

# Protection for Consumers Against Unfair and Deceptive Business Practices in Wisconsin

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## PROTECTION FOR CONSUMERS AGAINST UNFAIR AND DECEPTIVE BUSINESS

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### I. INTRODUCTION

In the past ten years the subject of consumer protection has become a matter of increasing public concern. Studies have concluded that unscrupulous business tactics seriously affect our nation's well being by contributing to social unrest in poverty areas<sup>1</sup> and by causing severe financial distress to consumers.<sup>2</sup> Moreover, such tactics concern legitimate businessmen as well, since money taken by the unethical merchant is money taken from the honest businessman.<sup>3</sup>

Although federal law regulates many consumer transactions, a substantial responsibility for protecting the consumer rests with the states. Traditionally, however, state consumer protection efforts have been largely limited to protection of the public through the use of criminal theft statutes<sup>4</sup> and through the licensing of certain

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1. EDELHERTZ, *THE NATURE, IMPACT AND PROSECUTION OF WHITE COLLAR CRIME* 11 (1970); *REPORT OF THE NATIONAL ADVISORY COMMISSION ON CIVIL DISORDERS* 274 (1968).

2. It has been estimated that several billion dollars are taken from the public each year through consumer fraud — or more than all the auto thefts, burglaries, robberies, embezzlements, larcenies and forgeries combined. MAGNUSSEN AND CARPER, *THE DARK SIDE OF THE MARKETPLACE* 8 (1968); *PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, THE CHALLENGE OF CRIME IN A FREE SOCIETY* 33 (1967).

3. In a message to Congress on February 24, 1971, urging a national attack on consumer fraud, President Nixon declared:

. . . the honest businessman is damaged by fraud and deceptive practices every bit as much as the consumer — and perhaps more. He is subjected to the unfair competition of the unscrupulous businessman, and he loses money. He is subjected to the opprobrium of those who have suffered at the hands of unscrupulous businessmen, and he loses the goodwill of the public. For it is a fact, however unfortunate, that in the area of business especially, the many are commonly judged by the actions of the few.

4. *See, for example*, WIS. STAT. § 943.20 (1)(d) (1971).

trades.<sup>5</sup> These approaches have proved useful in cases involving aggravated fraud or misconduct, but they have constituted an unsatisfactory and inflexible tool in combating the diverse types of deception practiced upon the public today.<sup>6</sup>

In recent years numerous states have taken steps to modernize and streamline state regulation and enforcement against fraudulent and deceptive sales practices. In 1957 the New York Attorney General's Office established the first active consumer fraud bureau<sup>7</sup> with primary reliance on civil, rather than criminal, sanctions. Since that time more than thirty-five other states have established similar programs.<sup>8</sup> In addition, several uniform or model state consumer fraud enforcement laws have been proposed.<sup>9</sup> Although these proposed model laws differ in many respects, they all contemplate the creation of a statewide consumer fraud bureau with the authority to: a) investigate alleged fraudulent and deceptive business conduct, b) seek injunctive relief against deceptive selling practices, and c) obtain court ordered restoration of monies to consumers injured by such practices.

During the past several years Wisconsin has been a focal point in the effort to protect the public from unfair and deceptive business practices. This effort is reflected in the passage of far-reaching legislation, the promulgation of significant new administrative regulations and in aggressive law enforcement against consumer fraud. This article will examine the development and present posture of this new body of law in Wisconsin.

## II. STATUTORY FRAMEWORK

### A. Sections 100.18 and 100.20 - Background

Although sections 100.18 and 100.20<sup>10</sup> have long been the two

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5. Illustrative of a state licensing framework is the Wisconsin Department of Regulation and Licensing which houses some eighteen independent examining and licensing boards.

6. For a discussion of the effectiveness of such approaches see Comment, *Consumer Protection in Michigan: Current Methods and Some Proposals For Reform*, 68 MICH. L. REV. 926, 928-933, 957-966 (1970); and Note, *Translating Sympathy for Deceived Consumers Into Effective Programs for Protection*, 114 U. PENN. L. REV. 395, 419-421, 424-427 (1966).

7. Mindell, *The New York Bureau of Consumer Frauds and Protection — A Review of Its Consumer Protection Activities*, 11 N.Y.L.F. 603 (1965).

8. Lovett, *State Deceptive Trade Practice Legislation*, 46 TUL. L. REV. 724 (1972).

9. These include: The Unfair Trade Practice and Consumer Protection Law (1969) recommended by the Federal Trade Commission; the Model Unfair Trade Practices and Consumer Protection Law (1970) suggested by the Council of State Governments; and the UNIFORM CONSUMER SALES PRACTICES ACT (1971) drafted and approved by the National Conference of Commissioner's on Uniform State Law.

10. WIS. STAT. §§ 100.18 and 100.20 (1971).

principal Wisconsin statutes dealing with unfair and deceptive business practices, they have enjoyed an inactive and somewhat obscure existence until recent years.

Section 100.18<sup>11</sup> was originally enacted in 1913 to prohibit untrue, deceptive or misleading "advertisements."<sup>12</sup> However, the statute was expanded in 1945<sup>13</sup> to cover any "advertisement, announcement, statement or representation" to the public.<sup>14</sup> Other subsections were added both to proscribe certain specific frauds<sup>15</sup> and to set positive standards for certain trades. Administration and enforcement of the statute was placed with the Department of Agriculture.<sup>17</sup> Section 100.20<sup>18</sup> was enacted in 1921<sup>19</sup> to regulate unfair trade practices and unfair methods of competition in business.<sup>20</sup> The Department of Agriculture was provided the authority

11. WIS. STAT. § 100.18(1) (1971) basically provides that:

no person [or] corporation . . . with intent to sell . . . or with intent to induce the public . . . to enter into any contract . . . relating to the purchase [or] sale . . . of any real estate, merchandise, . . . shall make, publish . . . in a newspaper . . . or in the form of a . . . notice, . . . , or over any radio or television station, or in any other way similar or dissimilar to the foregoing, an advertisement . . . or representation of any kind, . . . which contains any assertion . . . which is *untrue, deceptive, misleading*. (Emphasis added.)

12. Wis. Laws 1913, ch. 510. As a result, verbal representations were not within the ambit of the statute. See 14 WIS. OP. ATT'Y. GEN. 367 (1925). The statute was based upon a model advertising law drafted by PRINTERS INK MAGAZINE and subsequently adopted in most states. Because of the source of such laws, they are today commonly known as "Printer's Ink Statutes."

13. Wis. Laws 1945, ch. 399.

14. State v. Automatic Merchandisers of America, Inc., \_\_\_ Wis. 2d \_\_\_, \_\_\_ N.W.2d \_\_\_ (Oct. 1, 1974) held that one person can constitute "the public" for purposes of WIS. STAT. § 100.18(1). The word "public" has been construed under comparable statutes to mean that any person who invites the trade of the general populace in a given area, or who is engaged in his principal business, is dealing with the "public." See Texas State Board of Medical Examiners v. Koepsel, 159 Tex. 479, 322 S.W.2d 609 (1959); People v. Powell, 280 Mich. 699, 274 N.W. 372 (1937); State ex rel. Anderson v. Witthaus, 340 Mo. 1004, 102 S.W.2d 99 (1937); Ford Hydro-Electric Co. v. Aurora, 206 Wis. 489, 240 N.W. 418 (1932); Cawler v. Meyer, 147 Wis. 320, 133 N.W. 157 (1911). In other words, § 100.18(1) does not extend to misrepresentations in connection with a casual or incidental sale of merchandise not related to the business of the seller.

15. For example, bait and switch advertising. WIS. STAT. § 100.18(9) (1971).

16. For example, gasoline retailing. WIS. STAT. § 100.18(6) and (8) (1971).

17. WIS. STAT. § 100.18(7) (1953), which was renumbered § 100.18(11)(a) by Wis. Laws 1969, ch. 425.

18. WIS. STAT. § 100.20(1) (1971) reads as follows:

(1) Methods of competition in business and trade practices in business shall be fair. Unfair methods of competition in business and unfair trade practices in business are hereby prohibited.

19. Wis. Laws 1921, ch. 571. For a review of the stormy events leading to the enactment of this law, see Kellogg, *Czar in Lambskin? Administrative Regulation of Commercial Activities in Wisconsin*, 1965 WIS. L. REV. 133.

20. "Business" is defined as including "any business, except that of banks, savings and loan associations, insurance companies and public utilities." WIS. STAT. § 93.01(13) (1971).

to administratively prohibit unfair business practices by enjoining individual firms through the issuance of special orders<sup>21</sup> and by promulgating general orders<sup>22</sup> applicable to all firms engaged in certain proscribed business conduct. The statute was patterned after section 5 of the Federal Trade Commission Act of 1914<sup>23</sup> and has, therefore, sometimes been referred to as Wisconsin's "Little FTC Act."

Despite the far-reaching scope of these laws, they received little attention for more than forty years. From the outset the Department of Agriculture's priorities and expertise prevented it from effectively regulating unfair and deceptive business practices outside the areas of agriculture and food.<sup>24</sup> Indeed, the Department apparently lacked adequate staff to even deal with clearcut trade practice violations other than to refer them to private agencies or attorneys or to a district attorney.<sup>25</sup> As a result, the potential of sections 100.18 and 100.20 in dealing with unfair and deceptive business practices remained largely untapped and attorneys and judges,<sup>26</sup> not to mention the general public,<sup>27</sup> were largely unaware of the existence of the trade regulation laws as well as the Department of Agriculture's role in enforcing them.

With advent of "consumerism" during the 1960's, the Department of Agriculture's enforcement role in consumer protection matters began to come under attack in two ways. First, attempts were made to change the Department's name to more accurately reflect its trade regulation and consumer protection functions.<sup>28</sup> Secondly, a number of legislative efforts were made to transfer the consumer protection enforcement responsibilities of the Depart-

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21. WIS. STAT. § 100.20(3) (1971).

22. WIS. STAT. § 100.20(2) (1971).

23. 38 STAT. 719 (1914), 15 U.S.C. § 45(a)(1) (1970).

24. Wylie, *The Regulation of Trade Practices by Codes*, 12 WIS. L. REV. 265, 266 (1936).

25. In *Czar in Lambskin?*, *supra* note 19, at 155, the commentator stated that in the event the Department of Agriculture's complaints revealed illegal activity, it would "inform the violator of the applicable statute or order, and advise the complainant to see the local Better Business Bureau, Chamber of Commerce, a lawyer or the district attorney, as the case may be." See also WIS. LEG. BUREAU REPORT, CONSUMER PROTECTION BY THE STATE OF WISCONSIN 4 (1968).

26. *Id.*

27. The public identification of the Department's enforcement role was perhaps most poignantly expressed by a landlady charged with unfair trade practices as follows: "What in the world has Agriculture got to do with houses? We don't grow weeds." Milwaukee Journal, May 21, 1970, § 1, at 1, col. 6.

28. The most common suggestions were to change the name to Department of Agriculture and Commerce or Department of Agriculture and Consumer Affairs. However, all such attempts to change the department's name have failed.

ment to the Attorney General.<sup>29</sup> While the opponents of transferring the Department's enforcement responsibilities to the Attorney General argued that such duties should not be placed with an elected official, the proponents emphasized the need for the involvement of a statewide law enforcement agency to effectively combat consumer fraud.<sup>30</sup> They also contended that the Department of Agriculture's involvement in trade practice enforcement, though perfectly justified in the early twentieth century, had become antiquated and outmoded in our more urbanized society.<sup>31</sup>

The early legislative efforts to transfer the Department of Agriculture's consumer protection enforcement functions to the Attorney General were resisted both by the Department and the business community.<sup>32</sup> In 1961, Governor Gaylord Nelson, with the support of Attorney General John Reynolds, introduced two bills<sup>33</sup> which would have transferred the Department of Agriculture's authority under section 100.20 to the Attorney General. These bills failed as did two similar bills introduced in 1963<sup>34</sup> with the bi-

29. Earlier, in 1951, the legislature did grant the Attorney General the authority to file complaints and appear before the Department in its administrative proceedings. Wis. Laws 1951, ch. 622, creating Wis. STAT. § 100.20(4) (1971). However, this administrative remedy was hardly a major shift of responsibility since the Department of Agriculture retained the power to hear and dispose of complaints filed under this subsection.

30. Typical of this assessment is the comment in Lovett, *supra* note 8, at 735:

Although cooperation between an attorney general and an agriculture department can be reasonably effective, for a number of reasons it is desirable to make the state's attorney general primarily responsible for enforcement of its deceptive practice statutes. An attorney general normally has more legal expertise and greater access to hiring able legal staffs, and he would be more likely to implement reasonably vigorous prosecution under the legislation. A state attorney general will normally emphasize his record in consumer protection enforcement as a major factor with the electorate since his main function is law enforcement and few other responsibilities distract him. In contrast, the typical agriculture department in every state has much more diverse functions, and its primary emphasis, traditions, and habits of thought are likely to be the protection of producer interests, such as farmers, farm co-ops, and food processors, rather than up-to-date representation of urbanized consumer interests. Therefore, a great danger exists that consumer protection enforcement authority placed in a department of agriculture will be much less vigorously and effectively administered.

To the same effect, see Note, *Consumer Protection By the State Attorneys General: A Time For Renewal*, 49 NOTRE DAME LAW. 410,416-417 (1973); COUNCIL OF STATE GOVERNMENTS, CONSUMER PROTECTION IN THE STATES 26 (1970).

31. Until recently, Florida was the only other state that had given its Department of Agriculture primary enforcement authority in consumer fraud matters. In 1973 such authority was removed from that agency and placed with the Attorney General and local state attorneys. Fla. Laws 1973, ch. 73-124.

32. *Czar in Lambskin?* *supra* note 19, at 136.

33. Wis. S.B. 479 (1961 Sess. and Wis. A.B. 555 (1961 Sess.).

34. Wis. S.B. 596 (1963 Sess.) and Wis. A.B. 725 (1963 Sess.).

partisan support of Governor Reynolds, a democrat, and Attorney General George Thompson, a republican. Between 1965 and 1968, Attorney General Bronson LaFollette introduced two consumer bills<sup>35</sup> based upon the Illinois Consumer Fraud Act.<sup>36</sup> These bills would have created a comprehensive consumer fraud law and would have given the Attorney General broad investigative and injunctive authority. Although these bills fared better than previous efforts,<sup>37</sup> they failed nonetheless and tended to create an atmosphere of animosity between the two agencies.<sup>38</sup>

### B. 1970 Consumer Fraud Legislation

In early 1969, Governor Warren Knowles and newly elected Attorney General Robert Warren determined that the existing feud between the Department of Agriculture and the Department of Justice concerning consumer protection matters should be ended. Lengthy negotiations between the agencies resulted in a working agreement<sup>39</sup> which contemplated an integrated complaint processing system, investigation of meritorious complaints by the Department of Agriculture and referral of trade practice law violations to the Department of Justice for commencement of civil proceedings.<sup>40</sup> No understandings were reached at the time with respect to proposed legislation.<sup>41</sup>

It was not long, however, before problems arose under the cooperative agreement between the two agencies. Not only were few complaint files developed into actionable cases under the agreement, but it soon became apparent that the Department of

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35. Wis. A.B. 828 (1965 Sess.) and Wis. S.B. 162 (1967 Sess.).

36. ILL. STAT. ANN. ch. 121 ½ (Smith-Hurd Supp. 1972).

37. Assembly Bill 828 passed the State Assembly 98-0 and narrowly failed in the State Senate by a 17-15 vote.

38. Illustrative of the feelings was the statement of Attorney General LaFollette:

As the chief governmental agency in charge of consumer protection, the Department of Agriculture has been largely ineffective. Because it has important responsibilities to the farmers of Wisconsin, the Department has had neither the money nor the inclination to devote full-time effort to protecting the consumers of our state. In addition, its demonstrated propensity toward business interest has clearly indicated that the statutory inclusion of the duty to protect the consumer along with the duty to regulate and supervise agricultural and industrial activities is no longer justified. . . . *Federal Trade Commission, National Consumer Protection Hearings* 245 (1968).

39. Cooperative consumer protection program agreement between the Wisconsin Department of Justice and the Wisconsin Department of Agriculture, June 27, 1969.

40. *Id.*

41. Letter from Deputy Attorney General Arvid Sather to Deputy Secretary of Agriculture Frederick Griffith, June 20, 1969.

Justice's authority to handle civil proceedings was makeshift and inadequate. The principal consumer protection remedy available to the Attorney General was the public nuisance law,<sup>42</sup> which required the showing of an open, continuous and intentional violation of public law in order to obtain injunctive relief.<sup>43</sup> The other available remedy, revocation of a corporation's authority to do business in the state,<sup>44</sup> possessed equally serious limitations in that it required establishing a "substantial and willful violation."<sup>45</sup> Moreover, actions could only be brought for violations of existing orders issued under section 100.20<sup>46</sup> and the relief available operated as little deterrent to the continuance of the illegal operation under a new corporate guise. Thus, it was painfully clear that the statutory underpinnings of the cooperative agreement prevented its effective implementation.

Because of these underlying statutory deficiencies, Attorney General Warren directed that an in-depth survey be conducted of existing resources, programs and statutes in the consumer fraud field. This survey resulted in an extensive 240 page report<sup>47</sup> which made the following legislative recommendations:

1. Wisconsin should more fully utilize both the flexible regulatory techniques of the Agriculture Department and the law enforcement abilities of the Justice Department. . . .<sup>48</sup>

2. To achieve this goal, the Department of Justice and the District Attorneys should be given the authority to obtain temporary and permanent injunctions in the consumer fraud area. . . .

In conjunction with this injunctive authority:

a) The common law requirement of proof of actual deception or intent to deceive should be eliminated. . . .

b) The Department of Justice should be given broad primary investigative authority. . . .

42. WIS. STAT. § 280.02 (1969).

43. *State v. Texaco, Inc.*, 14 Wis. 2d 625, 111 N.W.2d 918 (1961); *State ex rel. Abbott v. House of Vision-Belgard-Spero, Inc.*, 259 Wis. 87, 47 N.W.2d 321 (1951); *State ex rel. Regez v. Blumer*, 236 Wis. 129, 294 N.W. 491 (1940); *State ex rel. Cowie v. LaCrosse Theaters, Inc.*, 232 Wis. 153, 286 N.W. 707 (1939); *State ex rel. Attorney General v. Theken*, 184 Wis. 42, 198 N.W. 729 (1924).

44. Wis. Stat. § 100.24 (1971).

45. *Id.*

46. *Id.*

47. WISCONSIN DEPARTMENT OF JUSTICE, CONSUMER PROTECTION REPORT (1969).

48. Thus, the conclusion was not that the Department of Agriculture's consumer protection authority be totally removed as earlier bills had proposed, but that its activities be tailored to its role as a regulatory rather than an enforcement agency. This recommendation



c) The Department of Justice should be able to request an order from the court granting restitution to consumers. . . .<sup>49</sup>

On October 10, 1969, a bill<sup>50</sup> sponsored by Attorney General Warren was introduced into the Wisconsin Legislature which contained most of the recommendations of the 240 page report. In addition to providing the Department of Justice and district attorneys broader authority in enforcing sections 100.18 and 100.20, the bill granted the Department of Justice investigative powers in consumer protection matters and removed the Department of Agriculture's authority under section 100.18.<sup>51</sup> The bill passed the Senate 29 to 1<sup>52</sup> but became bogged down in the Assembly after it was referred to the Committee on Agriculture.<sup>53</sup> However, following a public hearing at which the bill received broad support,<sup>54</sup> a compromise bill<sup>55</sup> was worked out. Although the compromise measure actually expanded the Department of Agriculture's authority under sections 100.18 and 100.20<sup>56</sup> it also extended enforcement authority to the Department of Justice and the district attorneys.<sup>57</sup>

was in accord with the conclusion in Comment, *Developments in the Law, Deceptive Advertising*, 80 HARV. L. REV. 1005, 1134 (1967):

The soundest approach might be to utilize both the flexible regulatory techniques of an administrative agency and the law enforcement abilities of an attorney general. An agency invested with rulemaking authority could concentrate on elaborating illegal practices in specific trades under the deceptive practices law and could apply these rules to individual cases through assurances of discontinuance or cease-and-desist orders where these means were sufficient. In more extreme cases, the attorney general could seek more stringent sanctions in the courts, such as injunctions, receivership, or dissolution. Both the agency and the courts could be authorized to order restitution to known victims of the deceptive practice, thus encouraging the submission of complaints from the public. Jurisdictional conflicts between the agency and the attorney general would not be unlikely. But assuming that a reasonably tolerable working relationship developed, a spirit of competition between these two authorities might well stimulate more creative approaches to commercial regulation.

49. WISCONSIN DEPARTMENT OF JUSTICE, SUMMARY OF CONSUMER PROTECTION REPORT 3-5 (1969).

50. Wis. S.B. 701 (1969 Sess.).

51. *Id.*

52. WIS. SENATE JOURNAL 2008 (1969 Sess.).

53. WIS. ASSEMBLY JOURNAL 2547 (1969 Sess.).

54. In addition to the Attorney General, the Governor, the District Attorneys' Association and the Wisconsin Consumers' League supported the bill. A representative of the Federal Trade Commission also strongly endorsed the concept of the bill at the public hearing. The bill was principally opposed by the Department of Agriculture and the Wisconsin Food Dealer's Association.

55. Wis. Assembly Subst. Amend. 1 to Wis. S.B. 701 (1969 Sess.).

56. *Id.* The Agriculture Department was given increased investigative and enforcement authority under newly created subsections (11)(c) and (11)(d) of § 100.18 and newly created subsection (6) of § 100.20.

57. Wis. STAT. §§ 100.18(11)(c) and (d) and 100.20(6).

This version of the bill passed both houses of the legislature in the closing week of the 1969 session, and was signed into law by Governor Knowles on February 12, 1970.<sup>58</sup>

Although the new consumer fraud legislation did not substantively change sections 100.18 and 100.20, it did dramatically strengthen and expand the civil enforcement remedies for violation of those laws. In general terms, the new legislation provided the following remedies:

1. *Injunction.* The Department of Agriculture, the Department of Justice and any district attorney, upon informing the Department of Justice, were authorized to commence actions in Circuit Court to restrain by temporary or permanent injunction any violation of section 100.18.<sup>59</sup> Such actions were required to be commenced within three years after the occurrence of the unlawful act or practice which was the subject of the action.<sup>60</sup> No injunction issued could conflict with any general or special orders of the Department of Agriculture or any federal or Wisconsin statute, rule or regulation.<sup>61</sup> The Department of Agriculture was also granted temporary or permanent injunctive authority for violations of general or special orders issued under section 100.10.<sup>62</sup>

2. *Restitution.* As an ancillary remedy to the injunction, the court could, prior to final judgment, "make such orders and judgments as may be necessary to restore to any person any pecuniary loss suffered because of the acts or practices involved in the action."<sup>63</sup>

3. *Voluntary Assurances.* The Department of Agriculture and the Department of Justice were authorized to accept voluntary assurances of discontinuance of acts or practices alleged to be violations of section 100.18.<sup>64</sup> Violations of such assurances were to be treated as violations of section 100.18.<sup>65</sup>

4. *Civil Forfeitures For Continued Violations.* The Department of Justice and any district attorney were empowered to commence actions to recover civil forfeitures of not less than \$100 nor more than \$10,000 for any violation of an injunction issued

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58. As Wis. Laws 1969, ch. 425.

59. WIS. STAT. § 100.18 (11)(d) (1971).

60. WIS. STAT. § 100.18 (11)(b)(3) (1971).

61. *Id.*

62. WIS. STAT. § 100.20(6) (1971).

63. WIS. STAT. § 100.18(11)(d)(1971). Substantially identical authority was also provided under WIS. STAT. § 100.20(6) (1971).

64. WIS. STAT. § 100.18(11)(e) (1971).

65. *Id.*

under section 100.18 or a general or special order issued under section 100.20.<sup>66</sup> The civil forfeiture remedy supplemented the previously existing criminal remedies<sup>67</sup> by providing stiff monetary penalties without the stigma or the burden of proof of a criminal proceeding.

5. *Investigatory Authority.* The new law gave the Department of Agriculture vastly expanded preliminary investigative powers in consumer protection matters whenever it had "reason to believe" that any person possessed information or documentary material relevant to the enforcement of section 100.18.<sup>68</sup> Additional investigative authority was also provided for violations of orders issued under section 100.20.<sup>69</sup> Although the Department of Justice was given limited investigative authority<sup>70</sup> it could request the Department of Agriculture to exercise its more extensive authority.<sup>71</sup>

6. *Private Remedy.* A private remedy of twice any pecuniary loss, together with costs and reasonable attorneys' fees, was provided for violations of injunctions issued under section 100.18.<sup>72</sup> An identical private remedy had previously existed for violations of special or general orders under section 100.20.<sup>73</sup>

### C. Other State Regulatory Laws

In addition to the trade practice authority of the Departments of Agriculture and Justice under chapter 100, at least ten other state agencies<sup>74</sup> have been vested with substantial regulatory au-

66. WIS. STAT. § 100.26(6) (1971).

67. Under WIS. STAT. § 100.26(3) (1971) any person who intentionally violates a general or special order is punishable by a fine of not less than \$25 nor more than \$5,000 or may be imprisoned for not more than one year, or both.

Under WIS. STAT. § 100.26(5) (1971) any person violating WIS. STAT. § 100.18(9) (1971), which prohibits bait and switch advertising, may be fined not less than \$100 nor more than \$1,000 or imprisoned for not more than one year, or both.

WIS. STAT. § 100.26(1) (1971) provides for a fine not to exceed \$200 or imprisonment for not more than six months, or both, for violations of ch. 100 for which no specific penalty is prescribed.

68. WIS. STAT. § 100.18(11)(c) (1971).

69. WIS. STAT. § 100.20(6) (1971).

70. WIS. STAT. § 100.18(11)(d) (1971).

71. *Id.*

72. WIS. STAT. § 100.18(11)(b) 2 (1971).

73. WIS. STAT. § 100.20(5) (1971).

74. These agencies include: the Office of the Commissioner of Banking, the Office of the Commissioner of Credit Unions, the Educational Approval Board, the Office of the Commissioner of Insurance, the Department of Industry, Labor and Human Relations, the Department of Natural Resources, the Public Service Commission, the Office of the Commissioner of Savings and Loans, the Office of the Commissioner of Securities and the Department of Transportation.

thority over a wide range of commercial activities in Wisconsin. Although an examination of each of these agencies and their activities is beyond the scope of this article, two recently enacted laws of major significance which deal, inter alia, with unfair and deceptive business practices should be briefly discussed in passing.

### 1. Wisconsin Consumer Act

The Wisconsin Consumer Act<sup>75</sup> was enacted after years of intensive study and debate<sup>76</sup> concerning the need for modernization of Wisconsin's fragmented and outdated credit laws.<sup>77</sup> Not only had these credit laws been written long before the mushrooming of consumer credit after World War II,<sup>78</sup> but they predated the

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75. Wis. Laws 1971, ch. 239.

76. As early as 1960, Governor Nelson appointed an eight man Committee on Revolving Credit and Installment Sales to prepare appropriate state credit legislation following the Governor's veto of Wis. S.B. 256 (1959 Sess.). Although no legislation resulted from the Committee's work, the usury law penalties were made substantially stronger in 1961 as a result of the efforts of several of the members of the Committee. Wis. Laws 1961, ch. 431. The presence of these tougher penalties proved to be a significant factor in the ultimate enactment of the Wisconsin Consumer Act following the ruling in *State v. J. C. Penney*, 48 Wis. 2d 125, 179 N.W.2d 641 (1970), that revolving charge accounts were subject to the state usury law (Wis. STAT. § 138.05(1) (1969)). After the passage of the Consumer Act with the support of the Wisconsin Merchants Federation, the legislature made the usury law penalties inoperative as to credit sales violations occurring prior to the Penney decision. Wis. Laws 1971, ch. 308, creating Wis. STAT. § 138.06(6) and (7) (1971).

An extensive study of the Uniform Consumer Credit Code (UCCC) was also conducted by an Advisory Committee to the Insurance and Banking Legislative Committee. The Advisory Committee was comprised of legislators and representatives of consumer groups, labor and the credit-granting industry. The Committee studied the UCCC for more than two years between 1969 and 1971 and recommended a revised version of the UCCC for enactment by the legislature. However, the Committee's version of the UCCC was discredited in large part because of the resignation of the consumer and labor representatives over a dispute concerning the extent of industry representation on the Committee. Thereafter, a coalition of various interest groups drafted and sponsored the Wisconsin Consumer Act. For a detailed review of the events leading to the negotiation and ultimate passage of the Act, see Davis, *Legislative Restrictions of Creditor Powers and Remedies, A Case Study of the Negotiation and Drafting of the Wisconsin Consumer Act*, 72 MICH. L. REV. 3 (1973).

77. Prior to the Consumer Act, loan transactions were regulated by a variety of statutes, primarily Wis. STAT. §§ 138.05, 138.07 and 138.09 (1969) and Wis. STAT. ch. 214 (1969). Automobile credit sales were regulated by Wis. STAT. § 218.01 (1969), while most other credit sales were unregulated. Revolving charge accounts, however, were subject to the state usury law as a result of the holding in *State v. J.C. Penney*, *supra* note 76. Such patchwork legislative treatment of consumer credit became increasingly artificial over the years as credit institutions' functions and services expanded and ultimately overlapped, thus blurring previous distinctions. See CURRAN, TRENDS IN CONSUMER CREDIT LEGISLATION 3 (1965).

78. Total outstanding consumer credit (excluding real estate mortgage credit) grew from 21.5 billion in 1950 to 137.2 billion in 1971, an increase of over five times. REPORT OF THE NATIONAL COMMISSION ON CREDIT FINANCE, CONSUMER CREDIT IN THE UNITED STATES 5 (1972).

development of many abusive and uncontrolled credit practices as well as such important new credit devices as retail revolving charge accounts and bank charge card plans.<sup>79</sup> The Consumer Act, by comprehensively revising Wisconsin's laws governing consumer credit transactions, reaches virtually every kind of consumer credit financing arrangement while providing substantially increased protection for consumers.<sup>80</sup>

Among the primary purposes of the Wisconsin Consumer Act is the protection of consumers against unfair and deceptive practices.<sup>81</sup> In particular, there are several sections which specifically dovetail with sections 100.18 and 100.20<sup>82</sup> by prohibiting false, misleading or deceptive credit advertising<sup>83</sup> or conduct<sup>84</sup> in consumer credit transactions. The Act also broadly prohibits unconscionable conduct in consumer credit transactions.<sup>85</sup> Violation of

79. For a historical review of the development of consumer credit, see Curran, *supra* note 77, 5-14.

80. WIS. STAT. chs. 421-427 (1971). See, Generally, Crandall, *The Wisconsin Consumer Act: Wisconsin Consumer Credit Laws Before and After*, 1973 WIS. L. REV. 334, and E. Heiser, *Wisconsin Consumer Act—A Critical Analysis*, 57 MARQ. L. REV. 389 (1974).

81. WIS. STAT. § 421.102(2) (b) (1971).

82. WIS. STAT. § 421.103(4) (1971), provides as follows:

This act shall not preempt the administration or enforcement of ch. 100. Conduct proscribed under §§ 423.301, 426.108, 426.109 or 426.110 may also constitute violations of §§ 100.18 or 100.20.

83. WIS. STAT. § 423.301 (1971). Although the prohibitory language of this section is substantially identical to § 100.18, the scope is limited to media advertising, concerning the extension of credit. At the same time, however, this provision goes beyond § 100.18 by making the omission of material information a violation if the omitted information ". . . is necessary to make the statements therein not false, misleading or deceptive."

84. WIS. STAT. § 426.109 (1971). The Act also requires the Administrator to promulgate rules declaring specific conduct to be unconscionable. WIS. STAT. § 426.108 (1971).

85. WIS. STAT. § 425.107 (1971). The list of factors to be considered in determining unconscionability under §§ 425.107(3) and 426.108 include, but are not limited to, the following:

(a) That the practice unfairly takes advantage of of the lack of knowledge, ability, experience or capacity of customers;

(b) That those engaging in the practice know of the inability of customers to receive benefits properly anticipated from the goods or services involved;

(c) That there exists a gross disparity between the price of goods or services and their value as measured by the price at which similar goods or services are readily obtainable by other customers, or by other tests of true value;

(d) That the practice may enable merchants to take advantage of the inability of customers reasonably to protect their interests by reason of physical or mental infirmities, illiteracy or inability to understand the language of the agreement, ignorance or lack of education or similar factors;

(e) That the terms of the transaction require customers to waive legal rights;

(f) That the terms of the transaction require customers to unreasonably jeopardize money or property beyond the money or property immediately at issue in the transaction;

these provisions carry a broad range of remedies, including injunctive relief<sup>86</sup> and the recovery of civil penalties<sup>87</sup> by any customer or the administrator.<sup>88</sup> Class action relief, however, for victims of false, misleading, deceptive or unconscionable conduct is severely curtailed under the Act.<sup>89</sup>

## 2. Wisconsin Franchise Investment Law

Other than the Consumer Act, the most significant trade regulation legislation enacted by the 1971 legislature was the Wisconsin Franchise Investment Law.<sup>90</sup> The Franchise Investment Law was sponsored by Attorney General Warren<sup>91</sup> to regulate the booming franchise industry<sup>92</sup> after numerous complaints had been received by the Department of Justice concerning deceptive advertising and income projections by franchise promoters.<sup>93</sup> The new law re-

(g) That the natural effect of the practice would reasonably cause or aid in causing customers to misunderstand the true nature of the transaction or their rights and duties thereunder;

(h) That the writing purporting to evidence the obligation of the customer in the transaction contains terms or provisions or authorizes practices prohibited by law; and

(i) Definitions of unconscionability in statutes, regulations, rulings and decisions of legislative, administrative or judicial bodies.

86. WIS. STAT. § 426.109 (1971).

87. WIS. STAT. § 426.301(1) (1971), provides that the Administrator may recover not less than \$100 and not more than \$1,000 for each violation of the Act. This amount may be increased under WIS. STAT. § 426.301(2) (1971) to not less than \$1,000 and not more than \$10,000 if the violation was knowing and willful.

For unconscionable conduct, the customer may recover \$100 plus actual damages pursuant to WIS. STAT. § 425.303 (1971). Customers who have been induced to consummate a consumer credit transaction as a result of false, misleading or deceptive advertising in violation of WIS. STAT. § 423.301 (1971) may retain the goods, services or money received without obligation to pay any part of the transaction total and may recover any sums paid to the merchants pursuant to WIS. STAT. § 425.305 (1971).

88. The Administrator under the Act is the Commissioner of Banking who may bring civil actions through the Department of Justice. WIS. STAT. § 426.104(1)(a) (1971).

89. WIS. STAT. § 426.110(3) (1971), provides that:

Notwithstanding this chapter, no class action may be maintained for conduct proscribed in sub. (2) or for a violation of s. 423.301, 425.107, 426.108 or 427.104(1)(h) unless such conduct has been found to constitute a violation of this act at least 30 days prior to the occurrence of the conduct involved in such class action by an appellate court of this state or by a regulation issued by the administrator as provided in ss. 426.104(a)(e) and 426.108 specifying with particularity the act or practice in question.

90. Laws 1971, ch. 241, creating WIS. STAT. ch. 553 (1971).

91. WIS. S. B. 784 (1971 Sess.).

92. Annual nationwide franchise sales are in the neighborhood of \$100 billion according to the Federal Trade Commission. FEDERAL TRADE COMMISSION CONSUMER BULLETIN NO. 4, *Advice for Persons who are considering an Investment in a Franchise Business* (1971).

93. 1972 ANNUAL REPORT, OFFICE OF CONSUMER PROTECTION, WISCONSIN DEPARTMENT OF JUSTICE 3 and 7.

quires a variety of disclosures to be made to franchise prospects prior to the signing of the franchise contract and requires that materials used in the promotion and sale of franchises be submitted to the Commissioner of Securities for review prior to their use unless such review is exempted by administrative rule.<sup>94</sup> Violations are subject to a variety of remedies and penalties, including injunctive and restitutionary relief substantially identical to section 100.18 (11)(d).<sup>95</sup>

### III. REGULATION OF UNFAIR TRADE PRACTICES UNDER SECTION 100.20

With the presence of stronger civil remedies for violations of special or general orders issued under section 100.20, the Wisconsin Department of Agriculture has become more assertive in regulating unfair trade practices and unfair methods of competition. As a result, a significant body of unfair trade practice law has developed in Wisconsin over the past several years.

#### A. *The Concept of Unfairness*

The authority of Department of Agriculture to enjoin and forbid unfair trade practices and methods of competition through the issuance of special or general orders has been upheld by the Wisconsin Supreme Court as a valid delegation of legislative power.<sup>96</sup> This decision was based upon an earlier opinion<sup>97</sup> which upheld a legislative delegation to the Governor under the Wisconsin Recovery Act to promulgate codes or standards of unfair methods of competition and unfair trade practices in business. In that opinion the Wisconsin Supreme Court described the power to promulgate codes regulating trade practices and methods of competition as follows:

Methods of competition in business and trade practices are divided by the act into two classes—those which are fair and those which are unfair. If from the whole body of methods of competi-

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94. WIS. STAT. §§ 553.21, *et seq.* (1971).

95. WIS. STAT. § 553.54 (1971). In addition, WIS. STAT. § 553.78 (1971) makes it clear that jurisdiction under WIS. STAT. §§ 100.18 or 100.20 (1971) is not preempted by the Franchise Investment Act. For a detailed review of the Franchise Investment Law, see Mett, *The Wisconsin Franchise Investment Law*, 45 WIS. BAR BULL., No. 5, 30 (1972).

96. *H. M. Distributors of Milwaukee v. Department of Agriculture*, 55 Wis. 2d 261, 272, 198 N.W.2d 598, 605 (1972); *State v. Texaco*, 14 Wis. 2d 625, 111 N.W.2d 918 (1961); *Ritholz v. Ammon*, 240 Wis. 578, 4 N.W.2d 173 (1942).

97. *In re Petition of State ex rel. Attorney General*, 220 Wis. 25, 264 N.W. 633 (1936).

tion in business and trade practices we eliminate those which are unfair, those which remain are fair methods of competition and fair trade practices. There is a vast fundamental difference between the power to make a rule and regulation which will eliminate an unfair trade practice or unfair method of competition in business, discovered upon investigation, and the power to prescribe a code of fair competition. . . . A rule or regulation whether in the affirmative or negative may eliminate such a practice. However, there may be many parallel fair trade practices. Suppose in a particular respect there are a dozen. The power to choose one among these fair trade practices and fair methods of competition and require conformity to that practice or method and so denounce all others as unfair is to exercise the kind of legislative power that may not be delegated because there is no standard which governs the action of the administrative agency in making its choice. When it picks out one method or practice from a group of fair methods and fair practices, it exercises pure legislative discretion. That particular method or practice so chosen cannot be discovered by any process of fact-finding. . . .<sup>98</sup>

Thus, under section 100.20, the Department of Agriculture cannot arbitrarily single out one fair practice from a number of other fair practices and make it the sole standard of business conduct. The department clearly does possess the authority, however, to adopt codes or issue special orders which prohibit or regulate practices found to be unfair.

In assessing the fairness of a particular business practice, the Department of Agriculture has been largely guided by the rules and decisions under section 5 of the FTC Act.<sup>99</sup> Congress, in creating section 5, deliberately left to the Commission the task of deciding what practices should be denominated unfair.<sup>100</sup> Moreover, the Commission is not limited to existing standards of criminal<sup>101</sup> or fraudulent<sup>102</sup> conduct in determining unfairness. Thus, a broad and flexible standard has developed which involves an examination of numerous public policy considerations in determining whether a par-

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98. *Id.* at 40-41, 264 N.W. 640.

99. 15 U.S.C. § 45(a)(1) (1970).

100. *FTC v. Sperry Hutchinson Co.*, 405 U.S. 232, 239-240 (1972); *FTC v. Cement Institute*, 333 U.S. 683, 708-709 (1948).

101. The early case of *FTC v. R.F. Keppel & Bros., Inc.*, 291 U.S. 304, 313 (1934), remains the leading case on this point.

102. *D.D.D. Corp. v. F.T.C.*, 125 F.2d 679 (7th Cir., 1949); *Wolf v. F.T.C.*, 135 F.2d 564 (7th Cir. 1943).



ticular act or practice should be declared unfair.<sup>103</sup> In carrying out this broad concept of unfairness, the Federal Trade Commission has envisioned its role as follows:

The Commission was not intended to be a simple enforcement agency, charged with preventing well-understood, clearly defined, unlawful conduct. Its principle function was . . . to explore, identify and define those competitive practices that should be forbidden as "unfair" because contrary to public policy. The commission was expected to proceed not only against practices forbidden by statute or common law, but also against practices not previously considered unlawful, and thus to create a new body of law - a law of unfair competition adapted to the diverse and changing needs of the complex evolving modern American economy.<sup>104</sup>

Subsequently, this interpretation of the range of Federal Trade Commission authority and responsibility was substantially supported by the United States Supreme Court in the celebrated *S & H* decision.<sup>105</sup> One of the principal issues in that case was whether the Federal Trade Commission is empowered to prohibit practices which are unfair to consumers irrespective of their competitive impact. Although the court ordered the case remanded to the Federal Trade Commission for further proceedings to link the findings and conclusions as to unfairness,<sup>106</sup> it strongly affirmed the Federal Trade Commission's authority to proscribe unfair practices which are injurious to consumers by stating:

Thus, legislative and judicial authorities alike convince us that

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103. The Federal Trade Commission has described the factors to be taken into consideration as follows:

(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—whether, in other words, it is within at least the penumbra of some common-law, statutory, or other established concept of unfairness; (2) whether it is immoral, unethical, oppressive, or unscrupulous; (3) whether it causes substantial injury to consumers (or competitors or other businessmen). . . . 29 FED. REG. 8324, 8355 (1964) (Statement of Basis and Purpose of Trade Regulation Rule Concerning Cigarette Advertising.)

See generally Comment, *Section 5 of the Federal Trade Commission Act - Unfairness to Consumers*, 1972 WIS. L. REV. 1071.

104. 29 FED. REG. 8349 (1964).

105. *FTC v. Sperry and Hutchinson Co.*, 405 U.S. 232 (1972).

106. *Id.* at 248. This is required by § 557(c) of the Federal Administrative Procedure Act. Under Wisconsin law decisions of administrative agencies cannot be "Unsupported by substantial evidence in view of the entire record as submitted." WIS. STAT. § 227.20(1)(d) (1971).

the Federal Trade Commission does not arrogate excessive power to itself if, in measuring a practice against the elusive, but congressionally mandated standard of fairness, it, like a court of equity, considers public values beyond simply those enshrined in the letter or encompassed in the spirit of the antitrust laws.<sup>107</sup>

Several recent special order proceedings before the Department of Agriculture illustrate the broad application of these standards of unfairness in Wisconsin. *In the matter of Mary Posnanski*,<sup>108</sup> involved the rental of dilapidated residential dwellings in the inner city of Milwaukee which were in violation of the Milwaukee Housing Code. Several of the buildings had actually been placarded and condemned as unfit for human habitation. After a two day hearing, the Department of Agriculture concluded that Posnanski was engaged in unfair business practices by renting such dwellings without disclosing the existence of the housing code violations. The Department ordered the respondent to cease and desist from renting condemned dwellings until necessary repairs were made or from renting dwellings with housing code violations without prior disclosure of such violations to prospective tenants.<sup>109</sup> On appeal<sup>110</sup> Posnanski raised a number of challenges to the order, including an argument that section 100.20 was unconstitutionally vague and should be limited to prior Federal Trade Commission rulings prohibiting specific unfair practices. Reserve Circuit Judge Currie concluded that the concept of unfairness is designed to be adaptable to the changing needs of society and could be applied to new practices.<sup>111</sup> The court also upheld the application of section 100.20 to landlord-tenant transactions by re-affirming the policy concerns expressed in *Pines v. Perssion*,<sup>112</sup> as follows:

The need and social desirability of adequate housing for people in this era of rapid population increases is too important to be rebuffed by that obnoxious cliché, *caveat emptor*. Permitting landlords to rent "tumble-down" houses is at least a contributing cause of such problems as urban blight, juvenile delinquency, and high property taxes for conscientious landowners.

*In the matter of Peter Subola*,<sup>113</sup> involved a special order pro-

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107. F.T.C. v. Sperry and Hutchinson Co., 405 U.S. 232, 244 (1972).

108. No. 877 (Wis. Dept. of Ag).

109. *Id.*, November 15, 1971.

110. Posnanski v. Department of Agriculture, No. 135-091 (Cir. Ct. Dane County).

111. *Id.*, Memorandum Decision, May 21, 1973.

112. 14 Wis. 2d 590, 596, 111 N.W.2d 409, 413 (1961).

113. In the Matter of Peter Subola, d/b/a American Home Improvement Company, No. 923 (Wis. Dept. of Ag).

ceeding commenced by the Department of Justice against a contractor who chronically failed to complete home improvement work as represented. After a public hearing, the Department of Agriculture declared that Subola was engaging in unfair business practices in violation of section 100.20. However, in addition to the standard prohibitions relating to misrepresentations of fact, the Department of Agriculture ordered<sup>114</sup> Subola to cease and desist from accepting any deposit or payment where the work would not be completed within sixty days and imposed a positive obligation that all his future contracts be in writing and include a specific completion date. Although the order was not appealed, the terms therein were subsequently incorporated in two circuit court orders issued against Subola.<sup>115</sup>

*In the matter of Inksetter*,<sup>116</sup> involved the so-called "term paper mills" which have sprung up on various college campuses across the country. In *Inksetter* the Department of Justice sought a ruling declaring the advertising and sale of term papers and take home examinations for use by students as their original work to be an unfair business practice. After a hearing, the Department of Agriculture held that the sale of term papers was ". . . inimical to the best interest of the student, the college or university he attends, and the public alike. . . ."<sup>117</sup> In forbidding the sale of term papers as a new breed of unfair practice, the Department relied heavily on Federal Trade Commission precedent ranging from *Keppel*<sup>118</sup> to the *S & H*<sup>119</sup> case.

Although the Department of Agriculture has yet to explore such emerging Federal Trade Commission concerns as corrective advertising, ad substantiation, and restitutionary orders,<sup>120</sup> it is clear that the department envisions the breadth of its substantive authority to be at least as extensive as that of the federal trade commission. Indeed, in the areas of rulemaking and affirmative disclosure requirements, the department has been able to assert itself more vigorously than the federal trade commission because

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114. *Id.*, April 19, 1971.

115. *State v. Subola*, No. CR-8-478 (Cir. Ct. Dane County, Sept. 25, 1973); *State v. Subola*, No. 135-457 (Cir. Ct. Dane County, May 18, 1972).

116. In the Matter of Bruce and Agnus Inksetter, d/b/a Academic Marketplace, No. 997 (Wis. Dept. of Ag).

117. *Id.*, Undated Opinion of the Examiner 13 (1972).

118. *Supra* note 101.

119. *Supra* note 100.

120. See Thain, *Advertising Regulation, the Contemporary FTC Approach*, 1 FORDHAM URBAN L. J. 349 (1973).

of its specific authority to issue rules and order the employment of fair practices.

### B. Rulemaking

The authority of the Department of Agriculture to promulgate industry-wide general orders is at least as extensive as that of any other state trade regulation agency in the nation.<sup>121</sup> In exercising this broad authority, the Department has promulgated orders which cover the entire gamut of consumer transactions from advertising inducements through the ultimate performance of the contract by the merchant.<sup>122</sup> In addition, the orders extend well beyond consumer transactions to inchoate antitrust<sup>123</sup> and price discrimination<sup>124</sup> practices. Perhaps most importantly, the orders carry the force and effect of statutory law.<sup>125</sup>

Although a working knowledge of each of the general orders is not essential for most practitioners in the trade regulation or commercial field, several of the orders are quite broad in scope and are of general interest. A review of these follows.

121. Note, *Developments in the Law, Deceptive Advertising*, 80 HARV. L. REV. 1005, 1119-1134 (1967).

122. The following listing of the general orders promulgated under WIS. STAT. § 100.20(2) (1971) illustrates the wide range of subject matter covered.

WIS. ADM. CODE, ch. Ag 108 (1974) - Egg Sizes, unfair practices  
 WIS. ADM. CODE, ch. Ag 109 (1974) - Freezer meat and food service plan trade practices  
 WIS. ADM. CODE, ch. Ag 110 (1974) - Home improvement  
 WIS. ADM. CODE, ch. Ag 111 (1974) - Leaf tobacco, buying and selling  
 WIS. ADM. CODE, ch. Ag 112 (1974) - Motor fuel trade practices  
 WIS. ADM. CODE, ch. Ag 113 (1974) - Gasoline advertising  
 WIS. ADM. CODE, ch. Ag 114 (1974) - Real estate advertising, advance fees  
 WIS. ADM. CODE, ch. Ag 116 (1974) - Deceptive offers of employment  
 WIS. ADM. CODE, ch. Ag 118 (1974) - Brewers, unfair sales discrimination  
 WIS. ADM. CODE, ch. Ag 121 (1974) - Referral selling plans  
 WIS. ADM. CODE, ch. Ag 122 (1974) - Chain distributor schemes  
 WIS. ADM. CODE, ch. Ag 124 (1974) - Price comparison advertising  
 WIS. ADM. CODE, ch. Ag 125 (1974) - Mobile home parks  
 WIS. ADM. CODE, ch. Ag 127 (1974) - Home solicitation selling  
 WIS. ADM. CODE, ch. Ag 128 (1974) - Academic material unfair trade practices.

123. WIS. ADM. CODE, ch. Ag 125 (1974), for example, lists in its declaration of policy the effect of certain practices as placing “. . . a substantial number of [mobile home] operators and dealers in a dominant market or monopoly position. . . .”

124. WIS. ADM. CODE, ch. Ag 112 (1974), for example, regulates price discrimination in the sale of gasoline to suppliers or wholesalers and WIS. ADM. CODE, ch. Ag 118 (1974), regulates price discrimination in the sale of malt beverages to wholesalers.

125. *State v. Texaco*, 14 Wis. 2d 625, 111 N.W.2d 918 (1961). As a result, contracts in violation of the orders are void and unenforceable. *Perma Stone v. Merkel*, 255 Wis. 565, 39 N.W.2d 730 (1949). It should be noted, however, that even though the contract is void, the contractor may recover the fair value of work performed under the doctrine of quantum meruit. *Zbichorski v. Thomas*, 10 Wis. 2d 625, 103 N.W.2d 536 (1960).

## 1. Home Improvement Trade Practices Code<sup>126</sup>

The Home Improvement Code is no doubt the most comprehensive, and perhaps the most significant, general order that has been promulgated by the Department of Agriculture. Although the Code dates back more than thirty years, it has been amended twice in the past five years to keep it abreast of certain new abuses and industry practices. The most recent<sup>127</sup> also substantially expands the scope of the Code from improvements "attached" to an existing home or building to such new matters as the construction, installation or repair of driveways, terraces, patios, and fences as well as other improvements to the "residential or non-commercial premises."<sup>128</sup>

The Code deals with a virtual laundry list of unfair or deceptive home improvement practices that have resulted in substantial financial losses to home owners over the years.<sup>129</sup> Practices such as model home presentations,<sup>130</sup> bait and switch advertising,<sup>131</sup> phony gift offers,<sup>132</sup> and gaining entry to the buyer's home under the guise of a governmental inspector<sup>133</sup> are either prohibited outright or severely curtailed by the Code. In addition, a long list of specific product misrepresentations are proscribed.<sup>134</sup> The Code also regulates price and financing representations,<sup>135</sup> contract terms<sup>136</sup> and performance<sup>137</sup> in home improvement transactions. Finally, the Code prohibits the taking of negotiable instruments in

126. WIS. ADM. CODE, ch. Ag 110 (1974).

127. Wis. Adm. Reg., May 1974, No. 221, eff. June 1, 1974.

128. WIS. ADM. CODE, § Ag 110.01(1) (1974).

129. Some observers have estimated the cost of phony home repair schemes as amounting to approximately one billion dollars each year. See Note, *Translating Sympathy for Deceived Consumers into Effective Programs for Protection*, 114 U PENN. L. REV. 395 (1966).

130. WIS. ADM. CODE, § Ag 110.02(1) (1974).

131. WIS. ADM. CODE, § Ag 110.02(3) (1974).

132. WIS. ADM. CODE, § Ag 110.02(5) (1974).

133. WIS. ADM. CODE, § Ag 110.02(4) (1974).

134. WIS. ADM. CODE, § Ag 110.02(2) (1974).

135. WIS. ADM. CODE, § Ag 110.02(6) (1974).

136. WIS. ADM. CODE, § Ag 110.05 (1974).

137. WIS. ADM. CODE, § Ag 110.05(2)(d) (1974), requires setting forth the date or time period on or within which the work is to begin and be completed by the seller. WIS. ADM. CODE, § Ag 110.02(7)(b) (1974), prohibits, with certain exceptions, failing to begin or complete work within the time period agreed upon. These provisions were added in 1974 after evidence was received that failure to perform constituted the most prevalent complaint in the home improvement industry. And see *Alsteen v. Gehl*, 21 Wis. 2d 349, 124 N.W.2d 312 (1963), which recognized a tort for intentional infliction of emotional distress as a result of faulty and untimely performance of a home improvement contract.

home improvement sales and provides that every assignee of a home improvement contract takes subject to all claims and defenses of the buyer.<sup>138</sup>

The classic example of how the above unfair practices are used and perpetuated over an extended period of time is the renowned Holland Furnace Company operation. The Holland salesmen would often gain entrance into a home by representing that they were government agents, gas or utility company inspectors, or heating engineers.<sup>139</sup> They would then tear down or dismantle the owner's furnace, often without permission, on the pretext of inspecting it or cleaning it. They would then refuse to reassemble the furnace in order to coerce the owner into signing a release absolving Holland of liability. The salesmen also employed scare tactics in selling, such as falsely representing that the old furnace would asphyxiate the customer's family, burn up or blow up.<sup>140</sup> Despite these onerous practices and the fact Holland did business in forty-four states and had gross annual sales totalling at least \$30 million, it took the Federal Trade Commission nearly two years before a cease and desist order could be issued against Holland in 1958.<sup>141</sup> This order was then stayed while Holland appealed twice to the United States Supreme Court.<sup>142</sup> Even then the company failed to discontinue its fraudulent practices. This resulted in further litigation and, ultimately, the imposition of heavy fines on company officials for noncompliance with the 1958 order.<sup>143</sup>

It is largely because of the magnitude and tenacity of the Holland Furnace Company operation and similar schemes that regulations such as the home improvement code have been adopted which permit prompt action<sup>144</sup> against flagrant home repair abuses.

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138. WIS. ADM. CODE, § Ag 110.06 (1974). This provision was originally adopted in 1970 and was modified in 1974 to bring it into conformance with WIS. STAT. §§ 422.406 and 422.407.

139. In the Matter of Holland Furnace Co., 55 FTC 55 (1958).

140. *Id.*

141. See *Holland Furnace Company v. FTC*, 295 F.2d 302 (7th Cir. 1961).

142. *Holland Furnace Co. v. FTC*, 269 F.2d 203 (7th Cir. 1959), *cert. den.* 361 U.S. 928 (1960), 295 F.2d 302 (7th Cir. 1961).

143. In re *Holland Furnace Company*, 341 F.2d 548 (7th Cir. 1965), *cert. den.* 381 U.S. 924 (1965).

144. In *State v. Spanky Heating & Air Conditioning, Inc., et al.*, No. 404-505 (Cir. Ct. Milwaukee County, Nov. 17, 1972), for example, the Justice Department was able to obtain a temporary injunction under WIS. STAT. § 100.20(6) against a furnace repair firm which allegedly engaged in practices similar to Holland Furnace within one month after the commencement of formal action.

## 2. Referral Selling Plans<sup>145</sup>

Referral selling plans are devices used primarily by door-to-door sales companies to obtain sales leads. Although individual referral plans differ in many respects, they all contain as a common ingredient the offer of some type of compensation to the buyer in return for the submission of names of potential customers to the seller.

In recent years referral plans in which the earning of compensation is contingent upon future sales have been prohibited in a number of jurisdictions.<sup>146</sup> The United States Post Office Department has taken the position that the use of the mail to further such referral schemes violates the postal fraud statute<sup>147</sup> and at least two court of appeals decisions have sustained this position.<sup>148</sup> Numerous state court decisions have also struck down such referral plans as fraudulent or unconscionable sales schemes.<sup>149</sup>

The primary basis for challenging contingent referral plans, however, has been under the lottery laws.<sup>150</sup> The leading case on the application of the lottery laws<sup>151</sup> to such plans is the State of Washington's *Sherwood & Roberts* decision.<sup>152</sup> The court in that case concluded that the amount of referral commissions which a

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145. Wis. ADM. CODE, ch. Ag 121 (1974).

146. See generally Annot., *Enforceability of Transactions Entered into Pursuant to Referral Sales Arrangement*, 14 A.L.R.3d 1420; Dodge, *Referral Sales Contracts: To Alter or Abolish?*, 15 BUFFALO L. REV. 669 (1966).

147. 18 U.S.C. § 1341 (1970).

148. *Blachly v. U.S.*, 380 F.2d 665 (5th Cir., 1967); *Fabian v. U.S.*, 358 F.2d 187 (8th Cir., 1966).

149. *Supra* note 146. The leading case is *State of New York v. ITM Inc.*, 52 Misc. 2d 39, 275 N.Y.S.2d 303 (1966).

150. In two states, Ohio and Oklahoma, such plans were held not to constitute a lottery. *Yoder v. So-Soft of Ohio, Inc.*, 30 Ohio Op. 2d 566, 202 N.E.2d 329 (1963); *Krehbiel v. State*, 378 P.2d 768 (Okla., 1963). Thereafter the courts of at least three states, Kentucky, New York and Washington, held such plans to be in violation of their respective lottery laws. *Commonwealth v. Allen*, 404 S.W.2d 464 (Ky., 1966); *State of New York v. ITM, Inc.*, 52 Misc. 2d 39, 275 N.Y.S.2d 303 (1966); *Sherwood & Roberts-Yakima, Inc. v. Leach*, 67 Wash. 2d 630, 409 P.2d 160, 14 [ALR3d 1411 (1965). The attorneys general of at least three other states, Delaware, Massachusetts and Missouri, have also concluded that such plans violate the lottery laws of their states.

151. The three essential elements of a lottery are a prize, chance, and a consideration. "Prize" is often defined as anything of value offered as an inducement to participate in a scheme. 38 AM. JUR. 2d, *Gambling*, § 8. The generally accepted definition of "chance" is Justice Holmes' succinct statement that "What a man does not know and cannot find out is chance as to him, and is recognized as chance by the law." *Dillingham v. McLaughlin*, 264 U.S. 370, 373 (1924). "Consideration" is generally anything that is sufficient to sustain a simple contract. 38 AM. JUR. 2d, *Gambling*, § 7.

152. 67 Wash. 2d 630, 409 P.2d 160, 14 ALR3d 1411 (1965).

customer might receive for supplying names of other potential customers largely depends upon the element of chance:

The lack of control feature in referral selling is much broader than that designated by the trial court. It is inherent in referral selling that purchasers such as respondents be without control. Sooner or later, the market, unknowingly, to the purchasers, will become saturated. This principle is the same as in the chain letter scheme. The case at hand is a classic example.

The Lifetown salesman told respondents that they could get something for nothing through the referral selling scheme. Respondents are obligated to pay \$1,187.28 for equipment costing \$225.32. For ease of demonstration, respondents must earn 12 commissions of \$100 each in order to get, as promised, something for nothing. This means that 12 of respondents' referrals must purchase as respondents did; they, in turn, to get something for nothing, must find 12 more people to purchase, and so forth, as follows:

	Number of Purchasers
	1
1st round	12
2nd round	144
3rd round	1,728
4th round	20,736
5th round	248,832

Soon the scheme will run itself out; the market will become saturated. Here, Lifetone made its first sale in May, 1963, and its last sale in October, 1963. The respondents entered the picture in September. They gave the Lifetone salesman approximately 60 names at that time, and they never received a commission. In fact, only \$14,900 in commissions were paid in the Yakima area, while the total number of sales was 137, totalling \$129,947.04 (without finance charges).

Respondents took a chance on whether they could get something for nothing. This chance permeates the entire scheme of referral selling. This court holds that the referral selling scheme is a lottery.<sup>153</sup>

Relying upon the *Sherwood & Roberts* decision and the restrictive view of lottery-type schemes in Wisconsin,<sup>154</sup> the Wisconsin

153. *Id.* at \_\_\_\_\_, 409 P.2d at 163-164.

154. *See* *Kayden Industries, Inc. v. Murphy*, 34 Wis. 2d 718, 724, 150 N.W.2d 447 (1967).



Attorney General advised the Department of Agriculture in 1968<sup>155</sup> that referral selling plans in which the awarding of a referral commission is contingent upon uncertain future sales constituted a lottery under Wisconsin law.<sup>156</sup> The opinion also concluded that the Department of Agriculture possessed the authority to prohibit such referral plans under section 100.20 under the theory that the use of a lottery to promote business constitutes an unfair method of competition.<sup>157</sup>

The referral selling plans code<sup>158</sup> which resulted effectively deals with the lottery aspects of referral selling by prohibiting referral selling plans unless the compensation for referring customers is paid prior to the initial sale.<sup>159</sup> Thus, any contingencies with respect to payment are eliminated.<sup>160</sup>

Because of the strong nationwide trend towards declaring referral selling to be illegal, the referral selling code has not been successfully challenged in any subsequent enforcement proceeding. Moreover, the legislature has recently reaffirmed the policies underlying the code by prohibiting contingent referral transactions as part of the Wisconsin Consumer Act.<sup>161</sup>

### 3. Chain Distributor Schemes<sup>162</sup>

The chain distributor code was promulgated in 1970<sup>163</sup> in response to a marketing phenomenon commonly known as multi-level or pyramid sales plans.<sup>164</sup> Multi-level marketing plans arose in the latter half of the 1960's on the crest of the franchise boom and, by late 1972, had generated more than \$300 million in invest-

155. 57 WIS. OP. ATTY. GEN. 68 (1968).

156. WIS. STAT. § 945.01(2) (1971).

157. *Jones v. Smith Oil & Refining Co.*, 295 Ill. App. 519, 15 N.E.2d 42 (1938); *FTC v. R. F. Keppel & Bros., Inc.*, 291 U.S. 304 (1934); *Featherstone v. Independent Service Station Association*, 10 S.W.2d 124 (Tex. Civ. App. 1928); *Glover v. Mallosa*, 238 Mich. 216, 213 N.W. 107 (1927).

158. *Supra* note 145 (eff. January 1, 1969).

159. WIS. ADM. CODE, § Ag 121.02 (1971).

160. In addition, by requiring that the compensation be paid *prior* to the sale, the code prohibits the practice of inflating the regular price of a product so that a fictitious discount can be offered to the buyer for providing names of prospective customers. In other words, the code requires that any offer of compensation for providing referrals be separated from the sale of the product.

161. WIS. STAT. § 422.416 (1971).

162. WIS. ADM. CODE, ch. Ag 122 (1974).

163. Wis. Adm. Reg., March, 1970, No. 171, eff. April 1, 1970.

164. For an in depth discussion of these marketing plans, see Ella, *Multi-Level or Pyramid Sales Systems; Fraud or Free Enterprise?*, 18 [S.D.L. Rev. 358 (1973); Note, *Pyramid Schemes; Dare to Be Regulated*, 61 GEO. L.J. 1257 (1973).

ments from the public.<sup>165</sup> The plans are typically presented to the public at so-called "opportunity meetings" where professional spielers or pitchmen artfully and emotionally appeal to the prospect's desire to be a "success," both financially and socially.

Although the schemes have been packaged as traditional marketing plans with various distribution levels geared towards ultimate consumer sales, the principal financial attraction of the plans stems from the profits that can be made by recruiting unlimited numbers of other distributors into the program who, in turn, possess similar recruiting rights. Thus, a chain distributor scheme shares certain common elements with chain letter schemes<sup>166</sup> and referral selling plans<sup>167</sup> in that, if carried out to their logical conclusion, the entire world would be saturated with distributors of a given company. In addition, misleading income representation have not been uncommon in the presentation of the plans. The result has been a plethora of litigation against multi-level operations initiated by virtually every state as well as several agencies of the federal government.<sup>168</sup>

In Wisconsin, chain distribution schemes have long been condemned as contrary to public policy. In *Twentieth Century Company v. Quilling*,<sup>169</sup> the Wisconsin Supreme Court refused to enforce a scheme in which territorial rights to sell a product were sold to persons who would in turn sell similar territorial rights to others, and so on ad infinitum. The court condemned the endless chain aspect of the arrangements as follows:

We are unable to regard such a project as a legitimate busi-

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165. According to William J. Casey, Chairman of the Securities and Exchange Commission, in an address to the North American Securities Administrator's Association, September 11, 1972.

166. Chain letter schemes have been declared illegal as lotteries under the mail lottery statute, 18 U.S.C. § 1302 (1970). *See* Public Clearing House v. Coyne, 194 U.S. 497 (1904); *New v. Tribond Sales Corp.*, 19 F.2d 671 (D.C. Cir. 1927). In addition, chain letter schemes have been held to be lotteries in several states. *See*, for example, *Kent v. City of Chicago*, 301 Ill. App. 312, 22 N.E.2d 799 (1939); *Niccoli v. Mc Clellant*, 21 Cal. App. 2d 759, 65 P.2d 853 (1937). In Wisconsin a chain letter type scheme known as the pyramid club was declared to be illegal as a lottery in 38 Wis. OP. ATT'Y GEN. 152 (1949).

167. In at least two states chain distributorship schemes were actually successfully prosecuted under statutes prohibiting referral selling. *See* State ex rel. Sanborn v. Koscot Interplanetary, Inc., et al., 212 Kan. 668, 512 P.2d 416 (1973); State ex rel. Turner v. Koscot Interplanetary, Inc., 191 N.W.2d 624 (Iowa, 1971). Prosecution under either Wis. ADM. CODE, ch. Ag 121 (1974) or Wis. STAT. § 422.416 (1971) would not be possible, however, because their scope is limited to consumer transactions.

168. *Supra* note 164.

169. 130 Wis. 318, 110 N.W.174 (1906).

ness enterprise. How large would be the number of purchasers who would be induced by the prospect of large returns for little labor to join the scheme it is impossible to say or even speculate. Each purchaser would be desirous to get back at least as much as he invested. In order to do this, the first purchaser under the most favorable circumstances would have to sell rights aggregating \$1,000, the second purchaser would have to sell rights aggregating \$2,000, and thus the necessity of finding victims would increase in geometrical progression until the purchasers who are in the tenth place from the original purchasers must, in order merely to reimburse themselves, find others who would pay more than half a million dollars. Of course, it is not likely that the scheme would last so long as this, but, however long it lasts, it will infallibly leave a greater or less crowd of dupes at the end with no opportunity to recoup their losses because the bubble has at last burst. It contemplates an endless chain of purchasers, or rather, a series of constantly multiplying endless chains, with nothing but fading rainbows as the reward of those who are unfortunate enough to become purchasers the moment before the collapse of the scheme. While contemplating large gains to the original promoters and early purchasers, it necessarily contemplates losses to the later purchasers; losses increasing in number with the greater success of the scheme. . . .<sup>170</sup>

Similarly, in its statement of policy supporting the declaration of chain distributor schemes as unfair trade practices, the Department of Agriculture emphasized that “. . . small investors . . . anticipate unrealistic profits through use of the chance to further perpetuate a chain of distributors, without regard to actual market conditions. . . .”<sup>171</sup>

The chain distributor code defines a “chain distributor scheme” as a “. . . sales device whereby a person, upon a condition that he make an investment, is granted a license or right to recruit for profit one or more additional persons who also are granted such license or right upon condition of making an investment. . . .”<sup>172</sup> The code further provides that the existence of a limitation on the number of participants does not change the identity of the scheme.<sup>173</sup>

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170. *Id.* at 324, 110 N.W. at 176.

171. WIS. ADM. CODE, § Ag 122.01 (1974).

172. WIS. ADM. CODE, § Ag 122.02(1) (1974).

173. *Id.* Although such a limitation eliminates the the endless chain aspect of the scheme, the chain still exists as does the uncertainty concerning the number of prior and potential participants.

The chain distributor code has been constitutionally challenged on several occasions. In *H M Distributors of Milwaukee v. Department of Agriculture*,<sup>174</sup> a group of Holiday Magic distributors argued that the code exceeded the Department of Agriculture's authority under section 100.20, that it was void for vagueness, that it infringed on the right of the participant to make the economic investment he chooses and that it violated the right of freedom of speech. The court upheld the Department's authority to prohibit chain distributor schemes as unfair trade practices and held that the words chosen to do so were reasonably definite and certain. The court rejected plaintiff's theory that every participant in the scheme is entitled to constitutional protection in making any economic investment he chooses by responding that "[e]very bucket-shop operator would applaud the statement, although he might be surprised to have it claimed that the right of his customers to be defrauded is somewhere in the United States Constitution."<sup>175</sup> With respect to the free speech argument, the court relied upon the line of federal cases that excludes commercial activity from the constitutional protection afforded free speech,<sup>176</sup> and concluded:

The role of the "spieler" in inducing prospective purchasers to invest their money is not to be underestimated. Whether the proposition is a chance in a carnival shell game or buying a piece of real estate or a share of stock in a legitimate business enterprise, the selling of it involves speaking or writing, almost always. However, the right to regulate or prohibit derives from the nature of the undertaking, what is being done or attempted, not what is said in explaining or selling it. . . . Speaking is involved, but the right to prohibit as an unfair trade practice the chain distributor scheme derives from what is being peddled and how it is being peddled. The right to regulate or prohibit derives from the unfairness of what is done and the scheme is not saved by the sales pitch that accompanies it.<sup>177</sup>

It now appears that the multi-level phenomenon has peaked and is in its decline. It also appears that having already survived one constitutional challenge in the Wisconsin Supreme Court the chain distributor code will not be overturned despite the continued

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174. 55 Wis. 2d 261, 198 N.W.2d 598 (1972).

175. *Id.* at 271-272, 198 N.W.2d at 604.

176. *Banzhaf v. FCC*, 405 F.2d 1082, 1101, 1102 (D.C. Cir. 1968); *Valentine v. Christensen*, 316 U.S. 52, 54 (1942).

177. *Supra* note 174 at 273, 198 N.W.2d at 605.

efforts of certain multi-level firms<sup>178</sup> to convince the courts of the wisdom of their ingenious theories.

#### 4. Price Comparison Advertising Code<sup>179</sup>

The comparison price advertising code is one of the newest<sup>180</sup> and most complex rules of the Department of Agriculture. It may also prove to be the most far-reaching since virtually every seller engages in some form of price comparison advertising.

The concept of comparative price advertising is probably as old as the art of selling itself. When not abused, it is an effective selling technique, beneficial to seller and buyer alike. However, in recent years the use of fictitious or distorted comparative savings claims has increased<sup>181</sup> and has no doubt contributed to the loss of confidence in the overall credibility of advertising.<sup>182</sup> Drafting effective standards that meet the diverse marketing and selling practices of the whole spectrum of retail selling has nonetheless proved exceedingly difficult. The Federal Trade Commission's Guides Against Deceptive Pricing<sup>183</sup> are vague and general and have been rarely enforced even under their most restrictive interpretation. Most state and local authorities have either adopted and laxly applied the Federal Trade Commission guides under their own consumer fraud laws or have chosen to ignore the problem area. Thus, the drafting of a specific price comparison code for Wisconsin became a laborious and controversial project involving numerous drafts

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178. In *Holiday Magic v. Warren*, 357 F. Supp. 20 (E.D. Wis. 1973), Federal District Judge Reynolds dismissed a complaint brought by several multi-level firms which requested the convening of a three-judge panel to consider the constitutional validity of the chain distributor code. In addition to the free speech and vagueness arguments that had previously been rejected in *H.M. Distributors of Milwaukee*, *Supra* note 174, the court also rejected a series of other challenges to the validity of the code, namely that it was preempted by federal law, that it impaired the distributor's "right to work," that it amounted to an impairment of contracts, that it denied equal protection and that it was an undue burden on interstate commerce. On appeal the Seventh Circuit vacated the district court's order of dismissal and remanded the case with directions to convene a three-judge district court on the ground that the district court had invaded the province of the three-judge panel by adjudicating the merits of the constitutional contentions. *Holiday Magic, Inc., et al. v. Warren, et al.*, \_\_\_\_ F.2d \_\_\_\_ (7th Cir. 1974).

179. Wis. ADM. CODE, ch. Ag 124 (1971).

180. Wis. Adm. Reg., July 1973, No. 211, eff. Jan 1, 1974.

181. According to extensive testimony of Department of Agriculture and Milwaukee Better Business Bureau officials at hearings to consider promulgation of a comparison price advertising code.

182. Approximately half of the public now says advertising is either fairly or very unbelievable according to a study by the Opinion Research Corporation (Sept., 1973).

183. 16 C.F.R., pt. 233 (1970).

over a period of several years.<sup>184</sup>

Basically, the code regulates three types of direct price comparisons:<sup>185</sup> (1) Comparisons between a seller's price and a price at which the seller offered or sold merchandise in the past;<sup>186</sup> (2) Comparisons between a seller's price and a price at which the merchandise will be offered in the future;<sup>187</sup> and (3) Comparisons between a seller's price and that of a competitor.<sup>188</sup> Where the comparison relates to a former price of the seller (*e.g.*, "Formerly priced at \$10.00, now \$8.00"), the item compared must either have been sold at that price within the last 90 days immediately preceding the date of the advertisement<sup>189</sup> or it must have been offered for sale for at least 4 weeks during such 90 day period and, on at least one occasion during such period, it must have been offered at the price stated in the advertisement.<sup>190</sup> If the comparison does not relate to an item sold or offered for sale during the 90 day period, the date, time or seasonal period of such sale or offer must be disclosed in the advertisement.<sup>191</sup> In any case, the code provides that no price comparison may be made based upon ". . . a price which exceeds . . . [the seller's] . . . cost plus normal markup regularly used by him in the sale of such property or services. . . ." <sup>192</sup>

Where the comparison relates to a seller's future price (*e.g.*, "Now \$5.00, next month \$7.00"), the future price must take effect on the date disclosed in the advertisement or within 90 days after the price comparison is stated in the ad.<sup>193</sup> The stated future price must then be maintained by the seller "for a period of at least 4 weeks after its effective date, except where compliance becomes impossible because of circumstances beyond his control."<sup>194</sup>

Where the comparison relates to a competitor's price (*e.g.*,

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184. See accounts of the final hearings and the preceding controversy with respect to the development of the code in the Milwaukee Journal, May 6, 1973, at § 1, P.17, col.4, and the Capitol Times (Madison), May 4, 1973, at 34, col.6.

185. WIS. ADM. CODE, § Ag 124.02(5) (1974), defines "price comparison" as ". . . the direct comparison, in any advertisement, of a seller's current price for consumer property or services with any other price or statement of value for such property or services expressed in dollars, cents, fractions or percentages."

186. WIS. ADM. CODE, §§ Ag 124.04 and 124.05 (1974).

187. WIS. ADM. CODE, § Ag 124.06 (1974).

188. WIS. ADM. CODE, § Ag 124.07 (1974).

189. WIS. ADM. CODE, § 124.04(1) (1974).

190. WIS. ADM. CODE, § Ag 124.05(1) (1974).

191. WIS. ADM. CODE, §§ 124.04(2) and 124.05(2) (1974).

192. WIS. ADM. CODE, §§ Ag 124.04(3) and 124.05(3) (1974).

193. WIS. ADM. CODE, § Ag 124.06(2) (1974).

194. WIS. ADM. CODE, § Ag 124.06(3) (1974).

"Valued at \$20.00, our price \$15.00"), the code requires that the competitor's price relate to property or services that were advertised or sold in the preceding 90 day period.<sup>195</sup> In addition, the price must be representative of prices at which such consumer property are sold or advertised in the trade area in which the price comparison is made.<sup>196</sup> The code also requires that the seller disclose that the price used as a basis for the comparison was not the seller's own price.<sup>197</sup> Finally, the code requires that the seller conspicuously disclose the general nature of the material differences in the property or services.<sup>198</sup>

One of the knottiest problem areas in the code relates to the coverage of catalog sales. Catalogs are often printed well in advance of their distribution date and are mailed directly to Wisconsin residents by firms operating in interstate commerce with no other physical presence in the state. The code specifically deals with the publication problem by defining the advertising "date" as either ". . . the date of publication or distribution or the date on which the completed advertising copy is submitted to the printer for final printing and publication, provided such submission date does not exceed 30 days from date of actual publication or distribution."<sup>199</sup> With respect to regulating the price comparisons in catalogs mailed into Wisconsin, the Department of Agriculture is relying upon the trend of recent case law towards expanded state jurisdiction over foreign corporations which are doing business with a state's citizen through the use of the mail.<sup>200</sup> It would also appear that the legitimate concern of Wisconsin in protecting its citizens from deceptive advertising claims would justify the incidental ef-

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195. WIS. ADM. CODE, § Ag 124.07(1) (1974).

196. WIS. ADM. CODE, § Ag 124.07(2) (1974).

197. WIS. ADM. CODE, § Ag 124.07(3) (1974).

198. WIS. ADM. CODE, § Ag 124.03(2) (1974).

199. WIS. ADM. CODE, § Ag 124.02(3) (1974). In addition, the effective date of the code for catalog advertisements was delayed to July 1, 1974.

200. Starting with the United States Supreme Court decision in *Travelers Health Assoc. v. Virginia*, 339 U.S. 643 (1950), the courts have substantially expanded the "minimum contacts" doctrine of *International Shoe Company v. Washington*, 326 U.S. 310, 316 (1945), in the area of mail order activities. The leading case is *State of Washington v. Readers Digest Ass'n., Inc.*, 81 Wash. 2d 259, 501 P.2d 290 (1972), *app. dism.* 411 U.S. 945 (1973), which related to the application of the State of Washington's "Little FTC" Act to the mailing of sweepstakes promotions to Washington State residents. And see *Kugler v. Market Development Corp.*, 124 N.J. Super. 314, 306 A.2d 489 (1973); *Readers Digest Ass'n. v. State ex rel. Conner*, 251 So. 2d 552 (Fla., 1971); *Ministers Life & Casualty Union v. Haase*, 30 Wis. 2d 339, 141 N.W.2d 287 (1965), *app. dism.* 385 U.S. 205 (1966), *reh. den.* 385 U.S. 1033 (1967); *People v. Fairfax Family Fund, Inc.*, 147 Cal. Rptr. 812, 235 Cal. App. 2d 881 (1965), *app. dism.* 382 U.S. 1 (1965).

fect on interstate commerce of applying the code to out-of-state merchants who direct advertising to Wisconsin residents in violation of the code.<sup>201</sup>

#### 5. Home Solicitation Selling Code<sup>202</sup>

The home solicitation selling code regulates consumer sales or leases which are personally solicited or consummated at the buyer's residence or place of business, at the seller's transient quarters, or away from a seller's regular place of business.<sup>203</sup> The code became effective in its present form on February 1, 1973,<sup>204</sup> and applies to any person or organization "advertising, offering or dealing in goods or services for the purpose of home solicitation selling or providing or exercising supervision, direction or control over sales practices used in the home solicitation sale."<sup>205</sup>

201. The general rule is that state regulations involving a legitimate local interest are not invalid under the Commerce Clause unless the burden on interstate commerce is clearly excessive in relation to the putative local benefits. *Pike v. Bruce Church Inc.*, 397 U.S. 137 (1970); *Head v. New Mexico Board of Examiners in Optometry*, 374 U.S. 424 (1963); *Huron Cement Co. v. Detroit*, 362 U.S. 440 (1960); *Robertson v. California*, 328 U.S. 440 (1945); *Southern Pacific Co. v. Arizona*, 325 U.S. 761 (1945); *Sligh v. Kirkwood*, 237 U.S. 52 (1914); In accord is *Ritholz v. Ammon*, 240 Wis. 578, 4 N.W.2d 173 (1942). Moreover, the fact that Federal Trade Commission guidelines exist in the comparison price advertising area is not fatal to the price comparison code so long as they are not in conflict. In *Double-Eagle Lubricants, Inc. v. State of Texas*, 248 F. Supp. 515 (N.D. Tex., 1965), for example, the application of a state labeling regulation to a foreign corporation was upheld despite the fact that lower Federal Trade Commission standards existed with respect to the identical subject matter. In accord is *State v. Texaco*, 14 Wis. 2d 625, 111 N.W.2d 918 (1961).

202. WIS. ADM. CODE, ch. Ag 127 (1974).

203. WIS. ADM. CODE, § Ag 127.01(1) (1974). This section further defines "personal solicitation" as including ". . . solicitation made directly by telephone, person-to-person contact, or by written or printed communication other than general advertising indicating a clear intent to sell goods or services at a regular place of business, and other than catalog or mail solicitation not accompanied by any other solicitation."

204. Wis. Adm. Reg., January 1973, No. 205. The Code originally went into effect on October 1, 1972, but was substantially amended thereafter, primarily to bring it into conformance with the Wisconsin Consumer Act.

205. WIS. ADM. CODE, § Ag 127.01(3) (1974). In addition, the term "seller" includes a supplier or distributor if:

- (a) The seller is a subsidiary or affiliate of the supplier or distributor.
- (b) The seller interchanges personnel or maintains common or overlapping offices or directors with the supplier or distributor; or
- (c) The supplier or distributor provides or exercises supervision, direction or control over the selling practices of the seller.

The Code's attempt to cut through the network of "independent contractors" and subsidiary corporations is consistent with Federal Trade Commission precedent where strict adherence to common law requirements has not been required in holding parent corporations liable for the deceptive acts of their door-to-door sales outlets. *See P. F. Collier & Son v. FTC*, 427 F.2d 261 (6th Cir. 1970).



Although the direct sales industry has long been subject to a variety of "Green River" ordinances<sup>206</sup> and "hawker and peddler" statutes,<sup>207</sup> many of these regulations were easily evaded<sup>208</sup> and thus were largely ineffective in curtailing actual fraud or sales misrepresentations. In recent years states have enacted "cooling off" period legislation designed to provide the consumer a reasonable period of time to reflect upon the wisdom of his purchase in door-to-door sales transactions.<sup>209</sup> However, despite the possible salutary impact of cooling off period legislation in alleviating the effects of high pressure salesmanship, such laws are obviously no panacea for eliminating unfair and deceptive practices which do not become apparent to the buyer until after the expiration of his cancellation period.<sup>210</sup>

Unlike the earlier regulations and the more recent cooling off period legislation, the home solicitation selling code is principally directed at the underlying unfair and deceptive practices used by direct sellers. As a result, the code takes on a number of time-worn door-to-door sales gimmicks and misrepresentations. For example, misrepresentations that the buyer has been specially selected,<sup>211</sup> that the seller is conducting a survey, test or research project<sup>212</sup> or that the seller is conducting a special sales promotion campaign or making a special offer to a few persons only or for a limited period

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206. So-named after an ordinance in Montana which declared unsolicited door-to-door selling to be a public nuisance and which has been widely adopted elsewhere.

207. See, for example, WIS. STAT. §§ 440.81, *et seq.* (1971).

208. For example, laws regulating or prohibiting unsolicited door-to-door selling were evaded by the use of telephone "come-ons" which would permit the salesman to technically gain entry into the home through the invitation of the prospective customer.

209. For a general discussion of high pressure selling tactics in the direct sales industry and a review of cooling off period legislation, see Sher, *The "Cooling Off" Period in Door-to-Door Sales*, 15 UCLA L. REV. 717 (1969). In Wisconsin, WIS. STAT. §§ 423.201, *et seq.* (1971), provides a three day "cooling off" period or right to cancel in any consumer transaction other than a catalog sale unaccompanied by any other solicitation or

. . . other than a sale or lease or listing for sale of real property, a sale of goods at auction, the sale or lease of goods for an agricultural purpose or a loan made to finance the sale of goods at auction for an agricultural purpose 1) which is initiated by face-to-face solicitation away from a regular place of business of the merchant or by mail or telephone solicitation directed to the particular customer and 2) which is consummated or in which the customer's offer to contract or other writing evidencing the transaction is received by the merchant away from a regular place of business of the merchant and involves the extension of credit or is a cash transaction in which the amount the customer pays exceeds \$25. WIS. STAT. § 423.201 (1971).

210. See Generally Note, *A Case Study of the Impact of Consumer Legislation: The Elimination of Negotiability and the Cooling Off Period*, 78 YALE L. J. 618 (1969).

211. WIS. ADM. CODE, § Ag 127.03(1)(a) (1974).

212. WIS. ADM. CODE, § Ag 127.03(1)(b) (1974).

of time<sup>213</sup> are prohibited. The code further prohibits representations that the seller will give any product or service free or as a gift if the furnishing of such product or service is contingent on the making of any payment or the purchase of any other product or service.<sup>214</sup> The code also prohibits misrepresenting the identity of the seller,<sup>215</sup> the length of the sales presentation,<sup>216</sup> the delivery or performance date,<sup>217</sup> or the nature of any document the customer is requested to execute.<sup>218</sup>

In addition to the prohibitions against specific misrepresentations, a general catch-all provision prohibits any false, misleading or deceptive representations to induce a sale or any “. . . plan, scheme or ruse which misrepresents the true status or mission of the person making the call. . . .”<sup>219</sup> The code also requires all material warranty representations to be furnished to the buyer in writing<sup>220</sup> and prohibits any statements or representations inconsistent with or contradictory to any document evidencing the transaction.<sup>221</sup>

A further safeguard against surreptitious entry into a prospective customer's home by a door-to-door salesman is the so-called “door opener” provision of the code.<sup>222</sup> Under this provision, the seller is required to initially disclose “the seller's individual name, the name of the business firm or organization he represents, and the identity or kind of goods or services he offers to sell . . . before asking any questions or making any statements other than an initial greeting.”<sup>223</sup> This one positive disclosure provision was added rather than attempting to specifically catalog each and every deceptive “foot in the door” tactic used by ingenious door-to-door salesmen over the years.

Although the home solicitation selling industry is specifically singled out by the code, the courts have given great leeway to the states in making reasonable classifications in areas of economic and fiscal regulation.<sup>224</sup> In light of the unfair practices which have

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213. WIS. ADM. CODE, § Ag 127.03(1)(c) (1974).

214. WIS. ADM. CODE, § Ag 127.03(1)(d) (1974).

215. WIS. ADM. CODE, § Ag 127.03(2)(a) (1974).

216. WIS. ADM. CODE, § Ag 127.03(2)(c) (1974).

217. WIS. ADM. CODE, § Ag 127.03(2)(d) (1974).

218. WIS. ADM. CODE, § Ag 127.03(2)(e) (1974).

219. WIS. ADM. CODE, § Ag 127.03(3) (1974).

220. WIS. ADM. CODE, § Ag 127.03(4) (1974).

221. WIS. ADM. CODE, § Ag 127.03(5) (1974).

222. WIS. ADM. CODE, § Ag 127.02(1) (1974).

223. *Id.*

224. *Dandridge v. Williams*, 397 U.S. 471 (1970); *Levy v. Louisiana*, 391 U.S. 68, 71

manifested themselves in home solicitation selling, there appears to be sound justification for treating that industry as a special class deserving of separate regulation.<sup>225</sup> As said in *State of Arizona v. Direct Sellers Association of Arizona*:

It is abundantly clear that the door-to-door segment of the retailing industry is a proper subject for separate classification and regulation. It should also be noted that house-to-house selling has in several instances been completely prohibited by city ordinances, and the classification has been upheld by the United States Supreme Court. *Breard v. City of Alexandria*, 341 U.S. 622, 95 L. Ed. 1233, 71 S. Ct. 21. If a separate classification is valid for the purpose of prohibiting door-to-door sales, *a fortiori* it is valid for the purpose of merely regulating them.<sup>226</sup>

#### IV. CONSUMER LAW ENFORCEMENT

##### *A. Department of Justice Program Activities*

Following the enactment of the remedial consumer fraud legislation in 1970,<sup>227</sup> the Wisconsin Department of Justice, through its Office of Consumer Protection, developed one of the more vigorous state programs directed against deceptive trade practices.<sup>228</sup> By the end of 1973, the Department had commenced eighty-seven formal legal actions<sup>229</sup> against a wide range of illegal business activities, including chain distributorship schemes, phony home repairs, usurious credit plans, deceptive door-to-door sales operations, and

(1968); *Williamson v. Lee Optical Co.*, 348 U.S. 483 (1955). See Generally Note, *Developments in the Law—Equal Protection*, 82 HARV. L. REV. 1065, 1087 (1969). For Wisconsin cases in support, see *Simanco, Inc. v. Department of Revenue*, 57 Wis. 2d 47, 203 N.W.2d 648 (1973); *State Bank of Drummond v. Nuesse*, 13 Wis. 2d 74, 108 N.W.2d 283 (1961); *Price v. State*, 168 Wis. 603, 171 N.W. 77 (1919).

225. In Wisconsin direct selling has generated more complaints than its share of the retail market would justify. For example, in 1971, 21% of the complaints received by the Wisconsin Departments of Agriculture and Justice were solicited in the home, although direct sales accounted for only 1 to 3% of all retailing. See Meserve, *The Proposed Federal Door-to-Door Sales Act: An Examination of its Effectiveness as a Consumer Remedy and the Constitutional Validity of its Enforcement Provision*, 37 GEO. WASH. L. REV. 1171, 1173 (1969). And see *Williamson v. Lee Optical Co.*, *supra* note 224; *Borden Co. v. McDowell*, 8 Wis. 2d 246, 99 N.W.2d 146 (1959); and *Kuhl Motor Co. v. Ford Motor Co.*, 270 Wis. 488, 71 N.W.2d 420 (1955), for cases on the subject of the validity of separate classification and treatment of particular industries.

226. 108 Ariz. 165, 168, 494 P.2d 361, 364 (1972).

227. Wis. Laws 1969, ch. 425.

228. Lovett, *State Deceptive Trade Practice Legislation*, 46 TUL. L. REV. 724, 760 (1972).

229. 1970-1973 ANNUAL REPORTS, OFFICE OF CONSUMER PROTECTION, WISCONSIN DEPARTMENT OF JUSTICE.

fraudulent or unconscionable automobile selling tactics.<sup>230</sup> During this same period the Department obtained 109 separate orders or judgments enjoining hundreds of merchants and firms from engaging in illegal activities and received 348 voluntary assurances of discontinuance of illegal conduct from a variety of businesses.<sup>231</sup> The Department also obtained twenty civil forfeiture judgments totalling \$1,477,443 and recovered more than one million dollars in restitution for Wisconsin residents through court judgments and resolution of complaints short of court action.<sup>232</sup>

In addition to maintaining an active mediation and complaint processing program involving the handling of more than 10,000 complaints each year,<sup>233</sup> the Justice Department's consumer protection program has functioned as a statewide clearing house for consumer complaints from other state and local agencies. These complaints are fed into a computer data bank where they are used as an enforcement tool in detecting statewide and local trends and practices relating to consumer fraud.<sup>234</sup> A monthly report is also disseminated to state and local enforcement officials and private organizations which summarizes consumer litigation developments

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230. *Id.*

231. *Id.*

232. *Id.*

233. *Id.* Department of Justice consumer complaints have steadily grown from 587 in 1969 to 3200 in 1970, 5780 in 1971, 9,977 in 1972, and 13,090 in 1973. In addition to handling complaints, the Department played a major role in assisting consumers in receiving refunds of excess interest paid as a result of the ruling in *State v. J. C. Penney*, 48 Wis. 2d 125, 179 N.W.2d 641 (1970), and the subsequent enactment of an interest refund law (Wis. Laws 1971, ch. 308). More than 100,000 refund request forms prepared by the Department of Justice were distributed to Wisconsin residents.

234. The Justice Department's computer data bank program was established in 1970 to help in processing and analysing the growing number of consumer complaints received by the Department and other state and local complaint receiving agencies in Wisconsin. By early 1974, the Departments of Agriculture and Regulation and Licensing, the State Motor Vehicle Division, the Office of the Commissioner of Securities and several local agencies actively participated in the computer program. Each complaint received by these agencies is recorded on computer tape by name of respondent, complainant, transaction date, place of initial contact, place of transaction, nature of practice, industry involved and disposition.

Microfiche reports of the information on each complaint are generated weekly. Monthly reports are generated which provide a statistical analysis of the complaints and an alphabetical listing of respondents against whom five or more complaints have been received. County listings are also sent to district attorneys on a quarterly basis for use in their own locality. In addition, specific industry-wide or trade practice printouts can be obtained for use at legislative or rule-making hearings.

A special forty-eight page summary of the Wisconsin Department of Justice computer data bank program appeared in *STATE CONSUMER ACTION SUMMARY '72, FEDERAL OFFICE FOR CONSUMER AFFAIRS (1972)*.

in Wisconsin. Through these and other activities,<sup>235</sup> a coordinated statewide program with the seventy-one district attorneys who share concurrent consumer protection enforcement jurisdiction<sup>236</sup> has been implemented.

In 1972 the Justice Department opened two neighborhood consumer offices in Milwaukee's inner city as a result of a grant from the Federal Office of Economic Opportunity.<sup>237</sup> The OEO funds were made available because of the pressing need for local consumer complaint centers in the low income communities of Milwaukee and the fact that the poor are reluctant to complain to distant state agencies even when they have been victimized by fraudulent business practices.<sup>238</sup> By establishing the Milwaukee consumer offices, the Department was able to initiate a concerted effort against certain inner city consumer abuses which had not previously been brought to the attention of state officials.<sup>239</sup>

The enforcement activities of the Justice Department have had a direct effect on the increased emphasis on rulemaking by the Department of Agriculture. Not only has the Justice Department's enforcement program eased the Agriculture Department's own enforcement responsibilities but many of the enforcement proceedings brought by the Justice Department have crystallized problem areas that proved to be susceptible to general rule-making. The home solicitation selling code, for example, was largely based upon the experience and special orders resulting from several complaints filed by the Department of Justice<sup>240</sup> against major door-to-door book or magazine sales operations.<sup>241</sup>

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235. Other innovations include preparation of a Prosecutor's Manual on Consumer Fraud and Unfair Business Practices (1971) and dissemination of a three-part complaint questionnaire for use by district attorneys and other complaint handling agencies.

236. WIS. STAT. §§ 100.18(11)(d) and 100.26(6) (1971).

237. OEO Grant No. CG5654.

238. See EDELHERTZ, *THE NATURE, IMPACT AND PROSECUTION OF WHITE COLLAR CRIME* 24 and 36 (1970).

239. In *State v. George de Gonzalez, d/b/a National Institute of Languages, Inc.*, et al., No. 415-040 (Cir. Ct. Milwaukee County, Nov. 19, 1973), for example, the State obtained an injunction and \$1000 civil forfeiture against an English language training school for soliciting Spanish speaking Milwaukee residents to enter into a contract which violated numerous provisions of the Wisconsin Consumer Act and the home solicitation selling code. Except for the existence of bilingual staff members in the Justice Department's Southside Milwaukee Office of Consumer Protection, it is highly doubtful whether the information leading to the action and subsequent injunction could have been obtained. *And see*, Note, *Consumer Protection By The State Attorneys General: A Time For Renewal*, 49 NOTRE DAME LAW. 423 (1973).

240. WIS. STAT. § 100.20(4) (1971).

241. In the Matter of Grolier Interstate, Inc., et al., No. 947 (Wis. Dept. of Ag, Feb.

### B. Prevention of Deceptive Selling Representations under Section 100.18

It is the general prohibition against untrue, misleading or deceptive selling representations<sup>242</sup> which provides the breadth and significance to section 100.18. Although there is little difficulty in defining the term "untrue"<sup>243</sup> under the statute, the definition of the terms "deceptive" and "misleading"<sup>244</sup> have proved more difficult to ascribe an exact meaning. However, the courts, through recognizing the difficulty in defining such terms, have consistently upheld the validity of statutes such as section 100.18,<sup>245</sup> as well as other similar trade regulation laws.<sup>246</sup> Moreover, the application of Federal Trade Commission standards concerning the meaning of the term "deceptive" under section 5 of the FTC Act has provided guidance to the courts in applying the statute.

Under Federal Trade Commission law deceptive statements are measured by the probable subjective effect the statement or representation has on the listener or reader.<sup>247</sup> Thus, it is not neces-

6, 1971); In the Matter of Terry Carrick, d/b/a Family Publications Service, No. 968 (Wis. Dept. of Ag, Oct. 25, 1971); In the Matter of Cowles Communications, Inc., et al., No. 798 (Wis. Dept. of Ag, Oct. 29, 1971).

242. In subsection (1) of Wis. STAT. § 100.18 (1971).

243. BOUVIER'S LAW DICTIONARY (1914) defines untrue as: "Prima facie inaccurate, but not willfully false." In *Zolintakis v. Equitable Life Assurance Society of the United States*, 108 F.2d 902, 905 (10th Cir. 1940), the court simply stated: "A statement is 'untrue' which does not express things exactly as they are."

244. The terms "deceptive" and "misleading" are virtually synonymous and are often defined in terms of each other. See *People v. Wahl*, 39 Cal. App. 2d Supp. 771, 100 P.2d 550 (1940).

245. In *Carpets By The Carload, Inc., v. Warren, et al.*, 368 F. Supp. 1075 (E.D. Wis., 1973), the federal district court upheld the constitutionality of § 100.18(1) against a claim that it was facially void for vagueness. See generally *State ex rel. Sanborn v. Koscott Interplanetary, Inc., et al.*, 212 Kan. 668, 512 P.2d 416 (1973); *Washington v. Readers Digest Ass'n., Inc.*, 81 Wash. 2d 259, 501 P.2d 290 (1972), *app. dism.* 411 U.S. 945 (1973); *People v. Gym of America, Inc.*, 493 P.2d 660 (Colo. 1972); *FTC v. R. F. Keppel & Bros., Inc.*, 291 U.S. 304, 314 (1934); *Sears Roebuck & Co. v. FTC*, 258 F. 307 (7th Cir. 1919). In discussing common law fraud and deceit, it is stated at 37 AM. JUR. 2d, *Fraud & Deceit*, § 1, at 18 as follows:

the fertility of man's invention in devising new schemes of of fraud is so great that courts have always declined to define it, reserving to themselves the liberty to deal with it in whatever form it may present itself. It is indeed, said that it is better not to define the term lest the craft of men should find ways of committing fraud which might evade such a definition.

246. See *Mourning v. Family Publications Service, Inc.*, 411 U.S. 356 (1973); *Papachristou v. City of Jacksonville*, 405 U.S. 156 (1972); *United States v. An Article of Drug*, 394 U.S. 784 (1969); *Standard Oil v. United States*, 221 U.S. 1 (1911).

247. Under FTC law the standard is "tendency or capacity to deceive," which measures whether the natural or probable result of a given representation will be to deceive the

sary to establish that anyone has actually been misled or injured by the statement in question so long as there exists a likelihood that a substantial segment of the public could be misled.<sup>248</sup> Moreover, even though each statement or representation taken individually is true, there exists a violation if the sales representations taken as a whole possess the capacity to deceive.<sup>249</sup>

In determining whether there exists a capacity to deceive, the law looks not to the most sophisticated readers or listeners, but to the most credulous and gullible.<sup>250</sup> As one court observed:

The law is not for the protection of the experts but for the public—that vast multitude which includes the ignorant, the unthinking, and the credulous who, in making purchases, do not stop to analyze, but who are governed by appearances and general impressions.<sup>251</sup>

In addition, lack of knowledge as to the falsity of the representations or a specific lack of intent to deceive is not a defense to a charge of deceptive selling representations.<sup>252</sup>

Since the temporary and permanent injunctive relief is specifically authorized,<sup>253</sup> the usual equitable grounds of irreparable harm or inadequate remedy at law need not be shown in actions under section 100.18.<sup>254</sup> In addition, the fact that the defendant

consuming public. *Carter Products v. FTC*, 323 F.2d 523, 528 (5th Cir. 1963); *United States Retail Credit Association of FTC*, 300 F.2d 212, 221 (4th Cir. 1962); *Kbch v. FTC*, 206 F.2d 311, 317 (6th Cir. 1953).

248. *FTC v. Sterling Drug, Inc.*, 317 F.2d 669, 674 (2d Cir. 1963) *Basic Books, Inc. v. FTC*, 276 F.2d 718 (7th Cir. 1960); *Ericson Hair and Scalp Specialists v. FTC*, 272 F.2d 318 (7th Cir. 1959), *cert. den.* 362 U.S. 940 (1960); *Gelb v. FTC*, 144 F.2d 580 (2d Cir. 1944). To the same effect, see *Kugler v. Koscott Interplanetary, Inc.*, 120 N.J. Super. 216, 293 A.2d 682 (1972).

249. *Murray Space Shoe Corp. v. FTC*, 304 F.2d 270 (2d Cir. 1962); *Kalwojty v. FTC*, 237 F.2d 654, 656 (7th Cir. 1956); *Donaldson v. Read Magazine*, 333 U.S. 178, 188 (1947) *Brockenstette v. FTC*, 134 F.2d 369, 371 (10th Cir. 1943).

250. *Charles of the Ritz Distributor Corp. v. FTC*, 143 F.2d 676 (2d Cir., 1944); *Aronberg, t.g. Positive Products Co. v. FTC*, 132 F.2d 16 (7th Cir. 1942).

251. *P. Lorillard Co. v. FTC*, 186 F.2d 52, 58 (4th Cir. 1950).

252. *Montgomery Ward v. FTC*, 379 F.2d 666, 670 (7th Cir. 1967); *Feil v. FTC*, 285 F.2d 879, 896 (9th Cir. 1960); *Goodman v. FTC*, 244 F.2d 584 (9th Cir. 1957); *D.D.D. Corporation v. FTC*, 125 F.2d 679 (7th Cir. 1942). To the same effect, see *State ex rel. Danforth v. Independence Dodge*, 494 S.W.2d 362 (Xo. 1973), and *In re Brandywine Volkswagon, Ltd.*, 306 A.2d 24 (Del. Super. 1973).

253. Pursuant to subsection (11)(d) of Wis. STAT. § 100.18 (1971).

254. See *Hendersen v. Burd*, 133 F.2d 515 (2d Cir. 1943); *Walling v. Builders Veneer & Woodwork Co.*, 45 F. Supp. 808 (E.D. Wis. 1942); *Securities and Exchange Commission v. Torr*, 87 F.2d 446 (2d Cir. 1937); 42 AM. JUR. 2d *Injunction*, § 38. This doctrine has been applied in several lower court decisions in Wisconsin state courts. *State v. Holiday Magic, et al.*, No. 388-759 (Cir. Ct. Milwaukee County, Oct. 12, 1971); *State v. Koscott Interplanetary, Inc., et al.*, No. 394-480 (Cir. Ct. Milwaukee County, Nov. 24, 1971).

may have voluntarily discontinued to engage in the alleged illegal practices prior to trial does not prevent the court from issuing an injunction because of the ease with which the defendant could resume the practices in the future.<sup>255</sup> Similarly, since the purpose of an injunction is not to punish for past offenses but to prevent illegal practices in the future,<sup>256</sup> the injunction may be broader than the specific offense charged to cover related unlawful acts.<sup>257</sup> As said in *Northern Wis. Co-operative Tobacco Pool v. Bekkedal*:

a court cannot look into the future and define all of the practices which might be restored to, . . . and an order which attempted to detail the various acts and practice prohibited would necessarily be construed as permitting all not specifically prohibited, and deny to the respondent full and complete remedy to which it is entitled to. We think the order must necessarily be in general terms.<sup>258</sup>

A common issue in enforcement proceedings under section 100.18 is whether a supplier or distributor should be enjoined for the illegal activities of the salesmen or "independent contractors" who were actually engaged in making the selling representations. Generally where the distributor equips the salesmen with customary sales aids, such as promotional literature and retail installment contracts, it is deemed responsible for the acts and practices employed by the salesmen to induce sales.<sup>259</sup> Indeed, once an agency relationship is established,<sup>260</sup> the supplier or distributor is responsible for his agents' activities even though he may have taken some steps to dismiss or discipline them for using misleading or deceptive tactics.<sup>261</sup>

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255. *Merch & Co., Inc. v. FTC*, 392 F.2d 921, 927 (6th Cir. 1968); *Giant Food, Inc. v. FTC*, 322 F.2d 977, 986-87 (D.C. Cir. 1963), *cert. den.* 376 U.S. 967 (1964); *Automobile Owners Safety Insurance Co. v. FTC*, 255 F.2d 295, 297-98 (8th Cir. 1958), *cert. den.* 358 U.S. 875 (1958). For Wisconsin cases see *Senn v. Tile Layers Protective Union, Local No. 5*, 222 Wis. 383, 268 N.W. 270 (1936) *Clancy v. Gelb*, 126 Wis. 286, 70 N.W. 746 (1905); *Mc Farland v. Lindekugel*, 107 Wis. 474, 83 N.W. 757 (1900). *And see State v. Ralph Williams Northwest Chrysler Plymouth, Inc.*, 82 Wash. 2d 265, 510 P.2d 233 (1973).

256. *Eugene Dietzgen Co. v. FTC*, 142 F.2d 321 (7th Cir. 1944); *Northern Wis. Co-operative Tobacco Pool v. Bekkedal*, 182 Wis. 571, 197 N.W. 936 (1924).

257. *FTC v. Colgate-Palmolive Co.*, 380 U.S. 374, 394 (1965); *FTC v. Rubberoid Co.*, 343 U.S. 470, 473 (1951).

258. 182 Wis. 571, 598, 197 N.W. 936, 946 (1924).

259. *Goodman v. FTC*, 244 F.2d 584 (9th Cir. 1957); *Standard Distributors v. FTC*, 211 F.2d 7 (2d Cir. 1954); *Consumer Sales Corp. v. FTC*, 198 F.2d 404 (2d Cir. 1952), *cert. den.* 344 U.S. 912 (1953); *International Art Co. v. FTC*, 109 F.2d 393 (7th Cir. 1940).

260. *See Dettman v. Nelson Tester Co.*, 7 Wis. 2d 6, 95 N.W.2d 804 (1959); *Meyers v. Matthews*, 270 Wis. 453, 71 N.W.2d 368 (1955).

261. *See FTC v. Standard Education Society*, 148 F.2d 931 (2d Cir. 1945); *Perma-Maid Co., Inc. v. FTC*, 121 F.2d 282 (6th Cir. 1941).



A similar problem relates to covering individual corporate officers in injunctive orders. The courts have generally upheld inclusion of the corporate officers of a corporation, whether a sham or not, who formulated, directed and controlled the corporate policies and practices of the company<sup>262</sup> even though they have since left the employ of the corporate respondent.<sup>263</sup>

The manifest state interest in protecting its residents from fraudulent business practices has led some state courts to assert jurisdiction over non-resident defendants with little or no physical presence in the forum state.<sup>264</sup> As the court said in *State v. Readers Digest Ass'n., Inc.*<sup>265</sup> which involved an action by the State of Washington to enjoin violations of its Consumer Protection Act committed solely through the mail:

Respondent solicited Washington business and derived substantial profits from Washington residents by clearly illegal methods. It is the duty of the state to protect its residents from such unfair practices. If our courts are not open, the state will be without a remedy in any court and the Consumer Protection Act will be rendered useless.

Although the remedy of injunctive relief is hardly novel and has been supplemented with stronger and more innovative consumer remedies, it remains the most significant public remedy against consumer fraud because of its flexibility<sup>267</sup> and relative simplicity

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262. *Standard Distributors, Inc. v. FTC*, 211 F.2d 7, 15 (2d Cir. 1954); *FTC v. Standard Education Society*, 302 U.S. 112 (1937).

The Wisconsin Consumer Act has gone beyond this doctrine by, in effect, making the corporate officers and other managing directors the guarantors for the recovery of damages or penalties under the Act which cannot be collected from the corporation because of insolvency or dissolution if they "knew of, should have known of or wilfully participated in" a violation and "if a meaningful part of the corporation's activities were in violation of the act." WIS. STAT. § 425.310 (1971).

263. *Benrus Watch Co., Inc. v. FTC*, 352 F.2d 313 (8th Cir. 1965).

264. *Doug Sanders Golf Intercontinental of Southeastern Wisconsin Inc. v. American Manhattan Industries, Inc., et al.*, 359 F. Supp. 918 (E.D. Wis. 1973); *People by Lefkowitz v. Colorado State Christian College of Church of Jesus Power, Inc.*, 346 N.Y.S.2d 482 (1973); *State v. Readers Digest Ass'n.*, 81 Wash. 2d 259, 501 P.2d 290 (1972), *app. dism.* 411 U.S. 945 (1973); *Ministers Life and Casualty Union v. Haase*, 30 Wis. 2d 339, 141 N.W.2d 287 (1965), *app. dism.* 385 U.S. 205 (1966), *reh. den.* 385 U.S. 1033 (1967); *Paulos v. Best Securities*, 260 Minn. 283, 109 N.W. 2d 576 (1961).

265. 81 Wash. 2d 259, 501 P.2d 290 (1972), *app. dism.* 411 U.S. 945 (1973).

266. *State v. Readers Digest Ass'n.*, 81 Wash. 2d 259, 278, 501 P.2d 290, 303 (1972).

267. In *State v. Johnson, d/b/a Park Furniture, et al*, No. 396-117 (Cir. Ct. Milwaukee County, March 27, 1973), the court not only enjoined the defendants from engaging in the future use of bait and switch tactics, misleading advertising and deceptive guarantees in violation of WIS. STAT. § 100.18(1) and (9)(a), but it also enjoined the defendants from

in directly halting deceptive practices.

### *C. Restitutionary Relief For Unfair Or Deceptive Sales Schemes*

An ancillary remedy to the injunctive relief available under sections 100.18 and 100.20 is the restoration of pecuniary losses to injured persons.<sup>268</sup> The inclusion of this remedy together with the public remedy of injunctive relief reflects a legislative concern for the considerable financial harm that can result from unfair or deceptive selling schemes as well as an awareness that traditional public and private remedies are often of little value in deterring consumer fraud. The restitution remedy is designed both to assure that the merchant is deprived of the illegal fruits of his past deceptive practices and to deter illegal conduct in the future by eliminating the merchant's expectation that he can profit from such activities.<sup>269</sup>

Approximately twenty-one other states<sup>270</sup> have provided similar authority to the Attorney General or other designated official to seek restitution in conjunction with a state action to restrain the

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enforcing or making collection efforts with respect to any contract induced by reason of the illegal activity. This latter ruling was most significant since Park Furniture had approximately 13,000 past customers involving an estimated \$1.5 million in purchases.

268. Wis. STAT. § 100.18(11)(d) (1971), reads as follows:

(d) The department or the department of justice or any district attorney, upon informing the department of justice, may commence an action in circuit court in the name of the state to restrain by temporary or permanent injunction any violation of this section. The court may in its discretion, prior to entry of final judgment, make such orders or judgments as may be necessary to restore to any person any pecuniary loss suffered because of the acts or practices involved in the action, provided proof thereof is submitted to the satisfaction of the court. The department of justice may subpoena persons, require the production of books and other documents, and may request the department to exercise its authority under par. (c) to aid in the investigation of alleged violations of this section.

Wis. STAT. § 100.20(6) (1971), provides:

(6) The department may commence an action in circuit court in the name of the state to restrain by temporary or permanent injunction the violation of any order issued under this section. The court may in its discretion, prior to entry of final judgment make such orders or judgments as may be necessary to restore to any person any pecuniary loss suffered because of the uses or practices involved in the action, provided proof thereof is submitted to the satisfaction of the court. The department may use its authority in ss. 93.14 and 93.15 to investigate violations of any order issued under this section.

269. See generally Comment, *Fraudulent Advertising: The Right of a Public Attorney to Seek Restitution For Consumers*, 4 PACIFIC L. J. 168 (1973); Wade & Kemenshine, *Restitution for Defrauded Consumers: Making the Remedy Effective Through Suit by Government Agency*, 37 GEO. WASH. L. REV. 1031 (1969).

270. See Lovett, *State Deceptive Trade Practice Legislation*, 46 TUL. L. REV. 724, 741 (1972).

violation of an unfair or deceptive trade practice law. All of these statutes are of recent vintage so there is not yet an extensive body of case law on the subject. However, the concept is grounded on the traditional equitable principal that once equity jurisdiction attaches the court may grant full and complete relief, including restitution to injured parties.<sup>271</sup> The concept is also embodied in several federal court decisions which implied restitution authority in instances where an administrative agency only possessed explicit power to seek injunctions for violations of federal law.<sup>272</sup> The rationale of these federal decisions appears equally applicable to a state agency proceeding under an unfair or deceptive trade practice statute which is silent as to whether restitution can be ordered.<sup>273</sup>

The leading decision dealing with an explicit grant of restitution authority tied to a state consumer fraud injunctive statute is *Kugler v. Romain*.<sup>274</sup> *Kugler* involved a proceeding for injunctive relief brought by the Attorney General pursuant to the New Jersey

271. *Fullerton Lumber Co. v. Torburg*, 274 Wis. 478, 80 N.W.2d 461 (1957); *Mitchell Realty Co. v. West Allis*, 184 Wis. 352, 199 N.W. 390 (1924).

272. *SEC v. Texas Gulf Sulphur Co.*, 446 F.2d 1301 (2d Cir. 1971); *Wirtz v. Independent Workers Union of Florida*, 272 F. Supp. 31 (M.D. Fla. 1967); *SEC v. Wong*, 252 F. Supp. 608 (D.P.R. 1966); *Mitchell v. Robert De Mario Jewelry, Inc.*, 361 U.S. 288 (1960); *Porter v. Warner Holding Co.*, 328 U.S. 395 (1946).

The Federal Trade Commission has concluded that it possesses the implicit authority to order restitution to vindicate the public injury resulting from unfair or deceptive business practices and to deter such conduct in the future. *See* In the Matter of Universal Credit Acceptance Corp., 3 CCH TRADE REG. RPTR., ¶ 20,240 (1973); In the Matter of Curtis Publishing Co., 3 CCH TRADE REG. RPTR., ¶ 19,719 (1971). However, the Commission's view of its restitution authority has yet to be upheld by the courts.

273. A recent far reaching case handed down by the California Supreme Court in *People v. Superior Court of Los Angeles, respondent, and the Jayhill Corporation*, 107 Cal. Rptr. 192, 507 P.2d 1400 (1973), held that even in the absence of a specific statutory provision the Attorney General had the inherent power to secure restitution on behalf of defrauded consumers. The court stated as follows:

At the time the complaint was filed Business and Professions Code section 17535 provided that false or misleading advertising 'may be enjoined' in an action by the Attorney General, but was silent as to the power of the trial court to order restitution in such a proceeding. On the other hand the statute did not restrict the court's general equity jurisdiction 'in so many words, or by a necessary and inescapable inference.' (*Porter v. Warner Co.* (1946), 328 U.S. 395, 398, 66 S. Ct. 1086, 1089, 90 L. Ed. 1332.) In the absence of such a restriction a court of equity may exercise the full range of its inherent powers in order to accomplish complete justice between the parties, restoring if necessary the *status quo ante* as nearly as may be achieved. . . . In particular, in an action by the Attorney General under section 17535 a trial court has the inherent power to order, as a form of ancillary relief, that the defendants make or offer to make restitution to the customers found to have been defrauded . . . (507 P.2d at 1402.)

274. 110 N.J. Super. 470, 266 A.2d 144 (Essex Cty. Ct., 1970), *modified*, 58 N.J. 522, 279 A.2d 640 (1971).

Consumer Fraud Act<sup>275</sup> against a door-to-door seller of certain so-called educational books. The trial court enjoined the defendant from various deceptive practices, but limited restitution to the twenty-four consumers who testified at the trial. The Supreme Court held that the restitution order should have extended to all customers of the defendant. The court largely based its decision on the “. . . tremendous need to find a simple, inexpensive solution which will accomplish the greatest possible good for the greatest number of consumers who have common problems and complaints vis-a-vis the seller. . . .”<sup>276</sup> The court concluded that the legislature must have had this in mind when it created the public restitution remedy:

it seems plain that the lawmakers accepted the premise that the market bargaining process does not protect ordinary consumers from serious damage in a large number of transactions. Obviously, giving the consumer rights and remedies which he must assert individually in the courts would provide little therapy for the overall public aspect of the problem. It has been said that “[o]ne cannot think of a more expensive and frustrating course than to seek to regulate goods or ‘contract’ quality through repeated lawsuits against inventive ‘wrongdoer.’”. . . . (M)ass consumer transactions growing out of unequal bargaining power and unfair practices should not be handled on a case-by-case basis. The emphasis must be upon public rather than private remedies, and the natural remedial step is government intervention.<sup>277</sup>

The court also recognized the deterrent value of providing broader restitution relief:

Denial of such relief would be unfortunate not only in this case, but it would operate as a serious impairment to the deterrent effect of the sanctions which we believe underlies the Consumer Fraud Act.<sup>278</sup>

Although *Kugler v. Romain* has been widely praised<sup>279</sup> and has subsequently been reaffirmed,<sup>280</sup> there is some doubt as to its appli-

275. Sections 56.8-2 and 56.8-8, New Jersey Statutes (1971).

276. *Supra* note 274, 279 A.2d at 649.

277. *Id.* at 536-537, 279 A.2d at 648.

278. *Id.* at 534, 279 A.2d at 647.

279. See Note, *Contracts - Consumer Fraud Act - State Attorney General Authorized to Initiate Class Actions in Instances of Price Unconscionability*, 40 FORDHAM L. REV. 671 (1970); Note, *Consumer Protection - State Attorney General's Class Action; Exorbitant Price to Unconscionability to Fraud*, 3 SETON HALL L. REV. 470 (1972).

280. *Kugler v. Koscott Interplanetary, Inc.*, 120 N.J. Super. 216, 236, 293 A.2d 682, 693 (1972).

cation to many consumer fraud transactions. The finding of price unconscionability<sup>281</sup> in *Kugler* enabled the trial court to devise a simple restitution formula, namely the difference between the price charged and the fair market value of the books sold, which could then be readily applied to each customer's transaction. Normally, however, such a simple formula is not available.<sup>282</sup> In addition, there may often be a problem in establishing the customer's reliance upon the unfair or deceptive practice involved.<sup>283</sup> This question was not present in *Kugler v. Romain* since the overpricing of the product was an objective standard applicable to all customers. A more difficult situation is presented in the case of the oral sales presentation which contains numerous inducements, many of which are perfectly legal. Does the state have to bring in each customer to individually testify as to the particular aspects of the sales presentation which induced him to enter into the contract?<sup>284</sup> To establish such a reliance factor could be extremely time-consuming and difficult since it would largely rest upon the subjective mental impressions of the customer. At least one court<sup>285</sup> resolved this problem by drawing an inference that the customer did rely on the illegal representations, thereby placing the burden upon the seller to come forward with evidence to the contrary. This solution, though helpful to the customer in establishing a prima facie case for restoration of pecuniary losses, hardly eases the problem of keeping the litigation within manageable bounds.

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281. In keeping with the progressive approach of the New Jersey courts in applying the concept of unconscionability to consumer transactions. See *General Investment Corp. v. Angelini*, 58 N.J. 396, 278 A.2d 193 (1971); *Unico v. Owen*, 50 N.J. 101, 232 A.2d 405 (1967); *Henningsen v. Bloomfield Motors, Inc.*, 32 N.J. 358, 161 A.2d 69 (1960). These decisions may now be good authority in Wisconsin as a result of the enactment of Wis. STAT. § 425.107(3)(i) (1971).

282. For example, in a case of bait and switch advertising the measure of restitution is at best confusing. It may be the difference between the price of the bait item and the represented value or price of the model to which the customer was switched. Or one could argue that no restitution should be ordered absent proof that the item the customer was switched to was overpriced in comparison to products of like grade or quality in the seller's trade area. The latter result would, however, clearly undermine the deterrent purposes of the law. Perhaps the easiest solution would be to order total restoration of the price paid. This, of course, results in a windfall to the customer who has had the use of the item without charge.

283. Both Wis. STAT. §§ 100.18(11)(d) and 100.20(6) (1971), require a causal connection between the practices found illegal in the injunction portion of the litigation and the pecuniary losses suffered by the customer.

284. Both Wis. STAT. §§ 100.18(11)(d) and 100.20(6) (1971), require the submission of "proof satisfactory to the court. . . ," but what this means in a given case is uncertain. What does seem clear is that the legislature attempted to provide the courts the greatest possible leeway in handling matters such as sufficiency of proof.

285. *Vasquez v. Superior Court of San Joaquin*, 4 Cal. 3d 800, 484 P.2d 964 (1971).

In light of the foregoing, it is obvious that both the enforcement official and the court must carefully weigh the value of a restitution order on a case by case basis. Because the remedy is not a true class action designed simply to compensate a large class of claimants for damages sustained, the court is not required to make restitution available to each prospective claimant. Rather the court must consider the private compensatory concerns only after the public considerations of deterrence and vindication of public injuries have been weighed and resolved. At such time the court may determine that total class relief may not further the public aims of the statute or that such relief may be unwarranted or unnecessarily burdensome, and the restitution order may be restricted accordingly to certain claimants falling within a narrow category.

#### *D. Civil Forfeiture Relief For Unfair And Deceptive Sales Schemes*

The authority<sup>286</sup> of the district attorneys and the Department of Justice to seek civil forfeitures up to \$10,000 per violation is an important enforcement tool in compelling compliance with injunctions issued under section 100.18 and special or general orders issued under section 100.20.

The civil forfeiture authority was enacted to provide a stiff monetary penalty for noncompliance with specific injunctions or orders<sup>288</sup> without the attendant criminal burdens of pleading<sup>289</sup> and

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286. WIS. STAT. § 100.26(6) (1971), reads as follows:

The department of justice or any district attorney may commence an action in the name of the state to recover a civil forfeiture to the state of not less than \$100 nor more than \$10,000 for the violation of an injunction issued under s. 100.18 or an order issued under s. 100.20.

287. In Lovett, *supra* note 270, at 739, the author expresses the view that the availability of civil forfeiture or penalty authority would not only make most responsible business firms reluctant to violate the law, but it would provide a needed remedy “. . . to deter and suppress misconduct by a hard core of ruthless, low-grade entrepreneurs who refuse otherwise to conform with reasonable standards of fairness.”

288. In a few states, notably California, Hawaii, New York and Washington, civil penalties or forfeitures are provided for initial violations of a general unfair or deceptive trade practice statute. Such penalties or forfeitures have been upheld as not being unconstitutionally void for vagueness. *State v. Ralph Williams North West Chrysler Plymouth, Inc.*, 82 Wash. 2d 265, 510 P.2d 233 (1973); *People v. Witzesman*, 29 Cal. App. 3d 169, 105 Cal. Rptr. 284 (Ct. App. 1972); *State v. Readers Digest Ass'n., Inc.*, 81 Wash. 2d 259, 501 P.2d 290 (1972), *app. dism.* 411 U.S. 945 (1973).

The Wisconsin Consumer Act also provides for civil penalties for initial violations of any portion of the Act. Wis. Stat. § 426.301 (1971).

289. In *People v. Superior Court of Los Angeles County*, 107 Cal. Rptr. 192, 507 P.2d 1400 (1973), the court held that the state could plead generally and was not required to

proof.<sup>290</sup> Similar civil forfeiture or penalty authority exists under the consumer fraud laws of more than 10 states<sup>291</sup> and for violations of cease and desist orders issued by the Federal Trade Commission.<sup>292</sup> The availability of the civil forfeiture remedy is particularly helpful in enforcement proceedings against firms which have devised subtle variations on a forbidden selling scheme. As said in *Federal Trade Commission v. Colgate-Palmolive Co.*, in discussing the propriety of a civil penalty in such cases:

If [defendants] in their . . . commercials attempt to to come close to the line of misrepresentation as the commission's order permits, they may without specifically intending to do so cross into the area proscribed by this order. However, it does not seem "unfair to require that one who deliberately goes perilously close to an area of proscribed conduct shall take the risk that he may cross the line." *Boyce Motor Lines, Inc. v. United States*, 342 U.S. 337, 340 [1952].<sup>293</sup>

In determining the amount of civil forfeitures in a given case the courts will, of course, primarily focus upon the number and duration of violations.<sup>294</sup> The courts will also consider the number of people reached<sup>295</sup> and the financial resources of the defendants.<sup>296</sup>

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separately identify each transaction by date, place, name of customer and name of salesman. See also Wis. STAT. § 288.02 (1971); *First Credit Corporation v. Myrichs*, 41 Wis. 2d 146, 163 N.W.2d 1 (1968); *State v. Zillman*, 121 Wis. 472, 98 N.W. 543 (1904); *Murray v. McGarigle*, 69 Wis. 483, 34 N.W. 522 (1887).

290. It is well settled that a civil forfeiture action is not criminal or quasi-criminal, but is strictly civil and remedial in nature. *Kugler v. Romain*, 110 N.J. Super. 470, 266 A.2d 144 (1970), *aff'd as modified* 58 N.J. 522, 279 A.2d 640 (1971); *U.S. v. St. Regis Paper Co.*, 355 F.2d 688 (2d Cir. 1966); *Olshausen v. Commissioner of Internal Revenue*, 273 F.2d 23 (9th Cir. 1960), *cert. den.* 363 U.S. 820 (1960); *Madonna v. State*, 312 P.2d 257 (Cal. App. 1957); *Helvering v. Mitchell*, 303 U.S. 391 (1938). Thus, proof of scienter or bad faith is unnecessary in such cases. See *United States v. H. M. Prince Textiles, Inc.*, 262 F. Supp. 383, 388 (S.D. N.Y., 1966); *United States v. Vitasafe Corp.*, 212 F. Supp. 397 (S.D. N. Y., 1962); *United States v. Karns*, 1963 Trade Cases, ¶ 70,950 (S.D. N. Y. 1963); *United States v. Home Diathermy Co.*, 1960 Trade Cases, ¶ 69,601 (S.D.N. Y. 1959); *Federal Trade Commission v. Algoma Lumber Company*, 291 U.S. 67, 81 (1934).

291. NATIONAL ASSOCIATION OF ATTORNEYS GENERAL, COMMITTEE ON THE OFFICE OF ATTORNEY GENERAL, STATE PROGRAMS FOR CONSUMER PROTECTION 24 (1973).

292. § 5(1) of the Federal Trade Commission Act, 15 U.S.C. § 45(1) (1970).

293. 380 U.S. 374, 393 (1965).

294. Under some statutes the forfeitures or penalties are assessed for each day of violation. Under other statutes, such as Wis. STAT. § 100.26(6) (1971), the assessment is based upon the number of violations.

295. In *People v. Superior Court of Los Angeles County*, *supra* note 289, the court held that the civil penalties should be assessed according to the number of customers who were subjected to certain misrepresentations.

296. *U.S. v. Wilson Chemical Co., Inc.*, 1962 Trade Cases, ¶ 70,478 (D.C. Pa. 1962); *U.S. v. University Wool Batting Corp.*, 1961 Trade Cases, ¶ 70,168 (D.C. N. Y. 1961).

The question of the intent or bad faith of the defendants, though not a valid defense to an action to recover civil penalties, is also an appropriate consideration in determining the amount of penalties or forfeitures to impose.<sup>297</sup> The courts will also consider mitigating circumstances which might result in a reduced civil forfeiture. For example, the failure of officials to enforce a violation for a period of time even though they were aware of violations or the fact that the firm has practiced long and faithful observance of an order which it has now violated are factors which have served to mitigate the amount of penalties or forfeitures.<sup>298</sup> At the same time, however, the enforcement authorities are not required to give the defendants advance notice that their conduct may be in violation of the order in question.<sup>299</sup>

Despite the potential of civil forfeitures of penalties in enforcing compliance with state consumer protection laws, this authority has been infrequently asserted by many states. According to a 1972 survey<sup>300</sup> only two states, New York and Wisconsin, had recovered in excess of \$10,000 per year in civil forfeitures or penalties. However, this apparent reluctance to vigorously utilize the forfeiture or penalty authority may be diminishing since in 1973 at least five states reported recovering at least \$20,000 in civil forfeitures or penalties in the preceding year.<sup>301</sup> In any event, regardless of the nationwide trend, the dramatic increase in the number and scope of injunctions and special and general orders issued under sections 100.18 and 100.20 in recent years leads to the conclusion that the exercise of the civil forfeiture authority will become increasingly necessary and important in Wisconsin.

### CONCLUSION

To a great extent the numerous additions to Wisconsin's consumer protection laws in the past five years represent a response to certain fundamental changes in the buyer-seller relationship

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297. *United States v. H. M. Prince Textiles, Inc.*, 262 F. Supp. 383, 388 (S.D. N. Y. 1966); *United States v. Vitasafe Corp.*, 212 F. Supp. 397, 398 (S.D. N. Y. 1962).

298. *American Greetings Corp. v. U.S.*, 1959 Trade Cases, ¶ 69,587 (6th Cir. 1959); *U.S. v. Home Diathermy Co., Inc.*, 1960 Trade Cases, ¶ 69,601 (D.C. N.Y. 1959).

299. *U.S. v. J. B. Williams Co., Inc.*, \_\_\_ F.2d \_\_\_ (2d Cir. 1974).

300. NATIONAL ASSOCIATION OF ATTORNEYS GENERAL, COMMITTEE ON THE OFFICE OF ATTORNEY GENERAL, STATE PROGRAMS FOR CONSUMER PROTECTION 52 (1972).

301. NATIONAL ASSOCIATION OF ATTORNEYS GENERAL, COMMITTEE ON THE OFFICE OF ATTORNEY GENERAL, STATE PROGRAMS FOR CONSUMER PROTECTION 24 (1973). The five states are Missouri, New Jersey, New York, Texas and Wisconsin.



which date back more than fifty years.<sup>302</sup> Similarly, the present demand for stronger laws relating to the quality and servicing of consumer products<sup>303</sup> can be traced back to the development of modern mass marketing techniques following World War II. With the current pressures of inflation and product shortages, new consumer problems are no doubt now emerging which could become aggravated in the near future. Although these emerging consumer problems will likely be intertwined with some of the most acute ills of our society and economy, the ability of the legal system to fashion rational and innovative responses will largely determine whether or not these problems will be dealt with fairly and effectively in the years ahead.

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302. An interesting discussion of some of the dramatic and profound changes that have taken place in the marketplace appears in O'Connell, *Consumer Protection in the State of Washington*, 39 STATE GOV'T 230 (1966).

303. At the federal level the concern for product quality was most clearly manifested by the enactment of the Consumer Product Safety Act of 1972 (Pub. L. No. 92-573). For a discussion of the background leading to the passage of this law, see Note, *Congress on the Consumer Bandwagon: The Consumer Product Safety Act of 1972*, 22 CATH. U. L. REV. 847 (1973). In Wisconsin the principal consumer protection law enacted by the 1973 legislature related to the regulation of the quality of mobile homes. See Wis. Laws 1973, ch. 116. In addition to providing for design and construction standards, the new mobile home law requires a one year written warranty for every mobile home sold or leased in Wisconsin and prohibits the waiver, exclusion or limitation of any implied warranty.

The regulation of automobile repair abuses has also been a volatile topic in recent years. Although auto repairs rank high in consumer complaints in most states, there exists relatively few laws regulating unfair auto repair practices. See generally Note, *Regulation of Automotive Repair Services*, 56 CORNELL L. REV. 1010 (1971). In Wisconsin the Division of Motor Vehicles promulgated Wis. ADM. CODE, § MVD 24.06 (1973), to regulate the repair and servicing of motor vehicles by dealers licensed pursuant to Wis. STAT. § 218.01 (1971). However, these administrative regulations were suspended for more than one year by the Joint Legislative Committee for Review of Administrative Rules and it is uncertain at this juncture what the final resolution of this problem area will be in Wisconsin.