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The New Kansas Buyer Protection Act

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The New Kansas Buyer

Protection Act

By ARTHUR H. TRAVERS, JR.

INTRODUCTION

The consumer is the hero of the free market system of economic organization. Indeed, perhaps the major justification for the market system is its unmatched efficiency in satisfying the consumer's wants. While it has long been recognized that the proper functioning of the competitive system depends upon consumers being sufficiently informed and competent to choose among the goods offered them, the problem of insuring that the consumer was informed and competent failed to receive adequate attention.¹ Textbook models of consumer behavior simply assumed the existence of perfect knowledge—appending the caveat that this was not true in the real world. For the most part we have relied on sellers to provide the necessary information to the buyers and hoped that competition among them would force each seller to make a reasonably full disclosure and eliminate misleading and deceptive advertisements. This approach has not proved totally successful.

The law did little to improve the situation. In fashioning the law of misrepresentation, the courts decided that reasonable buyers—and only reasonable buyers were considered worthy of legal protection—would recognize “puffing” or “dealers’ talk” for what it was and discount it accordingly.² Under this

theory, sellers could be use a great many questionable—and uninformative—sales techniques without fear of legal reprisals. The courts seem to have ignored the fact that “dealers’ talk” was the only information available to guide the consumer, especially after the revolution in packaging made inspection impossible in many instances.

In fact the law may have made matters worse by encouraging sellers to be even less informative than they otherwise might have been. The courts distinguished between misleading representations of fact (actionable)³ and misleading representations of value (not actionable).⁴ Naturally sellers looking for maximum promotional impact with minimum risk would be encouraged thereby to eliminate anything in their advertisements that could be labelled “fact” and replace it with uninformative superlatives.⁵

A spate of relatively recent studies has confirmed what most knowledgeable observers had long suspected: Although the large, industrial buyer is ordinarily able to inform himself, the average consumer is often not sufficiently informed to exercise his “sovereignty”⁶ Even the

¹ J. M. CLARK, *COMPETITION AS A DYNAMIC PROCESS* 466 (1961).

² 1 F. HARPER & F. JAMES, *THE LAW OF TORTS* 567-68 (1956); W. PROSSER, *TORTS* 739 (3d ed. 1964).

³ *Federal Agency Investment Co. v. Holm*, 123 Kan. 82, 254 Pac. 391 (1927); *Kiser v. Richardson*, 91 Kan. 812, 139 Pac. 373 (1914).

⁴ *Reeder v. Guaranteed Foods, Inc.*, 194 Kan. 386, 399 P.2d 822 (1965); *Elerick v. Reid*, 54 Kan. 579, 38 Pac. 814 (1895).

⁵ Note, *Developments in the Law—Deceptive Advertising*, 80 HARV. L. REV. 1005, 1017 (1967).

⁶ J. M. CLARK, *supra* note 1, at 466.

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"the goal of implemented customer competence [which] might be defined as including a set of market conditions in which customers of normal judgment are afforded the necessary means of looking after their interest effectively enough to avoid gross and demonstrable errors. . . ."¹⁰

The bulk of this legislation has been directed toward improving the amount and quality of information available to consumers. The new Buyer Protection Act, passed by the 63rd Legislature during its 1968 session, has this objective.¹¹ It commits the resources of the state to a

well-educated and affluent sometimes fail to get the most for their money, but the poor and uneducated—who desperately need to get a dollar's value for a dollar spent—often deepen their poverty by their inability to function properly in the marketplace.⁷

Although some courts have attempted to rectify the situation within the framework of the common law by stretching traditional concepts,⁸ for the most part it has fallen to the legislatures—both state and federal⁹—to enact the measures necessary to attain.

⁷ See generally D. CAPLOVITZ, *THE POOR PAY MORE* (1963).

⁸ A leading case here is *Williams v. Walker-Thomas Furniture Co.*, 350 F.2d 445, 448 (D. C. Cir. 1965).

⁹ Federal legislation includes the Consumer Credit Protection Act, 82 Stat. 146; the Fair Packaging and Labeling Act, 80 Stat. 1296. On the state level the major development may prove to be the approval by the National Conference of Commissioners on Uniform State Laws of a Uniform Deceptive Trade Practices Act. For thorough analyses of the act, see Dole, *The Uniform Deceptive Trade Practices Act: Another Step Toward a National Law of Unfair Trade Practices*, 51 MINN. L. REV. 1005 (1967); Dole, *Merchant and Consumer Protection: The Uniform Deceptive Trade Practices Act*, 76 YALE L. J. 485 (1967).

¹⁰ J. M. CLARK, *supra* note 1, at 466.

¹¹ House Bill No. 1782, Ch. 341, 1968 Session Laws 677. [Hereinafter citation to the act will be by section without further designation.]

**DEPEND ON
CAPITOL FEDERAL
for High Earnings**

NOW—LOWEST
MINIMUMS ON

5 1/4%

Savings Certificates
36 Mo. — \$1,000 Min.
6 Mo. — \$5,000 Min.

Plus Complete Safety

TOPEKA LAWRENCE
KANSAS CITY

Largest in Kansas

Capitol
Federal
Savings

program of eliminating misleading advertisements and promotional schemes. While eliminating objectionable advertising does not by itself increase the consumer, it may do this indirectly by channeling the promotional activities of sellers into more desirable channels. This article seeks to introduce the provisions of the Buyer Protection Act to those who may be unfamiliar with them.

THE SUBSTANTIVE STANDARDS

The substantive core of the act is found in Section 2, which declares that

“the act, use or employment by any person of any deception, fraud, false pretense, false promise, misrepresentation, or the concealment, suppression or omission of any material fact with intent that others rely upon such concealment, suppression or omission, in connection with the sale or advertisement of any merchandise, whether or not any person has in fact been misled, deceived or damaged thereby, is . . . an unlawful practice. . . .”

Not only is the word “person” defined to include any form of business organization; the definition also includes the “legal representative” of any natural person and “any agent, employee, salesman, partner, officer, director, member, stockholder, associate, trustee or cestui que trust” of any business organization. The intention here seems to be to prevent evasion of the act’s prohibitions by denying to a defendant the defense that his agent or employee had no authority to engage in the behavior objected to. It was not uncommon in the past for a consumer to go without relief because he could not establish a salesman’s authority to make the objectionable representations. Under this definition the state need only show that the actor served the defendant in one of the enumerated capacities; it will not be incumbent upon the state to show that the actor was operating within his orders from the defend-

ant.¹² This means that on occasion, a defendant will be held responsible when an employee in fact exceeded his authority. Given the nature of the remedies granted by the act, this will ordinarily not work a hardship on the defendant, but it will provide an incentive for sellers to police their salesmen and copy-writers to insure against repetitions. On balance, it seems to be sound not to clutter up a significant number of lawsuits with issues about the actor’s authority.

By defining “merchandise” to include “any objects, wares, goods, commodities, intangibles, real estate situated outside the state of Kansas or services,”¹³ the legislature has brought under the act sellers of items that might ordinarily not be considered “merchandise” but which have on past occasions been promoted in a questionable manner. These include desert or swampland passed off on Kansas residents with glowing descriptions of life during the sunset years in Arizona or Florida, and “services” life quickie or correspondence schools that purport to educate their students to step into glamorous jobs in various trades but in fact do very little to improve their students’ vocational abilities or opportunities.¹⁴

The definition of “sale” to include “any . . . offer for sale, or attempt to sell . . . for cash or on credit”¹⁵ and “advertisement” to include any attempt “to induce directly or indirectly any person to enter into any obligation or acquire any title or interest in any merchandise”¹⁶ ought to permit the state to intervene

¹² Dispensing with proof of this issue seems especially wise when one considers that evidence on the point is almost totally within the control of the defendant and persons dependent upon the defendant for their livelihood.

¹³ § 1 (b).

¹⁴ As is pointed out in W. MAGNUSON & J. CARPER, *THE DARK SIDE OF THE MARKET-PLACE* 25 (1968) these schools usually fleece uneducated persons trying to better their lot by improving themselves.

¹⁵ § 1 (d).

¹⁶ § 1 (a).

against an advertisement or promotion at any stage; clearly, they evidence an intention to eliminate such traditional issues as the location of "title". One interesting facet of the definition of "advertisement" is the specific inclusion of any device to disguise a solicitation as a bill or other document conveying the impression that the consumer already has a legal obligation to pay for the goods. Thus, the statute clearly encompasses such techniques as sending requests to renew magazine subscriptions dressed up as "invoices." By the same token it ought to empower the state to go after merchants who will unordered merchandise to consumers and mail a "bill" a few days later.

It is too early to predict whether Section 2 will be interpreted in such a way as to permit the state to enforce a standard of business behavior which is materially higher than that called for by the common law of misrepresentation. Yet there seems little doubt that the legislature intended to adopt a standard of illegality that would not be restricted in its growth by common law concepts. To this end, it expressly provided that certain common law issues were irrelevant in actions under the act. For example, the common-law plaintiff had to establish that he had relied upon the defendant's representation¹⁷ and had sustained an injury as a result thereof.¹⁸ But in an action to enforce the new act the state need not show that anyone "has in fact been misled, deceived or damaged" by the misrepresentation—whether it be outright falsehood, studied ambiguity, half-truth, or failure to disclose. As a result it will be unnecessary in many cases for the state to produce any actual consumers of defendant's product, let alone show that they had been exposed to defendant's advertising. The removal of this evidentiary burden should signifi-

¹⁷ 3 RESTATEMENT, TORTS § 546 (1938).

¹⁸ *Ibid.*

cantly increase the number of sellers against whom the state can act.¹⁹

Moreover, proof of reliance at common law often meant that plaintiff was required to establish a causal connection between the misleading element of an advertisement and his purchase.²⁰ Consequently, sellers could use certain questionable practices—like adopting a corporate name that suggested a large organization, such as American, Federal, or National²¹—that a plaintiff would be hard pressed to show were significant factors inducing his purchase. This obstacle will not confront the state.

Elimination of the need to show damage also will increase the number of practices that the act makes vulnerable. Suppose an advertisement claims a sewing machine is a \$400.00 value but priced at \$200.00 whereas the machine is only worth \$200.00. Since any purchaser would know what he was getting and the price and since any purchaser would pay what the machine was "worth" and no more, the damage, if any, lies in the disappointment of the buyer's expectancy that he was getting a bargain.²²

While there may be sound reasons for refusing to award such an expectancy to individual plaintiffs, they should not hinder the state's effort to improve the

(Continued on page 51)

¹⁹ If a particular advertisement is attacked as deceptive, it may be necessary to prove the capacity of the advertisement to deceive. However, as noted later it is possible to prove this by ways that do not involve the production of deceived consumers.

²⁰ 1 F. HARPER & F. JAMES, *supra* note 2, at 583-86.

²¹ Note, *Translating Sympathy for Deceived Consumers Into Effective Programs for Protection*, 114 U. PA. L. REV. 395, 398 n. 28 (1966).

²² The courts and the Federal Trade Commission have had no difficulty finding that this is a deceptive practice under § 5 of the Federal Trade Commission Act. See generally C. ALEXANDER, *HONESTY AND COMPETITION* 118-24 (1967). The leading case on deceptive pricing is *FTC v. Standard Educ. Soc.*, 302 U. S. 112 (1937).

Kansas Buyer

(Continued from page 14)

quality of information reaching its consumers.

In addition to dispensing with reliance and damage, Section 2 erects two separate standards of illegality that vary in the extent to which they depart from the common-law. "Concealment, suppression or omission" is unlawful only if "a material fact" is concealed, suppressed or omitted and the defendant had an "intent that others rely upon such concealment, suppression, or omission," but if the practice complained of involves the use of "any deception, fraud, false pretense, false promise, [or] misrepresentation," the state need not prove that a "fact" was misrepresented, that it was "material," or that the defendant had "scienter."²³ Since the draftsmen of Section 2 were careful to make these common-law concepts inapplicable to "any deception" etc., it can hardly be that terms like "fraud" and "misrepresentation" were intended to be given their common law meanings. To use those meanings—which include "materiality"²⁴ and "scienter"²⁵—would be to smuggle back into the act restrictions that the legislature meant to remove.

If the above analysis is sound, even words like "fraud" in Section 2 have a potential for growth, but the key word here is likely to be "deception." A similar term—deceptive practices²⁶—in the Federal Trade Commission Act has enabled the Commission and the courts to shift their emphasis from the advertisement's

²³ It is enough if the defendant intended to induce the plaintiff to act upon a false statement; scienter does not require any intent to injure. 1 F. HARPER & F. JAMES, *supra* note 2, at 532-33.

²⁴ "Materiality" means that a reasonable buyer would consider the undisclosed fact important. See 3 RESTATEMENT, TORTS § 538 (1938).

²⁵ See 3 RESTATEMENT, TORTS § 525 (1938).

²⁶ 15 U.S.C. § 45 (1964).

correspondence to literal truth²⁷ to its impact upon the consumer. The question has been whether the advertisement has the "capacity to deceive."²⁸

Emphasizing the impact on the consumer in turn implies the construction a model consumer through whose eyes the advertisement is perceived and understood. This seems especially true under section 2 since the state need not produce any "deceived" consumers to show deception.²⁹

Under the Federal Trade Commission Act, the FTC has been required to establish that the advertisement in question has the capacity to deceive not the "reasonable man" of the common law—that perceptive, attentive, skeptical paragon—but the "average" consumer, who may be careless or credulous. Indeed, language in some of the cases³⁰ suggests that an advertisement may be illegal if it will mislead the "wayfaring fool"³¹—the sort of chap who thinks that corn flakes sprinkled into a piano will really make piano legs grow.

What seems to have occurred is that the courts and the FTC balanced the seller's interest in phrasing his advertisement in a particular way against the risk—however remote—of some consumer being misled.³² The weights assigned to these interests indicate a somewhat dif-

²⁷ The FTC may, however, compel literal truth. *Moretrench Corp. v. FTC*, 127 F.2d 792, 795 (2d Cir. 1942).

²⁸ *Charles of the Ritz Distribs. Corp. v. FTC*, 143 F.2d 676, 680 (2d Cir. 1944).

²⁹ This would be so even if the state had to produce deceived consumers since it could always be questioned whether the consumers produced were representative of the advertisement's audience; hence, some sort of comparison of the witnesses' characteristics with a model would seem required.

³⁰ *E.g.*, *Exposition Press, Inc. v. FTC*, 295 F.2d 869, 872 (2d Cir. 1961).

³¹ The language is from *General Motors Corp. v. FTC*, 114 F.2d 33, 36 (2d Cir. 1940), in which the court quoted from the prophet Isaiah.

³² See Note, *supra* note 5, at 1042.

ferent scheme of values than that which prevailed at common law: Any appreciable risk of deception is treated as excessive, especially if it appears that the seller has alternative ways of phrasing his message that do not create such a risk.³³ Vanished almost entirely is the idea that some risk of deception is tolerable because the consumer is obligated to protect himself. The elimination of this duty of self-protection has dictated the choice of the "wayfaring fool" rather than the "reasonable man" to serve as a model. The draftsmen of the new Kansas act evidently intended to depart from the common law by making illegal at least some devices that would not deceive the "reasonable" man, but it is too early to gauge the extent to which the courts will sanction a departure from the common law.

Another interesting question posed by the act is the extent to which Section 2 may impose upon sellers and advertisers an affirmative duty to disclose information about their products that they would prefer to keep hidden. Section 2 does declare that "any concealment, suppression, or omission of any material fact with intent that others rely upon such concealment, suppression or omission," is unlawful, but this language may do little more than enact the common law.

Although the Kansas court has often reiterated the accepted rule that parties to an arm's length transaction, such as a merchant and consumer, have no obligation to disclose information to each other,³⁴ several cases have held "conceal-

³³ For example, in *Gelb v. FTC*, 144 F.2d 580 (2d Cir. 1944), the court agreed with the FTC that defendant's description of its hair coloring as permanent might induce some purchasers to think it would dye hair that had not grown out. It seems highly unlikely that an appreciable number of persons would put that interpretation on the advertisement, but eliminating the objectionable word would not materially restrict the defendant's ability to convey his message.

³⁴ *E.g.*, *Ferguson-McKinney Dry Goods Co. v. Gear*, 76 Kan. 164, 90 Pac. 770 (1907).

ment"—as distinct from "nondisclosure"—to be actionable fraud. *Jenkins v. McCormick*³⁵ found fraudulent concealment where a contractor covered a defective concrete floor with tile to hide its condition from prospective home buyers, knowing that the condition of the concrete would later cause the tile to crack and come loose. *Larrick v. Jacobson*³⁶ invalidated a mortgage secured from a husband and wife upon their homestead. The wife had previously told the mortgagee that she would never sign a mortgage on that property, but he remained silent while the wife signed the mortgage, knowing full well that she thought the mortgage covered a different tract and would not have signed had she known the truth.

The point to note about these cases is that neither raises serious questions about materiality and scienter. The contractor's behavior alone warrants the inference that he knew the floor's condition would be a significant factor in any reasonable buyer's purchase decision³⁷ and that he intended to affect that decision.³⁸ Likewise there is no doubt of the mortgagee's knowledge of the importance of the undisclosed information and his specific intent that the wife should sign a result of her mistaken impression.

The new act also requires that the state establish the materiality of any concealed, suppressed or omitted facts and defendant's scienter. If proof of these elements means establishing either that the defendant deliberately concealed information otherwise available to the consumer (*Jenkins*) or that the consumer specifically informed the defendant that a particular factor was crucial to his purchase decision and the defendant knew the consumer was mis-

³⁵ 184 Kan. 842, 339 P.2d 8 (1959).

³⁶ 139 Kan. 522, 32 P.2d 204 (1934).

³⁷ Were this not the case, he would hardly have gone to the trouble of concealing the floor.

³⁸ It is not necessary that he intended to change that behavior.

taken (*Larrick*), the statute will impose no greater duty to disclose than did the common law. The imposition of a greater duty can result only if the courts are willing to hold a seller who fails to disclose otherwise unavailable information about his merchandise on the ground that any reasonable person in the seller's position would know that a buyer would consider the information significant, and hence the intent to affect the buyer's behavior can be inferred from the nondisclosure.

The trouble with this theory is that it affords no basis for limiting the seller's duty to disclose. Almost anything viewed in retrospect may seem significant information. Obviously, it is not possible for an advertisement to contain everything that a buyer might like to know about the product. And it would probably be undesirable even if it were possible, since consumers would be inundated with such a mass of data that they could not be expected to assimilate it. Ideally, the duty to disclose should be imposed very gradually with the objective of requiring every advertisement eventually to meet some *minimum* level of informativeness.

Something of this sort may be occurring under the Federal Trade Commission Act. In 1950 the FTC's attempt to require the maker of an iron tonic to disclose in its advertisements that most tired people were not suffering from iron deficiency anemia and hence would not be helped by the tonic was overturned by the federal court.³⁹ Recently, however, the Sixth Circuit approved an FTC order requiring the maker of Geritol to disclose the identical information.⁴⁰ The difference in result seems attributable to the difference in the theories espoused by the FTC.⁴¹ In the earlier case, the FTC argued that every advertisement contains

an implied representation that all material facts had been disclosed, a theory offering no way of distinguishing between what must be disclosed and what may be kept hidden. In the later case, the FTC offered no sweeping principle and the court's opinion articulates none. All that can be said is that the FTC and the courts are somewhat gingerly forcing affirmative disclosures by advertisers in some cases. It is hoped that the Kansas act will be similarly pushed beyond the common law to require affirmative disclosures in some cases on a case-by-case basis that allows some limiting principle to emerge.

Section 2 is limited by two provisos. First, the owner of the medium of communication that disseminates the advertisement is not held responsible if he "has no knowledge of the intent, design or purpose of the advertiser." With some such exemption for media owners it is hard to quarrel, but two features of the present exemption seem open to question. First, the owner must have "knowledge" of the advertiser's intent, design or purpose instead of "notice." This suggests that an owner having no actual subjective knowledge would be exculpated even though a reasonable person in the owner's position should have realized what was going on.⁴² In effect this subjective test eliminates any pressure on the owner to conduct any investigation before accepting advertising copy. Indeed, it may discourage such an investigation since information of which the owner has actual knowledge makes him subject to the act. Accordingly, there is an advantage to knowing as little as possible. Had the act been drafted in such a way as to induce media owners to investigate advertisers and reject questionable advertisements, it would have provided a material aid to the state in

³⁹ *Alberty v. FTC*, 182 F.2d 36 (D.C. Cir.) *cert. denied*, 340 U.S. 818 (1950).

⁴⁰ *J. B. Williams Co. v. FTC*, 381 F.2d 884 (6th Cir. 1967).

⁴¹ See Note, *supra* note 5, at 1048.

⁴² This is the conventional distinction between "notice" and "knowledge." See, *e.g.*, the discussion in W. SEAVEY, *AGENCY* 17-18 (1964).

achieving its objective of improving the information reading consumers.

Furthermore, it is the advertiser's intent, design or purpose of which the owner must have knowledge. This permits a medium owner to accept with impunity advertising which he knows to be untrue, deceptive, or otherwise illegal so long as he knows nothing about the state of mind of the advertiser. There seems to be no reason why an owner should escape responsibility for disseminating advertising that he knows to be illegal. Here too the draftsmen seem to have passed up an opportunity to maximize the impact of the new act inducing to media owners to refuse unlawful advertising.

By a second proviso the act is made inapplicable to "any advertisement which is subject to and complies with the rules and regulations of, and the statutes administered by the federal trade commission." Thus, the advertisement must first be one over which the FTC has jurisdiction, which, as a practical matter, means that interstate commerce is involved.⁴³ If false advertising of food, drugs, devices, or cosmetics is under attack, the FTC has jurisdiction if the advertiser has engaged in interstate advertising whether he has made any interstate sales or not.⁴⁴ If other goods were involved, the 1941 case of *FTC v. Bunte Brothers*,⁴⁵ in which the Supreme Court held that the FTC could not reach purely intrastate transactions that affect interstate commerce, presumably controls. The FTC has never directly challenged the case⁴⁶ although it has successfully as-

serted jurisdiction over intrastate acts related to interstate activity.⁴⁷ Under either approach, however, a substantial number of activities occur wholly within Kansas and are not exempted from the act.

Even if the FTC would have jurisdiction over the activity, there is no exception from a state suit unless the advertisement complies with FTC standards. Undoubtedly this exemption would protect a seller who could show that the very advertisement challenged by the state had been approved by the FTC, but few sellers will be in that position. It might be argued that the exemption should be restricted to those cases in which the particular advertisement in issue has been sanctioned by the FTC. This narrow interpretation presupposes that the exemption is designed solely to avoid conflict between federal and state enforcement agencies in particular cases.

A broader and, to my mind, preferable interpretation would permit any merchant to show that if the FTC's rules and standards were applied to his advertisement, it would be held lawful. This construction assumes that the proviso has the broader purpose of not subjecting merchants subject to both state and federal jurisdiction to conflicting standards of behavior. In effect the state would be working with the federal government by enforcing federally created standards against activities in interstate commerce that the FTC has not gone after.⁴⁸ It is well known that the FTC lacks the resources to attack more than a small portion of the deceptive advertising under its jurisdiction.⁴⁹ State enforcement of federal standards can free the FTC to devote most of its time to bringing those

⁴³ Another jurisdictional limitation—that the proceeding appear to the reviewing court to be in the "public interest"—has fallen into utter disuse. Compare *FTC v. Klesner*, 280 U.S. 19 (1929), with *Exposition Press, Inc. v. FTC*, 295 F.2d 869 (2d Cir. 1961).

⁴⁴ *Mueller v. United States*, 262 F.2d 443 (5th Cir. 1958).

⁴⁵ 312 U.S. 349 (1941).

⁴⁶ G. ALEXANDER, HONESTY AND COMPETITION 3 (1967).

⁴⁷ E.g., *Bankers Sec. Corp. v. FTC*, 297 F.2d 403 (3d Cir. 1961).

⁴⁸ Of course, the state might choose to enforce less rigorous standards than are presently being enforced by the FTC; in that event, the proviso would act as a kind of ceiling.

⁴⁹ See W. MAGNUSON & J. CARPER, *supra* note 14, at 78-80.

cases that offer opportunities for doctrinal development while the state makes sure the law is obeyed.⁵⁰ Of course, with respect to intrastate activities the state is free to develop its own standards.

With respect to the "chain referral sales" technique, the draftsmen departed from the approach of making a promotion or advertisement unlawful only if it was fraudulent or deceptive and adopted a flat prohibition against the use of any referral sales scheme to induce a "buyer" to purchase merchandise for a price in excess of \$50.00.⁵¹ Under the typical referral sales scheme, a merchant tells a prospective purchaser that for every person referred to the merchant by the purchaser who buys the same or similar merchandise the merchant will give the purchaser a stated "commission."⁵² Often this technique is combined with other questionable practices and almost always it is used to distract the consumer's attention from the details of the transaction he is about to enter, thus making other deceptive practices more effective.⁵³

Evidently, the legislature decided that the referral sales technique is so likely to be used to mulct consumers and so rarely used in good faith that it was not worth the administrative inconvenience to attempt a case-by-case examination of the practice. The only qualifications to the rule are that the purchaser must be purchasing the merchandise for household

⁵⁰ This would, of course, require the state courts to apply standards which they have no hand in creating. This is not a particularly difficult assignment, and it is essentially what is called for under choice-of-law rules and the doctrine of *Erie RR. v. Tompkins*, 304 U.S. 64 (1938).

⁵¹ § 3.

⁵² Were such a scheme used deceptively, it would undoubtedly be covered by § 2. The element of chance is so strong in a referral sales scheme, however, that some states have held them illegal under state lottery laws. *E.g.*, *Sherwood & Roberts-Yakima, Inc. v. Leach*, 409 P. 2d 160 (Wash. 1965).

⁵³ See Note, *supra* note 21, at 398-99.

consumption⁵⁴ and that the price of the purchase—not the "value"—must exceed \$50.00

ENFORCEMENT

The act empowers either the Attorney General or a county attorney to take the initiative in eliminating unlawful practices.⁵⁵ In either case, the act provides for cooperation between the Attorney General's office and the local county attorneys. Should the Attorney General initiate the action, he may request such assistance as he needs from the county attorney in the locality in which the action is brought.⁵⁶ On the other hand, if a county attorney brings the action, he is required "to make a full report thereon to the attorney general including the final disposition of the matter." On its most literal reading this provision would require no communication from the county attorney to the Attorney General until the case was concluded; it does not prescribe who shall determine the contents of those reports. Yet the structure of the act leaves no doubt that is the Attorney General who hears the primary enforcement responsibilities under the act. Furthermore, sound administration would dictate that the state evolve a single enforcement policy and that each enforcement agency operate within the framework so established. Finally, the Attorney General's office will develop specialists in buyer protection. However able a county attorney may be, he is unlikely to have this sort of expertise.⁵⁷ All of these factors

⁵⁴ This result comes about through the definition of a "buyer" in § 1 (e) as one who purchases "not for resale in the ordinary course of his trade or business but for his use or that of a member of his household or in connection with the operation of his household."

⁵⁵ § § 4, 8, 14.

⁵⁶ § 14.

⁵⁷ It would seem that under ordinary doctrines of *res judicata* the attorney general would be barred from attacking any practice that had been the subject of an unsuccessful suit by the county attorney; hence, it is important that the first suit be properly tried.

suggest that the purpose of the act would best be served if the local attorneys were required to submit progress reports to the Attorney General's office at each stage of any litigation they commence, in such form and with such content as the Attorney General's office may prescribe. It should also be understood that the Attorney General is free to oversee and direct any action at anytime.

The extent to which a county attorney will play a role in any given action will in most cases depend upon the location of the trial, which in turn is determined by the venue provisions of Section 13. These give the state a choice of courts in which to bring an action. Any defendant—resident or nonresident—may be sued in the district court of any county in which an unlawful practice occurred. Thus, if an advertiser disseminated unlawful advertising in every county in Kansas, he could be sued in every county. If the defendant is a resident of Kansas, action may also be brought where the defendant resides. Whether resident or nonresident, if the defendant has his principal place of business in Kansas, he may be sued where that principal place of business is located. If the defendant has neither a residence nor a principal place of business in Kansas, he may be used in the district court of Shawnee county, a location offering maximum convenience to the Attorney General. It may be expected that the Attorney General will attempt to lay venue in the most convenient court possible and, in such cases, there will be little or nothing for the county attorney to do. Only if the venue provision compels an action to be brought in an inconvenient location will the Attorney General rely heavily upon the county attorney.

The basic remedy afforded the state under the act is the injunction. When an enforcement agency has "reasonable cause to believe that any person has engaged in, is engaging, or is about to engage in" an unlawful practice it may file for an

injunction.⁵⁸ The court is not limited to the granting of preventive relief; it may also order the restoration by any appropriate means of money acquired by the defendant as a result of a violation of the act.⁵⁹ Presumably, in the ordinary case, it would suffice if the defendant paid a sum of money into court for distribution, by means of a master or otherwise, to the defendant's customers. But if the defendant's violation is "substantial and willful" the court may revoke any certificate or license permitting the defendant to do business in Kansas or appoint a receiver⁶⁰ who is given the power to collect every asset of the defendant derived through a practice made illegal under the act, together with every other asset with which they may have been commingled.⁶¹ Thus if it is not possible to segregate those of the defendant's assets acquired as a result of an unlawful practice the receiver may be empowered to take over the defendant's entire business. The assets which thus pass into the receiver's hands are to be held for the benefit of those who have suffered damage as a result of the defendant's illegal practices the receiver is empowered either to distribute the assets collected in kind or to sell the assets and distribute the proceeds. Claimants under the act are treated in the same manner as the defendant's general creditors and are entitled to receive all out-of-pocket losses they are able to prove.⁶² It is to be noted that no expectancy interest is awarded claimants under this act. Thus, if the defendant tells the plaintiff that

⁵⁸ § 8.

⁵⁹ *Ibid.*

⁶⁰ *Ibid.*

⁶¹ § 9.

⁶² § 12 provides that the provision of the act "shall not bar any claim against any person who has acquired any moneys or property, real or personal, by means of any practice herein declared to be unlawful," except where there has been a court order terminating the defendant's business affairs "after receivership proceedings."

defendant's aluminum siding is a "\$400.00 value" that the plaintiff can have for \$250.00 whereas the siding is in fact worth \$175.00, plaintiff's damages are \$75.00, not \$225.00. One may expect that a receiver will not often be appointed. Not only is the relief unusually severe, but it requires more state resources to be devoted to a single case than can be spared except in extraordinary circumstances.

If the act is to be administered with maximum efficiency the overwhelming majority of cases will have to be disposed of through an informal settlement procedure leading to an "assurance of discontinuance." Only in this way will the state be able to proceed against a sufficient number of defendants.⁶³ Assurances are required to be in writing and filed with a district court having proper venue under the act. The chief advantage to the state in securing such an assurance lies in the fact that a violation of the assurance within six years of its filing is deemed "prima facie proof of a violation" of the act. Thus, if the state sought injunctive or other judicial relief initially, it would have the burden of establishing that the defendant's conduct was proscribed by the act. If, however, the state accepted an assurance of discontinuance and later sued to enjoin a violation of the assurance, the state need show only that the assurance had been violated. The defendant would then have the burden of persuading the court that its conduct did *not* violate the act.⁶⁴

The act offers two inducements to defendants to sign an assurance. First, violation of an injunction will subject a

⁶³ § 10.

⁶⁴ Actually, the use of the phrase "prima facie" suggests only that the court would be warranted in finding a violation of the law, not that it would be compelled to. Nevertheless, since the burden shifted to the defendant is one of establishing a point of law instead of establishing a set of facts, it would seem that the view expressed in the text is the more logical one.

defendant to liability for a civil penalty of \$10,000⁶⁵ whereas violation of an assurance will lead only to a suit for an injunction under the circumstances outlined above.⁶⁶ Second, the act provides that an assurance "shall not be considered an admission of a violation for any purpose."⁶⁷ Although the act is not crystal clear on this point, this provision seems to relate to the use that a subsequent private litigant may make of the assurance. If the state were forced to seek judicial relief against a defendant, statements made during that proceeding and, perhaps, even the final judgment of that proceeding could be used by a subsequent private plaintiff under the admissions exception to the hearsay rule.⁶⁸ A defendant who considers defeat likely or who believes he will be required to admit facts that might later be used against him will have some incentive to execute an assurance.⁶⁹

The initiation of a judicial proceeding (leading either to judgment or an assurance) or the acceptance of an assurance without litigation will ordinarily be preceded by some sort of state investigation. The act grants the state agencies extensive investigatory powers, but it is not mandatory that every action be preceded by an investigation so complete as to call into use any or all of the powers so granted. An informal investigation would

⁶⁵ § 11.

⁶⁶ This assumes that an assurance, although filed in court, is not a "court order" within the meaning of § 11.

⁶⁷ § 10.

⁶⁸ See generally, 4 J. WIGMORE, EVIDENCE § 1048059 (3rd ed. 1940).

⁶⁹ A parallel arrangement exists under the federal antitrust laws. Under § 5 (a) of the Clayton Act, final judgments rendered against a defendant in a government action may be used as prima facie evidence of a violation in a subsequent private action against that defendant, with the exception that consent judgments rendered before any evidence was taken shall not be so used. See generally Timberlake, *The Use of Government Judgments of Decrees in Subsequent Treble Damage Actions Under the Antitrust Laws*, 36 N. Y. U. L. REV. 991 (1961).

be sufficient if it gave the state agency reasonable cause to believe that a violation had occurred, was occurring or was about to occur.

Still, as a matter of tactics, a full scale investigation would often be the best route for an agency contemplating an action. All that is required is that the state agency receive a verified complaint setting forth facts showing a past or present (but not threatened) violation and that it determine that an investigation would be in the public interest.⁷⁰ Then the agency may require the alleged violator to file a statement under oath setting forth whatever information the agency requires;⁷¹ any person—not merely an alleged violator—may be examined,⁷² books records, documents and other material evidence may be examined or,⁷³ pursuant to a court order, impounded.⁷⁴

The act provides that any subpoena or notice issued in connection with the conduct of such an investigation as well as any action filed to enforce the act may be served outside the state of Kansas in any one of a variety of ways.⁷⁵ By its terms the act does not require that the person so served have any contact with the state of Kansas. Under recent Supreme Court

rulings a state is entitled to compel non-resident corporations—and possibly non-resident individuals and unincorporated associations—to appear in its courts if the party served has sufficient contacts with the state to make his appearing there not unfair.⁷⁶ It is to be doubted whether a state agency would take an interest in any alleged violator who did not have such contacts. Thus, the systematic advertising in Kansas or even the sporadic selling to Kansas residents ought to be enough to support jurisdiction,⁷⁷ although the point has not been definitively settled. More troublesome is the provision granting the state agency the power to subpoena an out-of-state nonresident witness in the course of an investigation. Invocation of that power will probably be met by constitutional challenge and the outcome is very much in doubt.

Finally, the provision for a \$10,000 civil penalty for the violation of any injunction or court order issued pursuant to the act is also the ultimate sanction against those who refuse to cooperate with the state agency conducting an investigation, but a two-step process is required. First, the agency must get a court order designed to secure such cooperation.⁷⁸ Further recalcitrance subjects the person to liability for the penalty.⁷⁹

⁷⁰ § 4.

⁷¹ § 4 (1).

⁷² § 4 (2).

⁷³ § 4 (3).

⁷⁴ § 4 (4).

⁷⁵ § 6 provides that if personal service within the state cannot be obtained, then substituted service may be made in any of the following ways: "(a) Personal service . . . without this state; or (b) the mailing . . . by certified mail to the last known place of business, residence or abode within or without this state of such person for whom the same is intended; or (c) in the manner provided in the code of civil procedure . . . ; or (d) such service as the district court may direct in lieu of personal service within this state."

⁷⁶ See *McGee v. International Life Ins. Co.*, 355 U.S. 220 (1957); *International Shoe Co. v. Washington*, 326 U.S. 310 (1945).

⁷⁷ Cf. the discussion in *Tilley v. Keller Truck & Implement Corp.*, 200 Kan. 641, 438 P.2d 128 (1968), upholding the constitutionality of the Kansas long-arm statute, K.S.A. § 60-308.

⁷⁸ § 7.

⁷⁹ The exact nature of the proceeding to impose this penalty is unclear. Although the penalty is labelled a "civil" penalty, the act is headed "Crimes and Punishment." Moreover, the penalty seems designed to vindicate the power of the court as well as to secure compliance with the court's order.