonely, retired man who testified before the Ohio Senate Judiciary Committee had paid \$10,000 for dancing lessons over a three-year period.²⁹

The problem with the martial arts studios has arisen recently due to the growing popularity of the art. Proficiency in such skills as karate and judo requires hard work and dedication, and this is not what is conveyed to the potential consumer by many of these schools. The dishonest instructors, who may not be proficient themselves, mislead the purchaser into believing that it is not difficult to learn these skills and that anyone is capable of acquiring them. The more students the studio turns out the bigger its profits, and yet the consumer in such a fraudulent situation may end up with minimal skill and a meaningless title.³⁰

PREPAID ENTERTAINMENT CONTRACTS—GENERAL REQUIREMENTS

Prepaid entertainment contracts between the same seller and same buyer are treated as a single contract if they are in effect at the same time or if the time periods stipulated in the contracts overlap.³¹ This is to ensure that the purpose of the Act is not frustrated by the seller's use of a series of less expensive contracts.

²⁷ A referral generally consists of a card including the name, address, phone number, photograph, and a short list of the purchaser's interests. A three-month investigation of dating services in Ohio by two newspaper reporters disclosed that (1) customers regularly receive verbal promises which surpass those of the written contract, although the contract stipulates that these are not binding; (2) customers rarely receive the number of referrals guaranteed in the contract; (3) information on customers is outdated, resulting in referrals of married persons, those who have moved or discontinued the service, and in one case of someone who had died; (4) some referrals lived 100 miles away; and (5) the guaranteed "compatibility" is often apparently ignored. Refunds are usually prohibited in these contracts, and the firms have a history of disappearing upon discovering they are under investigation. Sternberg & Rader, *Dating Firms: Thorns Amid the Roses*, Akron Beacon Journal, Jan. 4, 1976, § G, at 1, col. 1.

²⁸ See cases cited note 13 *supra*.

²⁹ Tongren Testimony *supra* note 5, at 10.

³⁰ *Id.* at 14-15.

All contracts shall: (1) be in writing and signed by both buyer and seller with a copy given to the buyer at the time it is signed,³² (2) provide that all personal and private material acquired from the buyer be returned by the seller after the contract or service ends,³³ (3) provide that if death or disability prevents the buyer from receiving benefits under the contract, the seller must return a proportional sum so that the buyer is liable only for payments attributable to the period before death or disability,³⁴ (4) require performance of the contract to begin within 180 days from date of the contract,³⁵ (5) require a buyer who moves 25 miles or more from a substantially similar facility that will provide the service to pay only the proportional amount of the contract attributable to the period before relocation,³⁶ and (6) provide for the same kind of proportional division if the seller relocates.³⁷

No contract shall be measured by the life of the buyer or have a duration of service that is not a precisely measured period of years or extend for longer than three years of service.³⁸ These provisions requiring definiteness will enable the consumer to more readily determine what he is purchasing. Terms such as "life membership", which are vague and which give the impression that the buyer's bargain is more valuable than it actually is, are prohibited. Thus, a contract with a health spa cannot be extended by the use of such measurements as "until one reaches 120 lbs.," which for some consumers might amount to a "life membership." Similarly, martial arts studios can no longer use a contract measured in terms of the buyer's reaching a certain level of proficiency.

The Act also prohibits contracts that require the buyer to pay more than \$50 or 10 per cent of the total contract price, whichever is less, prior to the date the facility or service is available for use.³⁹

³² *Id.* § 1345.42(B)(1).

³³ *Id.* § 1345.42(B)(4). This section is primarily applicable to social referral services which request an applicant to answer questionnaires, take tests, and otherwise supply personal information.

³⁴ *Id.* § 1345.42(B)(5).

³⁵ *Id.* § 1345.42(B)(6). This section is particularly applicable to health spa facilities which are often under construction and non-operational for long periods after the purchaser has contracted, thereby rendering the prospective services to be of little or no value to him. *See also* note 21 and accompanying text *supra*.

³⁶ OHIO REV. CODE ANN. § 1345.42(B)(7). While it appears evident that the seller will bear the burden of finding a "substantially similar" facility in order to bind a buyer who has moved twenty-five or more miles from the seller's facility, buyers and sellers certainly will differ in their opinions as to whether the seller, in fact, did locate a suitable replacement facility that would accept the seller's obligation under the contract.

³⁷ *Id.* § 1345.42(B)(8).

³⁸ *Id.* § 1345.42(B)(2) and (3).

³⁹ *Id.* § 1345.42(B)(9). UAkron, 1977

CANCELLATION

The core of the Prepaid Entertainment Contract Act is Section 1345.43, which gives the buyer a "cooling-off" period after signing a contract.⁴⁰ In part, Section 1345.43 provides:

In addition to any right otherwise to revoke an offer or to terminate or cancel a sale or contract, the buyer has the right to cancel a prepaid entertainment contract that has a purchase price in excess of two hundred dollars, or that extends over a period exceeding one year, until midnight of the third business day after the day on which the buyer received his first service under the contract or until midnight of the seventh business day after the date on which the buyer signed the contract, whichever occurs first, and if the facility or service that is the subject of the contract is not available at the time that the buyer signs the contract, the buyer has until midnight of the seventh business day after the day on which the buyer receives his first service under the contract to cancel the contract. . . .

It is evident that, because of the structure of the above quoted cancellation rights, a clear meaning of the term "first service" is essential to an efficacious implementation of the rights under this section. A "first service" is defined in Section 1345.41 (D) of the Act to mean

[t]he first service rendered to the buyer under a prepaid entertainment contract that is typical of the type of service rendered throughout the course of the contract and that is not a special or an introductory service.

Since the term "first service" is used in PECA only in Section 1345.43, the definition must be construed in conjunction with the cancellation rights provided in that section.

There are two possible interpretations which seem to comport literally with the definition, and the construction given to it will have a decided effect upon consumers' rights. In the absence of express statutory clarification, the purpose and effect of Section 1345.43 must be examined to determine which interpretation of the Act's definition of "first service" is consistent with the functional operation of the cancellation section and more closely reflects legislative intent.

One sense of "first service" which the definition seems to purport is that a "first service" is the first performance under the contract which is typical of the type of service *actually rendered* during the course of the contract. This gives effect to and places emphasis on the words "typical of the type

⁴⁰ See Tongren Testimony, *supra* note 5, at 18-19, stating that the effect of Section 1345.43 is to counteract high-pressure sales.

of service [that will be] *rendered throughout the course* of the contract." That such service may or may not be what is to be reasonably anticipated by the parties to the contract would be irrelevant if this reading of "first service" is correct ("typical services actually rendered" interpretation). Thus, for any service given to the buyer to qualify as a "first service" under PECA, it would have to be one which is typical of the later ones he received irrespective of any consideration of quality.

A second sense of "first service" which is inferable from the definition alone is that a "first service" under PECA means the first performance which the buyer receives that is typical of the type of service that is *supposed to be rendered* to the buyer according to the terms of his contract. This gives effect to and places emphasis on the words *typical* of the type of service [to be] rendered throughout the course of *the contract*." If this meaning is correct, any service given to the buyer would qualify as a "first service" under PECA only if it was representative of what the buyer could logically and fairly anticipate that he would receive under the terms of his contract with the seller ("typical services under the contract" interpretation).

It seems apparent, when Section 1345.41(D) is considered in conjunction with the usage of "first service" in Section 1345.43, that the "typical services under the contract" sense of the definition is the intended interpretation. Only this construction of "first service" furnishes discernible standards for knowing when a first service was, in fact, performed and confines the buyer's cancellation rights to their proper and intended scope.

The temporal requirements of Section 1345.43 are clear. A buyer may execute a timely cancellation until midnight of the third business day after the day on which he receives his first service under the contract or until midnight of the seventh business day after the date on which he signs the contract, *whichever occurs first*.⁴¹ The buyer has an unqualified right to cancel during the three-day period,⁴² even though he may have received a "first service", or at any time during the seven-day period if he received no "first service".

Any problem with applying this section to potential situations which may present themselves thus centers around a determination as to whether a "first service" under the contract has been received. Assuming that a buyer signs the contract on January 1, if the first performance he receives

⁴¹ With reference to the discussion below of the buyer's right to cancel under Section 1345.43, it will be assumed that the contract meets that section's \$200 or one year condition precedent.

⁴² However, it is evident that the absolute three-day "cooling-off" period shall not extend the buyer's right to cancel beyond seven business days after the date the contract was signed. Ohio Rev. Code Ann. §1345.43 (Page Supp. 1976).

on January 2 does not qualify as a "first service" as defined by the Act, he will still have seven business days after January 1 within which to cancel. In attempting to utilize the "typical services actually rendered" sense of the definition in the context of the above situation, and assuming the buyer does not attempt to cancel until after the three-day period has elapsed but prior to the expiration of seven business days after January 1, one is confronted with an impractical meaning of the term "first service". To be able to conclude whether the buyer had the right to cancel between the end of the three-day period and the end of the seven-day period, a feasible criterion must be available at that time for determining if he did, in fact, receive a "first service". Yet, the "typical services actually rendered" interpretation of the definition by which one must gauge the "typicalness" of a seller's first performance over a span of rendered services essentially forecloses the possibility of its use as a measuring tool that can be used after only one rendered performance. In the example above, neither the seller, the buyer, nor anyone else would be able to ascertain whether a "first service" had been received on January 2, and thereby determine whether the buyer had a legitimate right to cancel.

The fallacy of using the "typical services actually rendered" sense of the definition is manifest. Such a construction is not only inconsistent with the legislature's probable intent in giving the buyer a maximum seven-day "cooling-off" period but would, in a practical manner, render functionally inoperative the cancellation provision and almost totally negate the value of having a contract between seller and buyer.

Under the "typical services under the contract" meaning of the definition, the seller is to provide the buyer a service that is typical of the type of service the buyer is to receive as stipulated under the terms of the contract. This sense of "first service" presents no substantial problem with respect to the three-day period allowed the buyer for appraising the first performance received under the contract and, if dissatisfied, for invoking his right to cancel under Section 1345.43. However, a potential problem with the practical application of Section 1345.43 may occur where a buyer samples the seller's service during the first week and concludes that such service was not typical of that for which he contracted and was, therefore, not a "first service". Litigation may ensue if he foregoes cancellation within the three-day period on the presumption that he has until the end of seven business days after the date he signed the contract to effect a valid cancellation and the seller professes to believe that a "first service" was provided.⁴³ The chance of this situation arising, though,

⁴³ If the seller does not recognize the buyer's right to cancel and it is determined that the buyer did in fact have such right, the buyer may recover double damages plus attorney's fees.

may be more theoretical than actual, insofar as most consumers, if displeased with the service, would either cancel immediately (at least within the three-day period) or resolve the problem with the seller himself. The question of whether a first performance given to the buyer conformed to the terms of his contract is not a procedural matter which can be comprehensively resolved in the Act itself, but, rather, a problem which, if it proceeds to the point of litigation, will have to be determined on an individual basis.

The requirement of Section 1345.43 that the "service that is the subject of the contract" be available at the time the buyer signs the contract serves to reinforce the "typical services under the contract" interpretation of "first service". Since only a service representative of what the buyer has contracted for would be meaningful in any responsive way to the purpose of the Act in furnishing the buyer a time for evaluation, the logical inference may be drawn that such representative service is what is to be available upon the signing of the contract. Thus, there is no inconsistency with this sense of "first service" in the Act's use of the terms "service that is the subject of the contract" and "first service" in the continuing right of cancellation provision of Section 1345.43.

The "typical services under the contract" meaning of the definition does not seem to violate the intent of the Act to provide the buyer with an opportunity to test the service of the seller and to decide for himself whether he wants to continue to be obligated under the contract and, yet, to limit the time period in which the seller will be unable to ascertain whether the contract will remain in effect. It is this reading of the definition which is most congruent with all aspects of Section 1345.43.

The ambiguity of the term "first service" as defined in Section 1345.41 (D) and the consequent problem of its use in Section 1345.43 will likely entail litigation. Until the legislature rectifies this constructional problem, it appears that both the interest of the parties to a prepaid entertainment contract in having a high degree of predictability of contractual rights and obligations and the intent of the legislature in providing the buyer in the usual situation where the services are available at the time of the signing of the contract a limited "cooling-off" period will best be served by the adoption of the "typical services under the contract" sense of the term "first service".

Another provision under Section 1345.43 whose operational effect is closely related to the construction of the definition of "first service"

[i]f the facility or service that is the subject of the contract is not available at the time that the buyer signs the contract, the buyer has until midnight of the seventh business day after the day on which the buyer receives his first service under the contract to cancel. . . .

In light of the fact that it is a "first service" which the buyer is entitled to receive before his right to cancel terminates under this provision, it is arguable that "the facility or service that is the subject of the contract" may be construed to be equivalent to the service "that is typical of the type of service [to be] rendered throughout the course of the contract" to the extent that it is used to arrive at a determination of what must be available upon the signing of the contract. Moreover, it is logical to conclude that the word "*available*" denotes that which the buyer *may* make use of upon his signing the contract, and not simply that which the seller *could* furnish to him according to the seller's capability to do so. Therefore, assuming a buyer signs a contract on January 1 and uses the seller's facilities or services on January 2, if it is determined that the performance received on January 2 was not a valid first service, the argument could be advanced that such first service was unavailable on that date, since otherwise the seller would have little reason not to provide it. And if a "first service" was not available on January 2, it would seem to be difficult for the seller to make a sound argument that such "first service" was available, as required, on January 1 when the contract was signed. Inferentially, then, since a buyer has a continuing right of cancellation until he receives his "first service" if the service which is the subject of the contract is unavailable when he signs the contract, the buyer in the illustration above should have a right to cancel until seven days after he receives a "first service". This interpretation of the "availability" provision of Section 1345.43 does appear, however, to undercut somewhat the provision of Section 1345.43 which allows the buyer a maximum of seven business days after the contract was signed to cancel whether or not he received a first service within that period.

To effect a valid cancellation under Section 1345.43, the buyer must give *written* notice to the seller by mail, telegram, or manual or other personal delivery. The notice does not have to be in any particular form and is sufficient if it indicates the buyer's intention not to be bound by the contract.⁴⁴ A completed form in duplicate entitled "Notice of Cancellation" must be attached to the contract, be easily detachable, and be in ten-point boldface type in the form specified in the Act.⁴⁵

⁴⁴ OHIO REV. CODE ANN. § 1345.43 (Page Supp. 1976). This section also specifies when each of the possible types of delivery of notice becomes effective.

⁴⁵ *Id.* § 1345.44(B).

Until the seller has complied with the requirements of Section 1345.44 (A)⁴⁶ and Section 1345.44(B), the buyer has a continuing right of cancellation. Within ten days of receiving a valid notice of cancellation, the seller must refund all payments made by the buyer.⁴⁷

Sections 1345.43 and 1345.44 also pertain to contracts costing \$100 or more if they are for additional, similar services and there is in effect an earlier contract which has a price exceeding \$200 or a duration of more than one year.⁴⁸

A very important provision of PECA is the right of the buyer to assert as a defense to a claim by a holder in due course any defense that he could assert against the seller.⁴⁹ This could be particularly vital to consumers, as it is a common practice for the sellers of many of these future service contracts to sell them immediately to a finance agency. Formerly, when a health spa failed to open or closed without notice, or when the personnel operating the dating services or dance studios suddenly left town, the consumer was liable for the amount of the contract even if he had received no services. In addition to this protection, Section 1345.49 prohibits the buyer's waiver of any provisions of this Act, making such waiver contrary to public policy and void.

REMEDIES

Remedies available to the consumer are expanded under PECA. Section 1345.48(A) makes failure to comply with any section of the Act a deceptive act in connection with a consumer transaction in violation of Section 1345.02⁵⁰ of the Consumer Sales Practices Act.⁵¹ A violation of Section 1345.02 renders applicable the remedy under Section 1345.09(A)⁵² of

⁴⁶ A contract which extends for a period exceeding one year or has a purchase price in excess of \$200 must state the date on which the buyer signed it, and the seller must sign and give the buyer a copy of the contract.

⁴⁷ OHIO REV. CODE ANN. § 1345.44(D)(4)(a) (Page Supp. 1976).

⁴⁸ *Id.* § 1345.44(E).

⁴⁹ *Id.* § 1345.47.

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

No supplier shall commit a deceptive act or practice in connection with a consumer transaction. Such deceptive act or practice by a supplier violates this section whether it occurs before, during, or after the transaction.

⁵¹ Private and public enforcement procedures under CSPA are thus applicable to PECA. See OHIO REV. CODE ANN. §§ 1345.05-.09 (Page Supp. 1976). For a discussion of enforcement procedures of consumer protection laws, see also Tongren & Samuels, *supra* note 2.

⁵² OHIO REV. CODE ANN. § 1345.09(A) (Page Supp. 1976) states:

Where the violation was an act prohibited by section 1345.02 or 1345.03 of the Revised Code, the consumer may, in an individual action, rescind the transaction or recover his action damages.

See *Brown v. Lyons*, 43 Ohio Misc. 14, 332 N.E.2d 380 (C.P. Hamilton County 1974), awarding punitive damages where the seller committed an unconscionable act in violation of Section 1345.09(A) of CSPA.

CSPA permitting the consumer to rescind the transaction or to recover actual damages.

The Consumer Sales Practices Act also provides that a consumer may rescind or recover actual damages or \$100, whichever is greater,⁵³ where there has been either a violation of a rule adopted by the Department of Commerce or of an act or practice determined previously by an Ohio Court to violate Section 1345.02 or 1345.03. Such rules and judicial determinations must have been made available for public inspection by the Department of Commerce prior to the commission of the alleged violation.⁵⁴ Although the legislature did not specifically state that a violation of any section of PECA is to be considered an official declaration equivalent to a rule adopted by the Department of Commerce or to a judicial decision, legislative enactments are so analogous to official rules and court decisions that a sound argument can be made for construing a violation of PECA as the same type of deceptive act or practice which activates Section 1345.09 (B), thus giving the consumer the added option of obtaining \$100 minimal damages.

With reference to consumer interests, CSPA is deficient in that no provision is made therein for the recovery of attorney's fees in a private action. A bill is now pending in the legislature which, if passed, would amend CSPA to permit such a recovery.⁵⁵ PECA, however, does provide for double damages and the recovery of reasonable attorney's fees if the seller fails to refund all payments made under the contract after receiving a valid cancellation notice.⁵⁶ In that case, the buyer is entitled to the amount which he paid under the contract and may recover, in addition, damages in an equal amount, plus attorney's fees.⁵⁷

It is fairly clear that if any section of PECA is violated, the buyer will have a cause of action under Section 1345.48(A), thereby rendering applicable the remedies of rescission or actual damages under Section 1345.09(A) of CSPA. Moreover, if a violation of any section of PECA

⁵³ OHIO REV. CODE ANN. § 1345.09(B) (Page Supp. 1976).

⁵⁴ *Id.* See § 1345.05(A)(3) which provides:

The Director of Commerce shall:

Make available for public inspection all rules and all other written statements of policy or interpretations adopted or used by him in the discharge of his functions together with all judgments, including supporting opinions, by courts of this state that determine the rights of the parties and concerning which appellate remedies have been exhausted, or lost by the expiration of the time for appeal, determining that specific acts or practices violate section 1345.02 or 1345.03 of the Revised Code.

⁵⁵ Sub S.B. No. 156, sponsored by Senator David Headley, was recommended for passage by the Senate Judiciary Committee in February, 1976.

⁵⁶ OHIO REV. CODE ANN. § 1345.44 (D) (4) (a) (Page Supp. 1976).

⁵⁷ *Id.* § 1345.48 (B).

is deemed to be sufficiently analogous to a Department of Commerce rule or to a court decision to warrant applicability of Section 1345.09(B), the buyer will have the remedies of rescission or actual damages or \$100, whichever is greater. However, an area which has not been explicitly treated by the legislature is the manner in which cumulative remedies may be available for violations of PECA. The plain meaning of Section 1345.50, which states that the remedies provided in PECA "are in addition to remedies otherwise available under state or local law", seems to indicate that, if a violation of Section 1345.44(D)(4)(a) of PECA occurs, the buyer may be able to collect triple damages and attorney's fees if Section 1345.09(A) of CSPA is applicable or double damages plus \$100 and attorney's fees (in the situation wherein \$100 is greater than actual damages) if Section 1345.09(B) is the applicable provision for a violation of PECA. This aspect of consumers' rights has not yet been determined by the courts.⁵⁸

The buyer may be deterred from bringing a private action suit under CSPA due to the risk of incurring costly litigation expenses and attorney's fees unless he has alleged that the seller has failed to recognize an attempted cancellation under PECA,⁵⁹ in which case such expenses would be recovered if the buyer prevails. Added to the risk of not recovering attorney's fees in a private action suit under CSPA is the possible defense by the seller of the bona fide error rule.⁶⁰ This provision allows a supplier to prove that a violation resulted from a good faith error despite the maintenance of procedures reasonably adopted to avoid it. If he can prove this by a preponderance of the evidence, no liability will be imposed. This defense, though it requires a less strict standard of proof than is needed for fraud or deceit, is apparently rarely used by sellers of the services covered by CSPA. In only a small percentage of such cases on file in the Ohio Attorney General's Office did sellers assert the bona fide error rule as an affirmative defense.⁶¹ Since it is such a beneficial rule for the supplier and one that would usually be worth attempting to prove, the reason for its infrequent use is probably due to a lack of awareness of its availability.

FEDERAL TRADE COMMISSION

The Federal Trade Commission has proposed a Trade Regulation Rule covering requirements to be included in the membership contracts

⁵⁸ Section 1345.13 of CSPA states that the "remedies in sections 1345.01 to 1345.13 of the Revised Code, are in addition to remedies otherwise available for the same conduct under state or local law." This Section and Section 1345.50 of PECA may be intended to mean only that a consumer may seek several remedies such as a declaratory judgment, an injunction, restitution, rescission, and/or monetary damages rather than that he may seek and obtain cumulative monetary damages for the same violation.

⁵⁹ OHIO REV. CODE ANN. § 1345.48(B) (Page Supp. 1976).

⁶⁰ See note 19 *supra*.

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 Tongren Interview, *supra* note 74.

of health spas⁶² and has initiated hearings thereon. PECA appears to provide stronger protection for the consumer in this area; but, even if it is determined not to, it is at least similar enough so that federal preemption of state law regulating membership contracts of health spas in Ohio will probably not occur. The Magnuson-Moss Warranty Act,⁶³ dealing with consumer products, specifically states: "Nothing in this chapter shall invalidate or restrict any right or remedy of any consumer under state law. . . ."⁶⁴ The Act also allows

[a]n individual state to apply to the Federal Trade Commission for a determination that the state law affords greater protection to the consumer than the federal standards, and that it does not unduly burden interstate commerce. Following such a determination, the state law shall be applicable . . . so long as it is effectively administered and enforced.⁶⁵

The FTC has indicated that state laws will only be "checked or declared inoperative" if they do not measure up to the minimal standards mandated in the Magnuson-Moss Warranty Act.⁶⁶

CONCLUSION

If the evil to be remedied concerning future service contracts is the high-pressure sales tactics to which consumers are subjected, PECA should be effective in addressing this problem either by convincing the sellers of the services involved that such tactics will be unrewarding or by enabling the consumer to counteract such pressure by having time to reconsider the sale. PECA, however, is not intended to be a comprehensive solution for all problems which a buyer of future services may encounter. The Act's effectiveness as a remedy for misrepresented services is basically limited to giving the consumer the opportunity to try the service and compare its

⁶² 40 Fed. Reg. 34615-19 (1975) (to be codified in 16 C.F.R. § 443). A major provision of the proposed rule gives the consumer three operating days after the date of the contract to cancel or the right to cancel at any time after the three days for any reason, with the seller then being entitled to receive a cancellation fee of an amount specified in the individual contract (not exceeding 5 per cent of the total contract price) plus a pro rata portion of the total contract price determined by a prescribed formula involving the amount of time the buyer was permitted to use the facilities. No provision for cancellation after a first service is given; but, if within the three days after signing the contract, the seller permits the buyer to use the facilities, he must do so without charge. *Id.* § 443.2(c)(1) and (2). If the spa is not open when the contract is signed, the buyer would have ten days to cancel after receiving notice that the facilities are available. *Id.* § 443.2(d)(1) and (2).

⁶³ 15 U.S.C.A. §§ 2301-12 (Supp. 1977), (Effective January 1, 1977).

⁶⁴ *Id.* § 2311(b)(1). See generally Schmitt & Kovac, *Magnuson-Moss vs. State Protective Consumer Legislation: The Validity of a Stricter State Standard of Warranty Protection*, 30 ARK. L. REV. 21 (1976).

⁶⁵ Schmitt & Kovac, *supra* note 64, at 29, citing 15 U.S.C.A. §§ 2311(c)(2), 2302(a), 2309 (Supp. 1977).

⁶⁶ *Id.* at 31.

quality to any sales representations he may have received prior to signing the contract. Even this remedy is restricted to those prepaid entertainment contracts costing more than \$200 or extending beyond one year.

Due to the import of the term "first service" as used in the Act's cancellation section, the legislature should eliminate the ambiguity of the "first service" definition by redefining it to more explicitly state the standard by which a "first service" is to be measured. Section 1345.43 should also be amended to clarify that it is a "first service" which must be available upon the signing of the contract, and not merely a service which approximates the kind of services in which the seller deals.

Alternatively, it seems that the legislature could effectuate the essential purpose of PECA by eliminating the concept of a "first service" entirely and redrafting Section 1345.43 to provide that the buyer shall have one designated period (*e.g.*, five days) within which to cancel after he signs the contract, and that if the facilities or services are not available upon the signing of the contract, the buyer shall have this same period of time to cancel after receiving notification from the seller that such facilities or services are available for use by the buyer. The section would further stipulate that the buyer has a right to try the seller's service during the "cooling-off" period, but would not specify any standard for such service. If the buyer does sample the service and subsequently cancels during the "cooling-off" period, the seller would then be entitled to a designated fee. This approach is functionally simpler than the present one and, yet, still gives the buyer an opportunity to evaluate the seller's service before being committed to the contract, and also gives the seller incentive to render an adequate service so that the contract will remain in force.

SANDRA S. BRADEN

