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H.B. 681: An Amendment to Ohio's Consumer Sales Practices Act

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H.B. 681: AN AMENDMENT TO OHIO'S CONSUMER SALES PRACTICES ACT.

I. INTRODUCTION

The Ohio Consumer Sales Practices Act,[1] passed in 1972, was designed to provide consumers[2] with statewide protection against marketplace abuses. By declaring suppliers'[3] deceptive or unconscionable practices in connection with consumer transactions to be illegal, the 1972 Act was designed to promote fair bargaining in the marketplace. The passage of five years has demonstrated the inadequancy of this law in achieving its intended legislative purpose.

In testimony before the Senate Judiciary Committee on March 15, 1978, William J. Brown, Ohio Attorney General, expressed his alarm over the "deceptive-unconscionable"[4] clause description in the 1972 Act, as reflecting an inadequate enforcement standard for properly policing the unscrupulous supplier. He stated:

> The term "deceptive" limits the scope of public and private enforcement capability under the Act. In the five years' experience under the Consumer Sales Practices Act, there have been many practices which are "unfair" but not necessarily "deceptive." Numerous consumer complaints have been received regarding practices which fall within this

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1. OHIO REV. CODE ANN. §§ 1345.01-.13 (Page 1972) (amended by Am. Sub. H.B. 681, note 6 *infra*) (current version at Page Supp. 1978).

2. *Id.* § 1345.01(D). *Id.* § 1345.01(A) defines consumer transaction as:

> [a] sale, lease, assignment, award by chance, or other transfer of an item of goods, a service, franchise, or an intangible, except those transactions between persons, defined in sections 4905.03 and 5725.01 of the Revised Code, and their customers, or between attorneys or physicians and their clients or patients, to an individual for purposes that are primarily personal, family, or household, or solicitation to supply any of these things.

3. *Id.* § 1345.01(C). "Supplier" is the term of art used by the Act to designate a businessman selling in the market.

4. For a review of recent Ohio decisions focusing on the deceptive act or practice clause of the Act, see Brown v. Lyons, 43 Ohio Misc. 14 (C.P. Hamilton County 1974); Brown v. Town and Country Sales, Inc., 43 Ohio App. 2d 119, 334 N.E.2d 488 (1974); Brown v. Just-Good Meats Inc., No. 73-CI-419 (C.P. Trumble County, Mar. 18, 1974); Brown v. Spitzer Ford, Inc., No. 74-931,755 (C.P. Cuyahoga County, Mar. 25, 1977); Brown v. Joe Schott Chevrolet, Inc., No. A-7510051 (C.P. Hamilton County, April 29, 1976); Creeger v. Betz, No. 7801 (Ct. App. Lucas County, Dec. 27 1974); Clayton v. McCary, 426 F. Supp. 248 (N.D. Ohio 1976).

For a review of recent Ohio decisions focusing on the unconscionable act or practice clause of the Act, see Brown v. Lyons, 43 Ohio Misc. 14 (C.P. Hamilton County 1974); Santiago v. S.S. Kresge Co., 2 Ohio Op. 3d 54 (C.P. Cuyahoga County 1976); Brown v. Cole, No. 75-579 (C.P. Richland County, Jan. 18, 1976); Brown v. Banks, No. 944,618 (C.P. Cuyahoga County, Mar. 15, 1976); Bennett v. Tri-State Collection Serv., No. 940,002 (C.P. Cuyahoga County, Aug. 24, 1976).

category [yet no enforcement machinery presently exists for dealing with it].[5]

The Ohio Legislature responded to this call for consumer protection by enacting House Bill 681[6] to cure the deficiencies in the 1972 Act. H.B. 681 widens the field of unlawful business methods to include a prohibition against unfair supplier acts or practices.

Among the most important revisions to the 1972 Act[7] are an authorization of treble damage recoveries,[8] an authorization for award of legal fees to a consumer suing successfully,[9] an elimination of the thirty day notice period before suit,[10] and a prescription for court ordered civil penalities.[11] These remedial provisions will provide Ohio courts with increased power to supervise fraudulent suppliers. A more thorough examination of these revisions follows a brief explanation of the legislative history surrounding the issue of unfairness.

The Uniform Consumer Sales Practices Act,[12] developed by the National Conference of Commissioners on Uniform State Laws, was recommended to the General Assembly in 1971 by Ohio's Joint Committee to Study Consumer Problems and Protection.[13] This model

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5. *Testimony of the Attorney General William J. Brown in support of H.B. 681 by Robert S. Tongren, Chief, Consumer Frauds & Crime Section, before the Senate Judiciary Committee* at 3 (March 15, 1978) (copy on file in the Ohio Legislative Service Commission Library) [hereinafter cited as Senate Testimony]. Brown offered the following example of an unfair supplier practice not reached by the Act:

> The "as is" used car sale scheme has been frequently utilized in Ohio. A consumer purchases a car "as is" from the dealer, drives it a short distance until it's inoperable because of bad brakes or some other major defect. The consumer stops making payments and the dealer repossesses the car and collects on the deficiency balance. After making "minor repairs," the dealer sells the car to another unsuspecting consumer, again on an "as is" basis, and the cycle repeats itself.

6. Am. Sub. H.B. 681, 112th Gen. Assembly, Ohio (1977) (codified at OHIO REV. CODE ANN. §§ 1345.02, .05-.09, .11-.12 (Page Supp. 1978) (effective Aug. 11, 1978).

7. *Id.*

8. *See* OHIO REV. CODE ANN. § 1345.09(B) (Page Supp. 1978).

9. *See id.* § 1345.09(F)(1).

10. *See id.* § 1345.06(F)(2). This thirty day grace period was thought to unnecessarily delay the courts from administering relief to the injured consumer.

11. *See id.* § 1345.07(D). This represents a major alteration from the previous authority to enjoin only unlawful conduct by suppliers. The injunctive remedy permitted unscrupulous suppliers to have a first "free bite" in exploiting the innocent Ohio purchaser.

12. *See* FTC *Fact Sheet—State Regulation to Combat Unfair Trade Practices* (April 1978) [hereinafter referred to as FTC *Fact Sheet*] (copy on file in the Ohio Legislative Service Commission Library), which attests to the fact that the Act, or a variation thereof, has been adopted in seven jurisdictions: District of Columbia, Kansas, Michigan, New Mexico, Ohio, Utah, and Nebraska.

13. The purpose behind this recommendation was to develop laws that would be similar in different state jurisdictions so that suppliers would not be burdened with

legislation formed the basis of the first comprehensive consumer protection law enacted in Ohio in 1972.[14]

The General Assembly, in adopting the Ohio Consumer Sales Practices Act, disapprove of the approach taken by a majority of other states who modeled their laws on the Federal Trade Commission Act.[15] The FTC Act, which proscribes "[u]nfair methods of competition and unfair or deceptive acts or practices,"[16] was rejected by Ohio's General Assembly in favor of legislation which prohibited deceptive practices but remained silent on the issue of unfairness.

The question of unfair supplier conduct was brought before the Ohio Legislature in 1975, in the form of Senate Bill 156. The bill sat in the Rules Committee as the session ended and was never brought to a vote on the Senate floor. Certain political realities made the bill unattractive for passage in 1976.[17]

The following FTC standards were set out in S.B. 156 to define an unfair or deceptive act or practice:

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havng to comply with a variety of different state standards. Tongren, *The Development of Consumer Protection in the Ohio Attorney General's Office,* 37 OHIO ST. L.J. 581, 584 (1976) [hereinafter referred to as Tongren].

14. Tongren, *supra* note 13, at 585.

15. 15 U.S.C. §§ 41-58 (1976). *Testimony of the Attorney General William J. Brown in support of H.B. 681 by Robert S. Tongren before the House Judiciary Committee* (June 22, 1977) (copy on file in the Ohio Legislative Service Commission Library) [hereinafter cited as House Testimony]. His testimony states, "Thirty-one state statutes presently include prohibitions against unfair methods of competition and unfair or deceptive acts or practices." *Id.* at 3.

16. 15 U.S.C. § 45 (1976). The Wheeler-Lea Amendment, Pub. L. No. 75-447, § 3, 52 Stat. 111 (1938) (codified at 15 U.S.C § 45 (1976)) amended the Federal Trade Commission Act, P.L. No. 63-203, § 5, 38 Stat. 719 (1914) which previously had disallowed unfair methods of competition between businessmen only. The Amendment requires that consumers be protected against unfair methods of competition and unfair or deceptive acts or practices. The House Report sets forth the Amendment's primary purpose: "This amendment makes the consumer who may be injured by an unfair trade practice, of equal concern, before the law, with the merchant or manufacturer injured by the unfair methods of a dishonest competitor." H.R. REP. NO. 1613, 75th Cong., 1st Sess. 3 (1937). *See also* S. REP. NO. 1705, 74th Cong., 2d Sess. 2-3 (1936).

17. Interview with Robert S. Tongren, Chief, Ohio Consumer Frauds & Crimes Section, Ohio Attorney General's Office, in Columbus, Ohio (Nov. 10, 1978). Among other things, S.B. 156, 111th Gen. Assembly, Ohio (1975), attempted to include real estate transactions within the field of activity subject to the unfairness standard. This presumably caused a strong lobbying effort by an industry not previously subject to the statute's prohibitions which perhaps helped to insure the bill's failure. S.B. 156 was also introduced during a period when the Assembly and the Attorney General's Office were actively concentrating on S.B. 157, 111th Gen. Assembly, Ohio (1975). The Attorney General's Office placed its major effort in 1975 and 1976 behind passing Am. Sub. S.B. 157: The Pre-Paid Entertainment Contracts Act, OHIO REV. CODE ANN. §§ 1345.41-.50 (Page Supp. 1978), and left S.B. 156 for deliberation in a succeeding year. *See* Tongren, *Ohio's Newest Consumer Protection: The Pre-Paid Entertainment Contract Act,* 10 AKRON L. REV. 731 (1977).

(1) engaging in conduct which creates confusion or misunderstanding;[18]

(2) engaging in the use of threats, coercion, harassment, or other similar conduct to induce the purchase of, or payment for a consumer transaction;[19]

(3) engaging in conduct which is immoral, unethical, oppressive, or unscrupulous;[20]

(4) confusing or impeding a consumer's ability to make an economically rational choice with respect to a consumer transaction.[21]

These four requirements were further supplemented by S.B. 156's additional criteria for assessing the reasonableness of a supplier's representation:

> A representation of fact by a supplier is unfair and deceptive unless at the time the supplier makes the representation the supplier has a reasonable basis for believing that the representation is true. A reasonable basis shall consist of information within the supplier's actual knowledge which is of such reliability and validity to justify a reasonable and prudent supplier acting in good faith in believing that the representation is truthful, complete and applicable to the subject of the consumer transaction.[22]

S.B. 156 reflected an effort on the part of the Ohio Legislature to incorporate specific FTC standards on unfairness into the statutory provisions of the Consumer Sales Practices Act.[23] The crucial groundwork for development of its successor bill, H.B. 681, was laid by this preliminary effort.[24]

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18. *See* Uniform Deceptive Trade Practices Acts, *e.g.*, ILL. ANN. STAT. ch. 121½, §§ 311-317 (Smith-Hurd Supp. 1978); 48 IDAHO CODE §§ 602-619 (1977). This is a standard debt collection type of prohibition.

19. Dorfman v. FTC, 144 F.2d 737 (8th Cir. 1944).

20. FTC v. Sperry & Hutchinson Co., 405 U.S. 233 (1972).

21. Pfizer, Inc., FTC Dkt. 8819, TRADE REG. REP. (CCH) ¶ 20,056 (1972). In *Pfizer,* the unfairness charge rested on the proposition that it is an unfair practice to make advertising claims without having first conducted well controlled studies or tests sufficient to ensure the credibility of the statements made. The court therein concluded that it was unfair to make an affirmative product claim without a reasonable basis for making the claim. An unfair product claim imposed upon the consumer the unavoidable economic risks that the product might not perform as advertised. A reasonable basis for making such a claim is a question of fact involving: (1) the type and specificity of the claim, (2) possible consequences of a false claim, (3) the degree of reliance by consumers, and (4) the types and accessibility of evidence adequate to form a reasonable basis for making the claim.

22. S.B. 156, 111th Gen. Assembly, Ohio (1975).

23. The Senate Judiciary Committee later refused to pass on S.B. 156 until the fourth criterion (impeding a consumer's ability to make an economically rational choice with respect to a consumer transaction) had been extracted from the bill.

24. Interview with Tongren, *supra* note 17. H.B. 681 followed the practice adopted under S.B. 156 of excluding real estate transactions under the provisions of this amendment. It was simply felt that inclusion might cause the bill to fail. *Id.*

II. ANALYSIS

A. *H.B. 681—An Unfairness Doctrine*

The FTC first articulated the unfairness doctrine in 1964.[25] The standards which the commission considers in determining whether a practice is unfair are:

> (1) whether the practice, without necessarily having been previously considered unlawful, offends public policy as it has been established by statutes, the common law, or otherwise . . .;
> (2) whether it is immoral, unethical, oppressive, or unscrupulous;
> (3) whether it causes substantial injury to consumers . . . .[26]

The United States Supreme Court cited these standards with approval in *Federal Trade Commission v. Sperry & Hutchinson Co.*[27] Although this 1972 decision dealt with curbing unfair supplier acts or practices in interstate commerce,[28] it provoked Ohio to restructure its consumer protection statutes to incorporate a similar doctrine on unfairness.

The unfairness criteria adopted in H.B. 681 are nearly identical to those proposed by S.B. 156 in 1976. The distinction between the bills is that H.B. 681 words its test of unfairness so that it is not limited exclusively to the specific FTC criteria suggested in S.B. 156. This flexibility was accomplished by incorporating a clause into the bill stating that an Ohio "court shall give due consideration and great weight to federal trade commission orders, trade regulation rules and guides, and the federal courts' interpretations of subsection 45(a)(1) of the 'Federal Trade Commission Act' . . . as amended."[29] This subsection of H.B. 681 reflects the General Assembly's concern that Ohio courts be required to examine FTC precedent regardless of whether its develop-

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25. FTC Trade Regulation Rule for the prevention of *Unfair or Deceptive Advertisng and Labeling of Cigarettes in Relation to the Health Hazards of Smoking,* 29 Fed.Reg. 8324 (1964).

26. *Id.* at 8355.

27. 405 U.S. 233, 244-45 (1972).

28. Prior to 1975, the commission's jurisdiction was limited to practices in commerce. Congress, by passing the Magnuson-Moss Warranty—Federal Trade Commission Improvement Act § 202(a), 15 U.S.C. § 57(A) (1976), provided the FTC with jurisdiction over interstate commerce as well as commerce affecting interstate commerce. Arguably the FTC now has jurisdiction over conduct solely in Ohio. Due to its limited resources, however, it is impracticable to expect that the FTC will pay much attention to a small business-man operating in Ohio. The FTC would normally get involved only where there is a major manufacturing or retail concern which is substantially involved in interstate commerce. Interview with Tongren, *supra* note 17.

29. OHIO REV. CODE ANN. § 1345.02(C) (Page Supp. 1978). This division offers guidance to Ohio courts in interpreting what the General Assembly meant when they prohibited unfair and deceptive acts or practices.

ment is drawn from interpretations of state "mini-FTC acts"[30] or from federal court decisions interpreting subsections of the full FTC text. An Ohio judge is not bound by what the FTC considers an unfair act or practice; he need only consider the merits of the FTC precedent in deciding the consumer's complaint.[31]

B. Rule-Making Authority

The Ohio Attorney General's Office already had authority to develop state trade regulation rules consistent with the underlying purposes of the 1972 Act.[32] Section 1345.05(B)(2) of the Consumer Sales Practices Act has further qualified that authority by requiring that "in adopting, amending, or repealing substantive rules, . . . due consideration and great weight shall be given to federal trade commission . . . trade regulation rules . . . ."[33] The goal is to increase the probability of state uniformity with FTC rule guidelines. The Attorney General's Office has nevertheless developed several innovative rules of its own,[34] both in areas where the FTC has not chosen to intervene[35] as well as in

30. Mini-FTC acts are state consumer statutes which have adopted a considerable amount of their language from the FTC Act.

31. Members of the General Assembly were concerned that section 1345.02 might possibly be found unconstitutional, since it was felt by some as representing an unlawful delegation of legislative authority to the FTC. Since Ohio courts are only required to examine available FTC precedent, however, and are not required to apply it when they feel its use would be inappropriate, there is no legitimate claim for unlawful delegation. Interview with Tongren, *supra* note 17.

32. Am. Sub. S.B. 221, 112th Gen. Assembly, Ohio (1977). Prior to the Attorney General's acquisition of rule-making authority in 1977, the Ohio Department of Commerce used its rule-making power to develop twelve rules which defined with reasonable specificity acts or practices which are deceptive in nature. These substantive rules were adopted by the Department of Commerce pursuant to division 1345.05 (B) and Chapter 119 of the Revised Code. *See* Ohio Director of Commerce Rule No. 109: 4-3-02 *Exclusions and Limitations in Advertisements* (effective May 1, 1975); 109: 4-3-03 *Bait Advertising* (effective June 5, 1973); 109: 4-3-04 *Use of Word "Free" Etc.* (effective June 5, 1973); 109: 4-3-07 *Deposits* (effective June 5, 1973); *New For Used* (effective June 5, 1973); 109: 4-3-09 *Failure to Deliver/Substitution of Goods* (effective June 5, 1973); 109: 4-3-12 *Price Comparisons* (effective August 1, 1975).

33. This provision in H.B. 681 improves the likelihood that Ohio rules will not be preempted by conflicting FTC rule guidelines. For a discussion of the issue of preemption, see *Revisions in Ohio's Door to Door Sales Law,* 48 OHIO B. 387 (1975).

34. OHIO REV. CODE ANN. § 1345.05(B)(2) (Page Supp. 1978) does not say that every rule which the FTC has adopted is automatically a rule in the State of Ohio. The rule-making authority here in Ohio must explicitly adopt the FTC rules in order to have them enforceable under the Consumer Sales Practices Act. Therefore, this implies that the Attorney General will occasionally choose to develop his own rules rather than rely totally on FTC directives. Interview with Tongren, *supra* note 17.

35. *See* Ohio Director of Commerce Rule No. 109: 4-3-14 *Insulation* (1978). The FTC has not yet enacted a rule dealing with insulation, but has only come forth with a proposal. In complying with the requirements of section 1345.05(B)(2), the first Ohio proposed rule on insulation gave due consideration and great weight to the FTC pro-

areas where existing FTC guidelines have not been sufficiently specific in curbing the problems associated with various forms of supplier misconduct.[36] The Attorney General, through his rule-making power, now can correct shortcomings in state consumer protection statutes without having to first convince the legislature that changes ought to be made.

C. *Authority to Investigate*

Following the 1972 enactment of the Ohio Consumer Sales Practices Act, a political debate developed over the extent of authority to investigate and institute actions under this statute. The 1972 Act split that authority between the Department of Commerce and the Office of the Attorney General:[37] "If, by his own inquiries or as a result of complaints, the director of commerce has probable cause to believe that a supplier has engaged . . . in an act or practice [in volation of the Act] . . . he may request the Attorney General to investigate."[38] Four years later in *Brown v. Bill Garlic Motors, Inc.*,[39] the court interpreted

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posal. As a result of later testimony from industry and consumers, it was determined that the FTC proposal was seriously inadequate. As a consequence, the present Ohio rule on insulation differs from the FTC proposal in assessing what constitutes an unlawful supplier act in the labeling, representing, and contracting of insulation. Interview with Tongren, *supra* note 17.

36. *See* Ohio Director of Commerce Rule No. 109: 4-3-05 *Repairs and Services* (effective June 5, 1973; rescinded Sept. 28, 1978). The 1973 *Repairs and Services* rule required suppliers involved in repairs to provide advance written estimates to each customer when the repair costs more than twenty-five dollars. If for any reason the estimate was not provided, it constituted a violation of the statute, section 1345.09(B). Because of several impractical aspects of the rule, the Attorney General amended it to provide that in the case of repairs costing more than twenty-five dollars, the supplier must provide the consumer a form upon which to make the choice of a written estimate, oral estimate, or no estimate. In addition, the supplier must post a sign in his facility informing the consumer of his rights to choose the form of his estimate. *See also* Ohio Director of Commerce Rule No. 109: 4-3-13 *Motor Vehicle Repairs or Services* (effective 1978).

37. *See* OHIO REV. CODE ANN. § 1345.05 (Page 1972). The Department of Commerce was basically the administrator of the statute. It engaged in public education, referred complaints to the Attorney General, held public hearings on industry abuses, and did some investigation of substantive rules. Interview with Tongren, *supra* note 17.

38. *See* OHIO REV. CODE ANN. § 1345.06(A) (Page 1972). H.B. 681 has amended this provision to state that the Director of Commerce needs reasonable cause for believing that a supplier has engaged or is engaging in an act or practice in violation of Chapter 1345 in order to request the Attorney General to investigate. H.B. 681 has also added the following language to § 1345.06(A): "If by his own inquiries or as a result of complaints, the Attorney General has reasonable cause to believe that a person has engaged or is engaging in an act or practice that violates Chapter 1345 of the Revised Code, he may investigate."

39. No. 40780 (C.P. Huron County, Feb. 4, 1976).

this provision in conjunction with section 1345.07 (A) and concluded that the Attorney General did have independent authority to investigate complaints arising under the 1972 statute. H.B. 681 has reformed the statutory language in both of these provisions to comport with this judicial interpretation.[40]

H.B. 681 has also broadened the discretionary role of the Attorney General in the area of investigation and enforcement. The statute now gives the Attorney General several strategies with which to supervise unlawful supplier conduct. He may afford a supplier an opportunity to cease and desist from any suspected violation; he may suspend his investigation during the time period that he permits the supplier to cease and desist; he may terminate an investigation upon acceptance of a written assurance of voluntary compliance from a supplier who is suspected of a violation; or he may reopen an investigation terminated by acceptance of voluntary compliance if he believes further proceedings are in public interest.[41]

One troublesome issue recently addressed by the Ohio Court of Appeals is the procedural question of the Attorney General's authority to investigate consumer claims arising under the Consumer Sales Practices Act. The decision reached in *Brown v. Spitzer-Ford, Inc.*,[42] effectively assures that the Attorney General may investigate consumer claims as well as file lawsuits without first giving the supplier thirty days notice as required in some cases by section 1345.06.

D. Reasonable Attorney Fee Clause

Under the 1972 provisions of the Consumer Sales Practices Act, individual Ohio consumers were permitted to bring private lawsuits to enforce their statutory rights under the Act.[43] During the past five years, however, relatively few private lawsuits were brought by con-

40. *See* OHIO REV. CODE ANN. § 1345.06(A) (Page Supp. 1978). Pertinent divisions of section 1345.06 further provide the Attorney General subpoena power to investigate cases on his own in addition to cases referred to him by the Department of Commerce. Divisions of section 1345.07 state that the Attorney General may bring a suit in the public interest based on complaints, his own inquiries, or referrals to him by the Department of Commerce. The sole requirement is that he establish a reasonable cause for believing that a supplier has engaged in or is actively engaging in acts or practices in violation of Chapter 1345.

41. OHIO REV. CODE ANN. § 1345.06(F)(1), (2) (Page Supp. 1978). Prior to the amendment by H.B. 681, section 1345.07(A) read as follows: "The Attorney General may, and in consumer transaction cases referred to him by the Director of Commerce, shall bring an action to obtain declaratory relief."

42. *See* note 55 *infra*. No. 37802 (C.P. Cuyahoga County, Dec. 7, 1978). The following decision also involved an issue of pre-suit notification: Brown v. Halpert Chrysler-Plymouth, Inc., No. 74-932, 573 (C.P. Cuyahoga County, Feb. 23, 1977).

43. *See* OHIO REV. CODE ANN. § 1345.09(A) (Page 1972).

sumers.[44] This is partly because the 1972 Act failed to authorize reimbursement of reasonable attorney fees.[45]

In order to help insure enforcement, the bill now authorizes recovery of legal fees by a consumer who sues successfully.[46] The addition of this fee clause is expected to encourage consumers who could not otherwise afford the services of a private attorney, to seek out this assistance in the future.[47] This increased incentive to private litigants should lessen the degree to which enforcement depends on the Ohio Attorney General's Office.[48] Robert Tongren, speaking for the Attorney General's Office, noted the adoption of this reimbursement clause has improved the attractiveness of private attorney counselling in this area of consumer litigation:

> When the Attorney General receives a consumer complaint which could best be characterized as a dispute of fact violation, the state consumer agency lacks sufficient available resources for developing an enforcement action based on the nature of this complaint. As a consequence, we tell the consumer to consult his local attorney should he or she so desire to press the claim further. The whole idea behind including a reimbursement fee clause in H.B. 681 is to develop knowledge in the legal community that attorneys can in fact represent these clients with a full expectation that they will be compensated for their efforts. In effect, we have attempted to encourage the development of the concept of private attorneys general.[49]

H.B. 681 secures the reimbursement of reasonable attorney fees whenever private plaintiffs successfully establish that a supplier has

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44. House Testimony, *supra* note 15, at 4. Brown identified a number of contributing factors which served to discourage consumers from entertaining a private lawsuit. (1) Most consumers simply could not afford an attorney when their claim fell anywhere between five hundred and one thousand dollars. (2) The expense attributed to paying attorney's fees was simply too burdensome for the typical consumer, especially when the alleged violation was marred by several disputes of fact. *Id.* at 4-5.

45. *Id.* "The Unfair Trade Practices and Consumer Protection Law, developed by the Federal Trade Commission and recommended as state legislation by the Council of State Governments, authorizes a court to award reasonable attorneys' fees and costs in private actions brought under the law." *Id.* at 5.

46. *See* OHIO REV. CODE ANN. § 1345.09(F)(2) (Page Supp. 1978). Section 1345.09(F)(1) also provides that the court may award a supplier reimbursement for his attorney's fees when a consumer files or maintains an action that is groundless and the consumer files or maintains an action in bad faith.

47. House Testimony, *supra* note 15, at 4. Brown noted the following common problem of consumers under the 1972 Act: since only a few consumers can afford an attorney to act in their individual behalf, when a consumer loses from five hundred to a thousand dollars to a ruthless supplier, there is no practical remedy available to the complainant for redressing that wrong. *Id.*

48. *Id.* at 5-6.

49. Interview with Tongren, *supra* note 17.

knowingly committed a violation under the statute.[50] To establish a knowing vilolation, the plaintiff must show that the supplier made a representation for which he had no basis in fact.[51]

E. Multiple Damage Recoveries

To further encourage consumers to pursue just claims, H.B. 681 eliminates the 1972 provision which limited monetary recoveries to the actual damages arising out of an alleged violation.[52] The statute now authorizes the court to award injured consumers either treble damages or a two hundred dollar minimum recovery from the supplier who violates a rule adopted under the Act by the Attorney General or a ruling rendered under the 1972 Act.[53] Multiple damage awards are commonly used to encourage private plaintiffs to pursue legal claims.[54]

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50. OHIO REV. CODE ANN. § 1345.09(F)(2) (Page Supp. 1978). Interview with Tongren, *supra* note 17:

> Knowing does not mean, "I know what the law is yet I still intend to violate the law." As pointed out in the case of Brown v. Bredenback, 2 Ohio Op. 3d 286, 286 (C.P. Franklin County 1975), intent to deceive is not a necessary element of a violation of the Consumer Sales Practices Act. However, it remains to be seen whether the Ohio Judiciary will adhere to this lenient test for proving knowledge or intent when the consumer action focuses upon an allegation of unfair supplier conduct. At present, there remains a real uncertainty as to the standard of proof required by plaintiff's attorney in order to prove a knowing violation under this unfairness rule. The definition of knowledge as defined in section 1345.01(E) provides, at present, the most logical argument available to private attorneys attempting to show the standard of knowledge required to prove a knowing violation. Section 1345.01(E) defines knowledge as actual awareness, but such knowledge may be inferred where objective manifestations indicate that the individual involved acted with such knowledge.

Interview with Tongren, *supra* note 17.

51. *See* Brown v. Bredenback, 2 Ohio Op. 3d 286, 287 (C.P. Franklin County 1975). A deceptive supplier act or practice is one which has the likelihood of inducing a state of mind in the consumer that is not in accord with the facts. The place to look to determine the presence of this deception is in the mind of the consumer and not in the intent of the supplier. The supplier's knowledge or intent at the time he makes the representation is immaterial. Interview with Tongren, *supra* note 17.

52. OHIO REV. CODE ANN. § 1345.09(B) (Page 1972). Courts had previously been authorized to award consumers either actual damages (the cost of the goods or services supplied in the consumer transaction, regardless of the amount of resulting damages) or a one hundred dollar minimum recovery. Brown mentioned the inequitable results occasioned by an "actual damages" clause limitation:

> When a homeowner pays $100 to purchase plumbing or electrical goods or services which are provided improperly or in a deceptive manner and which result in a $1000 loss through water or fire damage, [the consumer can recover] . . . only the $100 cost of the goods or services provided. The consumer loses his $900 since the court is not authorized to require the supplier to pay for the total damages which resulted from his deception.

House Testimony, *supra* note 15, at 6.

53. OHIO REV. CODE ANN. § 1345.09(B) (Page Supp. 1978).

54. FTC Fact Sheet, *supra* note 12. Forty-two jurisdictions presently have consumer legislation which authorizes a court to award double, treble, or punitive

F. *Revocation of Grace Period Clause*

According to at least one 1977 court decision[55] an Ohio court could not grant restitution to consumers even though a claim referred to the Attorney General by the Director of Commerce required immediate injunctive relief because of egregious violations of the law, unless the violating supplier had been notified to desist from the practice at least thirty days in advance of the legal action. Because of this thirty day grace period, swift judicial action was not available in many cases where relief was necessary. This rule also allowed suppliers additional time to continue their unlawful conduct and cause more financial injury to customers.[56] To alleviate this problem, H.B. 681 now permits the Attorney General to commence an action without thirty days advance notice to the supplier.[57]

G. *Civil Penalties*

"In an attempt to encourage voluntary compliance with the Consumer Sales Practices Act and to require violators, rather than Ohio taxpayers, to fund the state's consumer protection effort," courts are now authorized, in their discretion, to impose civil penalties against suppliers who violate the law.[58] The addition of section 1345.07(D)

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damages. In his testimony before the Senate Judiciary Committee, Tongren mentioned examples of Ohio legislation which include provisions for multiple damage recoveries:

> Section 319.58 of the Revised Code authorizes the assessment of double damages and costs of suit against any person who uses any weights, measures or other instruments of measurement which do not conform to state standard. Section 4905.61 of the Revised Code provides for treble damages against a public utility for violations of Ohio's public utilities law. The General Assembly recently passed Sub. S.B. 78, which authorizes treble damages in cases involving odometer rollbacks.

Senate Testimony, *supra* note 5, at 9.

55. Brown v. Spitzer-Ford, Inc., No. 74-931,755 (C.P. Cuyahoga County, Mar. 25, 1977).

56. *See* House Testimony, *supra* note 15, at 8. This rule also gave "the supplier sufficent time to conceal his deceptively earned profits for the purpose of avoiding the payment of restitution even when ordered to do so by a court." *Id.*

57. *See* OHIO REV. CODE ANN. § 1345.06(F)(2) (Page Supp. 1978).

58. House Testimony, *supra* note 15, at 8. Under the 1972 version of the Consumer Sales Practices Act, there was no provision which spoke to the issue of civil penalties. To quote from William J. Brown's testimony, the injunctive remedy which existed under the 1972 Act

> is merely a slap on the wrist [to the violating supplier] and allows the violator the freedom to "have the first bite free."
>
> Violators are never required in public enforcement proceedings under the Act to pay any monetary penalty for their violations of the law. The risk of sanctions for violating the Consumer Sales Practices Act is therefore slight when the supplier can continue to profit through his deception.

Id. at 8-9.

now allows a court to impose a penalty of up to twenty-five thousand dollars when a supplier's conduct had previously been prohibited by a substantive rule or prior court determination.[59] Use of the civil penalty makes it more expensive for the supplier to violate the law than to comply with its provisions.[60] This added feature of H.B. 681 is a strong expression of the legislature's determination to crack down on violators who blatantly disregard the state's consumer protection laws.

H. Procedural Requirements

H.B. 681 establishes several new procedures[61] which must be followed by the private attorney in the process of prosecuting an alleged "consumer transaction" violation. When an individual action for declaratory relief, or injunction or a class action is filed, section 1345.09(E) requires that the clerk of courts mail a copy of the complaint to the Attorney General.[62] There are two reasons for incorporating this procedure into the Act. First, when a lawsuit is brought under the Consumer Sales Practices Act, the Attorney General has a statutory right to intervene.[63] Therefore, the statute includes a procedural mechanism designed to provide the Attorney General with notice. Secondly, in certain instances the Attorney General lacks sufficient resources to directly intervene, yet he may still want to intervene from an amicus standpoint. This latter approach has become an important mechanism often used by the Attorney General in airing his legal opinions on the subject of unfair or deceptive supplier conduct.[64]

Section 1345.09(E) also requires that the clerk of courts send the Attorney General a copy of the opinion following an entry of final judgment by the court. The Attorney General's Office must keep these deci-

59. OHIO REV. CODE ANN. § 1345.07(G) (Page Supp. 1978) further provides that the payment of civil penalties will be allocated in the following manner: "[O]ne-fourth of the amount to the treasurer of the county in which the action is brought and three-fourths to the treasurer of state to the credit of the general revenue fund."

60. FTC *Fact Sheet, supra* note 12. Twenty-nine jurisdictions presently have consumer protection statutes with civil penalty provisions.

61. OHIO REV. CODE ANN. § 1345.11(C)(1)-(3) (Page Supp. 1978). These three non-compulsory provisions explain the powers and duties a receiver may exercise with the approval of the court when an enforcement action is brought under the Consumer Sales Practices Act.

62. This means that when the lawyer time-stamps the copy of his client's complaint, he is expected to give the clerk one more copy. Interview with Tongren, *supra* note 17.

63. *See, e.g.,* Santiago v. S.S. Kresge Co., No. 948,069 (C.P. Cuyahoga County, Jan. 15, 1976). From a resource allocation standpoint, intervention in most cases will generally occur only in the case of a class action suit. Interview with Tongren, *supra* note 17.

64. *See, e.g.,* Weaver v. J.C. Penney, 53 Ohio App. 2d 165, 373 N.E.2d 383 (1977).

sions in a public information file, in order to establish a body of legal precedent helpful to attorneys representing the supplier in actions initiated under the Consumer Sales Practices Act.[65]

III. CONCLUSION

The principle policy consideration triggering the enactment of H.B. 681 was a concern that the public and private rights and remedies under the Consumer Sales Practices Act were insufficient to provide sound marketplace protection to the Ohio consumer. Under the original version of the Act, consumers lacked explicit protection against business practices which were clearly unfair but not necessarily deceptive. As a direct result of this defect in the statute, suppliers were legally free to practice various forms of fraud or trickery upon the innocent Ohio purchaser. This defect has been cured by adoption of H.B. 681.

The impact of H.B. 681 is identified most distinctively by comparing the 1972 Ohio Consumer Sales Practices Act to the present version as amended by House Bill 681. Under the language of the original 1972 Ohio statute,[66] deceptive and unconscionable supplier acts or practices referred solely to sections 1345.01 through 1345.13 of the Act. Following adoption of the amendments in H.B. 681, unfair, deceptive, and unconscionable acts or practices now refer to the entire scope of Chapter 1345. This revision insures that more of Ohio's consumer protection laws will impose these stricter standards on supplier conduct.[67] This expanded protection against supplier misconduct further mandates that the specific additional remedies of civil penalties and treble damages also be incorporated into other statutory provisions which supplement chapter 1345.

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65. OHIO REV. CODE ANN. § 1345.09(E) (Page Supp. 1978). Attorneys representing suppliers need this public information file because rule violations as well as conduct previously determined improper by a court and placed on file with the Attorney General creates the potential for (1) application of section 1345.07(D) civil penalties or (2) in the case of a private action, application of section 1345.09(B) treble damages or two hundred dollar minimum recovery. Of course, this case law repository would also be of benefit to plaintiff's attorney.

66. Ohio courts have generally given a liberal interpretation to the language of the 1972 Act in an effort to comply with the legislature's concern for promoting an honest marketplace. The court decided in Liggins v. May Co., 44 Ohio Misc. 81 (C.P. Cuyahoga County 1975) that the legislature intended the statute to apply from the initial contract between the supplier and the consumer until the relationship had fully terminated. In Brown v. Market Dev., Inc., 41 Ohio Misc. 57, 60 (C.P. Hamilton County 1974) the court gave another broad reading to the 1972 Act, deciding it was meant to apply to all Ohio suppliers engaged in consumer transactions, regardless of whether they sold their goods in Ohio or elsewhere.

67. *See* OHIO REV. CODE ANN. § 1345.41-.50 (Page Supp. 1978).

The enactment of H.B. 681 has raised a number of questions of concern to both consumers and suppliers: (1) To what extent will courts rely on FTC precedent in arriving at a standard for supplier unfairness in Ohio? (2) Following adoption of this reasonable attorney fee clause, will there be a measurable increase in the volume of consumer suits brought? (3) Will the courts react to the adoption of a civil penalty clause by applying it to each and every supplier violation, or will they apply it only to certain specific violations? (4) How will the Attorney General choose to apply his newly acquired rule-making authority? Answers to these questions must wait for the development of experience with the new provisions.

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Code Sections Affected: 1345.02, .05-.09, .11, .12.
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Committees: Judiciary Committee (H & S).

68. Consumers still have access to all remedies developed in conjunction with the 1972 Act. *See* Brown v. The Wonderful World Publishing Co., No. 74 CV-12-4741 (C.P. Franklin County, July 28, 1976); Brown v. Lawyer's Tax Serv., Inc., No. A-7601295 (C.P. Hamilton County, May 17, 1976); Brown v. Miami Vacations, Inc., No. 75-CV-12-5247 (C.P. Franklin County, Aug. 18, 1976); Brown v. Bill Garlic Motors, Inc., No. 40780 (C.P. Huron County, Feb. 4, 1976); Brown v. Joe Schott Chevrolet, Inc., No. A-7510051 (C.P. Hamilton County, Apr. 29, 1976); Brown v. Holmes Bros. Used Car Co., No. 76 CV-08-3226 (C.P. Franklin County, Jan. 12, 1977); Brown v. Home Educ. Serv., Inc., No. 72-256 (C.P. Stark County, Feb. 24, 1976).