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Consumer Protection in Florida: Inadequate Legislative Treatment of Consumer Frauds

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NOTES

CONSUMER PROTECTION IN FLORIDA: INADEQUATE LEGISLATIVE TREATMENT OF CONSUMER FRAUDS*

With the great increase in consumer credit[1] and the steady rise in the volume of consumer goods marketed each year, consumer protection has become a major legal problem.[2] While much attention has been given to the products liability area, the economic losses in transactions not involving personal injury are of equal significance. Deceptive sales practices affect every class of society, particularly the poor and elderly.[3] Such practices are numerous and varied. Among the most common are: the sale of used or rebuilt merchandise as new, sale of shoddy merchandise, failure to honor repair guarantees,[4] spurious special prices, "free" gift offers,[5] and referral sales.[6] Losses in individual fraud cases run from a few dollars to several thousand dollars. In the aggregate the annual economic loss to consumers runs into the billions.[7]

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1. In the past thirty years total outstanding consumer credit has risen from approximately $7 billion in 1939 to well over $122 billion in 1969. *See* 56 FED. RESERVE BULL. 54 (1970).

2. Awareness of the magnitude of consumer problems has brought a great expansion in the literature. The following deal with consumer problems on a broad scale: D. CAPLOVITZ, THE POOR PAY MORE (1963); W. MAGNUSON & J. CARPER, THE DARK SIDE OF THE MARKETPLACE (1968); Murray, The *Consumer and the Code: A Cross-sectional View*, 23 U. MIAMI L. REV. 11 (1969); Rice, *Remedies, Enforcement Procedures and the Duality of Consumer Transaction Problems*, 48 B.U.L. REV. 559 (1968); *Symposium—Consumer Protection*, 37 GEO. WASH. L. REV. 1013 (1969); *Note, Translating Sympathy for Deceived Consumers into Effective Programs for Protection*, 114 U. PA. L. REV. 395 (1966).

3. *See generally* PRESIDENT'S COMM. ON CIVIL DISORDERS, REPORT (1968) (unconscionable business practices are a major cause of unrest in the ghettos); SUBCOMMITTEE ON FRAUDS AND MISREPRESENTATIONS AFFECTING THE ELDERLY, 89TH CONG., 1ST SESS., REPORT ON FRAUD AND DECEPTIONS AFFECTING THE ELDERLY 1 (Comm. Reprint 1965) [hereinafter cited as REPORT ON FRAUDS]: "[T]he elderly of the United States are now clearly the major victims of the highly organized, high-pressure techniques of the modern day medicine man." *Id.* at 11.

4. Failure to honor guarantees is the largest source of complaints received by consumer protection agencies. *See, e.g.*, JOINT SENATE-HOUSE COMM. ON CONSUMER PROTECTION, CONSUMER PROTECTION IN FLORIDA 10 (1970) [hereinafter cited as FLORIDA CONSUMER PROTECTION REPORT].

5. Free gift advertising is an offer of free goods with the purchase of other goods, when in fact the price of the purchased goods includes the cost of the free item. For a disussion of Florida statutes on the subject *see* note 53 *infra*.

6. Referral sale is a technique whereby the buyer is led to believe he can pay for a product by commissions on sales made to persons he has refrred to the seller as prospective customers. The buyer almost invariably collects nothing for referrals since the number of successful referrals is extremely small and some companies do not bother to follow up referrals or to remit commissions if successful. Referral sales are especially pernicious because the consumer is led to buy something he does not really need and cannot afford. Hoping to make money on the referrals, the consumer instead finds he must pay for overpriced merchandise and high credit charges.

7. REPORT ON FRAUDS, *supra* note 3, at 8.

Until recently, consumers have had to rely on commercial and tort law for protection from fraud and inferior merchandise. Private remedies have proved inadequate, however, to correct these problems.[8] This note examines the inadequacy of private remedies and evaluates recent Florida legislation directed at protecting the consumer from deceptive sales practices.[9]

INADEQUACY OF TRADITIONAL REMEDIES FOR FRAUD

Establishing a Legal Case Against Misrepresentations

Traditional remedies for fraud have been ineffective in providing adequate relief for the aggrieved consumer. Although the consumer has a variety of theories to choose from, each theory has inherent liabilities that decrease chances for recovery.[10] Under the tort theory of misrepresentation, a consumer must show that he has been damaged as a result of reliance on a misrepresentation of fact. The consumer must prove that the seller acted with knowledge of the misrepresentation and with intent to deceive.[11] It is difficult to establish reliance, knowledge, and intent, however, because of the subjective elements involved. In the alternative, the consumer may choose to bring suit in contract, but this is often prevented by loss of contract documents[12] or by the parol evidence rule. Although many courts now have statutory authority to modify unconscionable contracts,[13] this is rarely done.[14] The court's reluctance to utilize fully their power to declare contracts unconscionable is apparently due to being unaccustomed to overtly exercising the extensive discretion inherent in a concept as vague and elusive as unconscionability.[15]

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8. *See* Note, *Translating Sympathy for Deceived Consumers into Effective Programs for Protection*, 114 U. PA. L. REV. 395 (1966).

9. Florida requirements for the disclosure of finance charges are not included since this area has been largely preempted by the Federal Truth-in-Lending Act. Other important consumer issues, such as the holder-in-due-course doctrine and confession of judgment clauses are beyond the scope of this note. For a discussion of such consumer problems see Lopucki, *The Uniform Consumer Credit Code: Consumer's Code or Lender's Code?*, 22 U. FLA. L. REV. 335 (1970).

10. The primary theories the consumer may utilize are misrepresentation, breach of warranty, and unconscionability. For a complete discussion of private remedies see Hester, *Deceptive Sales Practices and Form Contracts: Does the Consumer Have a Private Remedy?*, 1968 DUKE L. J. 831.

11. Ball v. Ball, 160 Fla. 601, 36 So. 2d 172 (1948).

12. The consumer need not prove reliance under the warranty theory. The seller's use of promises, samples, or descriptions of merchandise are presumed to be part of the bargain. UNIFORM COMMERCIAL CODE §2-313, Comment 6. For the Florida enactment of the U.C.C. see FLA. STAT. ch. 672 (1969).

13. *E.g.*, FLA. STAT. §672.302 (1969).

14. *See, e.g.*, Vokes v. Arthur Murray, Inc., 212 So. 2d 906 (2d D.C.A. Fla. 1968); Lippencott Mortgage Inv. Co. v. Childress, 204 So. 2d 919 (1st D.C.A. Fla. 1967).

15. For example, for 160 years Louisiana courts have had statutory authority to void immoral contracts, but have never done so. Comment, *Unconscionable Contract Provisisons: A History of Unenforceability from Roman Law to the UCC*, 42 TUL. L. REV. 193 (1967).

The legal view of what constitutes a misrepresentation also inhibits recovery. "Puffing," or exaggerating the quality of sales merchandise, has been traditionally allowed as a necessary part of the bargaining process. The consumer is not legally entitled to rely on exaggerations, opinions or predictions of future performance made by the salesman.[16] It is assumed at law that the consumer is competent to assess the quality of the merchandise presented and will realistically evaluate a sales pitch.[17] In reality, these assumptions may not be justified. The consumer is often naive or incapable of evaluating products of advanced technology without relying on the salesman for assistance.[18] Courts have restricted the puffing privilege only in clearly unconscionable cases[19] or when some definite standard of misconduct is available.[20] As a result, misrepresentation of the quality of merchandise and many common sales frauds usually fall within the scope of permissible puffing and leave the consumer without a remedy.[21]

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16. Stokes v. Victory Land Co., 99 Fla. 795, 128 So. 408 (1930); Williams v. McFadden, 23 Fla. 143, 1 So. 618 (1887); Tonkovich v. South Florida Citrus Indus., Inc., 185 So. 2d 710 (2d D.C.A. Fla. 1966).

17. "The legal structure is based on a model of the 'sophisticated' not the 'traditional consumer' prevalent among low-income families. It assumes . . . that the consumer understands the conditions to which he is agreeing when he affixes his signature to an installment contract. But we have seen time and again, that this assumption does not hold for many of these consumers. . . . [The law] unwittingly favors the interest of the merchant over those of the consumer by permitting deviant practices which take advantage of the consumer's ignorance." D. CAPLOVITZ, *supra* note 2, at 188, 189.

18. *Id.*

19. *See, e.g.*, Vokes v. Arthur Murray, Inc., 212 So. 2d 906 (2d D.C.A. Fla. 1968), where statements were made to a fifty-one year old widow as a means of committing her to dancing contracts for $31,000. The court held that the general rule about puffing did not apply where there is a fiduciary relationship between the parties or where the parties do not deal at arm's length or the consumer does not have equal opportunity to become apprised of the truth or falsity of the fact represented. *Id.* at 908-09. *See also* Gulf Shore Dredging Co. v. Hutto, 31 Fla.. Supp. 24 (Cir. Ct. Hillsborough County 1968). *See generally* Davenport, *Unconscionability and the Uniform Commercial Code*, 22 U. MIAMI L. REV. 121 (1967).

20. Courts generally utilize the theory of unconscionability only if some objective factor such as illiteracy of a party to the contract is present. *E.g.*, Soud v. Hike, 56 So. 2d 462 (Fla. 1952); Frostifresh Corp. v. Reynoso, 52 Misc. 2d 26, 274 N.Y.S. 757 (Dist. Ct., Nassau County 1965), *rev'd in part*, 54 Misc. 2d 119, 281 N.Y.S. 2d 964 (2d Dep't 1967). *See generally* Davenport, *supra* note 19 for an attempt to isolate objective factors that have led to findings of unconscionability. Where one party is able to point only to a general feeling of unfairness or one-sidedness of the contract the courts have been reluctant to reform the contract under the unconscionability doctrine. *See, e.g.*, M. Lippencott Mortgage Inv. Co. v. Childress, 204 So. 2d 919 (1st D.C.A. Fla. 1967), in which the court found the elements of a lottery present in a referral sales contract and held it invalid because of a statutory prohibition against lotteries and chain letters rather than unconscionable. *See also* Florida Discount Centers, Inc. v. Antinori, 226 So. 2d 693 (2d D.C.A. Fla.), *aff'd*, 232 So. 2d 17 (Fla. 1969), holding a referral sales contract invalid as a violation of the Florida Blue Sky Laws. The advantages of the unconscionability approach in the referral sales context are discussed in, Comment, *Let the Seller Beware—Another Approach to the Referral Sales Scheme*, 22 U. MIAMI L. REV. 861 (1968).

21. Phony special prices and free gift offers often fall within the permissible puffing category. *See* Hester, *supra* note 10, at 841. Recent cases, however, have tended to restrict

Parol Evidence Rule — Integration Clauses

The parol evidence rule bars proof of prior or contemporaneous oral evidence that may vary the terms of a written contract entered into as the final expression of the parties agreement.[22] Thus, even if the seller's misrepresentations are actionable, the parol evidence rule may prevent recovery under contract theory. For example, the consumer and seller may agree on one set of contract terms orally, but the consumer may sign a different contract upon assurances by the seller that the terms are the same. In such an instance, evidence of the oral agreement is barred in order to protect the integrity of the written contract.[23] In most jurisdictions, however, fraud is an exception to the parol evidence rule and the consumer may obtain relief under this theory.[24]

The law is less clear where the contract contains an integration clause claiming that there are no representations, warranties, or promises beyond those contained in the written instrument.[25] Most jurisdictions have taken the position that "a standard clause in a form contract should not be sufficient to shield fraud and eliminate a recognized exception to the parol evidence rule."[26] However, a few jurisdictions, including Florida, have held that since the consumer has signed a statement that no representations were made by the seller, oral evidence of such representations are not admissible in evidence to prove fraud.[27]

A case that exemplifies the possible inequities of the interplay between the parol evidence rule and a contract integration clause is *Apolito v. Johnson*.[28] The plaintiff sought to rescind a contract to purchase real estate on the ground that defendant had fraudulently misrepresented both the price and terms of purchase. Plaintiff alleged she was told the total price would be 26,000 dollars, but the contract actually provided for a price of 52,000 dollars. Plaintiff said that before signing the contract she inquired about the higher price but was assured by the seller, "That don't mean nothing. . . . Don't worry about it. That is something that has to be marked in there for the escrow people."[29] On rehearing, the court held the plaintiff was not entitled

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the puffing privilege, particularly in those cases where misrepresentation concerns the condition of the sales goods themselves. Thus, statements that a used car is in "A-1 condition" or in "perfect running shape" or that rebuilt goods are new have been held to be actionable misrepresentations. *See, e.g.*, Packard Norfolk, Inc. v. Miller, 198 Va. 557, 95 S.E. 2d 207 (1956); Touchstone v. Bond, 223 Miss. 487, 78 So. 2d 463 (1955).

22. FLA. STAT. §672.202 (1969).

23. *E.g.*, Wise v. Quina, 174 So. 2d 590, 596 (1st D.C.A. Fla. 1965).

24. Hester, *supra* note 10, at 839.

25. *See, e.g.*, Note, *Warranties, Disclaimers and the Parol Evidence Rule*, 53 COLUM. L. REV. 858 (1953); Note, *Disclaimers of Warranty in Consumer Sales*, 77 HARV. L. REV. 318 (1963).

26. Hester, *supra* note 10, at 838.

27. *E.g.*, Greenwald v. Food Fair Stores Corp., 100 So. 2d 200 (3d D.C.A. Fla. 1968). *See also* Apolito v .Johnson, 3 Ariz. App. 358, 414 P. 2d 442 (1966); Newmark v. H. & H. Products Mfg. Co., 128 Cal. App. 2d 35, 274 P.2d 702 (1954).

28. 3 Ariz. App. 232, 413 P.2d 291 (1966).

29. *Id.* at 234, 413 P. 2d at 293.

to rescind the contract because the evidence of the alleged fraud was inadmissible under the parol evidence rule.[30] Florida has generally followed the same line of reasoning although none of the cases have arisen in a consumer situation.[31]

Cost of Litigation and Other Problems Inherent in Private Remedies

One of the primary limitations of private litigation is that often the consumer cannot avail himself of any legal recourse. Thus, a mechanic may increase an automobile repair bill or change a car mileage indicator on a used car without fear of legal action. It is unlikely the consumer will be able to prove he was overcharged[32] or learn of the falsified mileage.[33] Furthermore, in many instances consumers fail to bring suit because they are ignorant of their legal rights,[34] fear legal action by the seller or loss of their credit rating,[35] or are frustrated with the legal process.[36] Even if the consumer is willing to go to court, the cost of attorney's fees usually exceeds the small amount of damages that may be recovered.[37] In the case of low income con-

30. 3 Ariz. App. 358, 359, 414 P.2d 442, 443 (1966).

31. *E.g.*, Greenwald v. Food Fair Stores Corp., 100 So. 2d 200 (3d D.C.A. Fla. 1958), arising out of the lease of commercial property by a business enterprise. It is noteworthy that the underlying basis for the decision does not seem to be the parol evidence rule itself. In each case examined, the court first found that the alleged misrepresentation did not constitute fraud before going on to find that evidence of the misrepresentation was barred by the parol evidence rule. In *Greenwald,* for example, a lessee attempted to rescind a lease on the basis that the landlord had concealed the fact that a competing store rented adjoining premises. Since the landlord had reserved the right to rent adjoining stores to third parties, the court found there was no material misrepresentation. *Id.* at 202. The court, however, then went on to base its holding on the parol evidence rule reasoning that a "no fraud" provision in the lease agreement precluded suit for fraud. *See also* East Coast Electronics, Inc. v. Walter E. Heller & Co., 355 F.2d 923, 924 (5th Cir. 1966) (lack of fraud found, decision based on parol evidence rule). *But see* Oceanic Villas, Inc. v. Godson, 148 Fla. 669, 4 So. 2d 689 (1941) (contract did not have a no-fraud provision, parol evidence rule did not bar proof of fraud).

32. A typical example of this type of problem is a 1969 letter from General Motors to their dealers instructing them: "Unless a safety defect is discovered, no warranty work is to be performed *unless requested by the customer and needed." Hearings on S. 3074 Before the Consumer Subcomm. of the Senate Commerce Comm.,* 91 Cong., 2d Sess. at 28 (1970) (emphasis added). The consumer was clearly deprived of something to which he had a right—repairs—as long as he did not discover that parts or workmanship were defective. General Motors withdrew the instruction upon intervention of the Federal Trade Commission.

33. *But see* FLA. STAT. §319.35 (Supp. 1970) requiring the registration of mileage on used automobiles at time of sale to the dealer.

34. *See* D. CAPLOVITZ, *supra* note 2, at 169.

35. Threats of penalties, repossession, garnishment, loss of credit rating, or legal action are common among unscrupulous sellers. Rice, *supra* note 2, at 567.

36. "Low income consumers' attitudes toward and knowledge of the law and legal institutions are derived largely from their experience with the law. . . . experience pregnant with oppression, abuse, and frustration." Rice, *supra* note 2, at 568.

37. *See* Note, *supra* note 8, at 409. In addition to the loss stemming from fraud, over 1 billion appliances are covered by some sort of product guarantee. If the product is

sumers, the cost of litigation is often increased by the necessity of losing a day's pay to appear in court. This alone may effectively bar suit.[38]

Small claims courts may ultimately provide the best answer to the problem of litigation cost.[39] At present, however, most consumers are unaware of the existence of these courts and are unacquainted with their procedures.[40] In addition, although lay plaintiffs may represent themselves, Florida does not exclude attorneys from small claims courts.[41] Thus, a consumer litigant may be opposed by professional counsel. This situation greatly reduces the usefulness of small claims courts as a consumer remedy.[42]

Rather than pursue a judicial remedy, the consumer may choose to complain to local administrative agencies. However, a complaint to the better business bureau would be largely ineffective. Local bureaus generally do not intervene in disputes between businessmen and consumers except to attempt voluntary reconciliations or to release information on the number of complaints received against a given business.[43] Also, state[44] and local[45] consumer

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defective and the seller either refuses to honor the guarantee, has given a guarantee that does not cover cost of repair or requires the consumer to mail the product to the manufacturer for repair, the cost of seeking legal redress is prohibitive. *See* Note, *The Card Warranty and Consumer Sales*, 2 VALPO. L. REV. 358 (1968).

38. Note, *Consumer Litigation and the Poor*, 76 YALE L. J. 745, 765 (1965).

39. Small claims courts are comparatively informal and inexpensive. Note, *supra* note 8, at 437. For Florida statutes on small claims courts see FLA. STAT. ch. 42 (1969).

40. *See generally* INSTITUTE OF JUDICIAL ADMINISTRATION, SMALL CLAIMS COURTS IN THE UNITED STATES (Supp. 1959); Scott, *Small Causes and Poor Litigants*, 9 A.B.A.J. 457 (1923).

41. Attorneys are not statutorily barred from Florida small claims courts nor does it appear to be within the judge's discretion to exclude them. *See generally* FLA. STAT. ch. 42 (1969). *But see* Prudential Ins. Co. v. Small Claims Court, 76 Cal. App. 2d 379, 173 P.2d 38 (1946), holding: "If one of the litigants in such a court could employ counsel it would of necessity mean that the poor untrained litigant who could not afford to pay such costs would be at a disadvantage." *Id.* at 383, 173 P.2d at 40, 41. As stated by Roscoe Pound: "[I]t is a denial of justice in small causes to drive litigants to employ lawyers." Pound, *The Administration of Justice in the Modern City*, 26 HARV. L. REV. 302, 318 (1913). For a detailed discussion of the legal and psychological obstacles confronting laymen in small claims courts, see Comment, *The Persecution and Intimidation of the Low-Income Litigant as Performed by the Small Claims Court in California*, 21 STAN. L. REV. 1657 (1969).

42. Note, *supra* note 8, at 438. *See also* Comment, *supra* note 41, at 1662. It is argued that if lawyers are excluded from the small claims courts, nonlegal personnel who appeal regularly on behalf of sellers would quickly acquire an expertise in handling small claims beyond the capacity of the individual litigant. Hence, the only effective means of establishing equality of sellers and consumers in small claims courts would be to supply consumer litigants with counsel or paralegal personnel to assist them. *Id.* at 1681.

43. Note, *supra* note 8, at 405; *see* Comment, *Consumer Protection in Michigan: Movement Towards Some Long-Needed Reforms*, 68 MICH. L. REV. 926 n.238 (1970). *See also* Project, *The Direct Selling Industry: An Empirical Study*, 16 U.C.L.A.L. REV. 890, 931-42 (1969).

44. The Florida Legislature established a division of consumer affairs in 1967, FLA. STAT. §570.283 (1969).

45. *E.g.*, both Jacksonville and Miami have established consumer affairs offices. FLORIDA CONSUMER PROTECTION REPORT, *supra* note 4, at 2. The function of these agencies is to receive complaints from consumers, investigate complaints, refer violations of laws to appropriate law enforcement agencies, and act as consumer advocates before local governmental bodies. The Jacksonville office is also authorized to prosecute violations of the

protection offices have no authority to effect a recovery, but they may serve as an intermediary between buyer and seller.[46] As a result "consumers in Florida have no viable, effective remedy when the loss they suffer is not sufficient to warrant engaging a lawyer to represent them."[47] Such inability of the individual consumer to recover for misrepresentation may encourage an increase in consumer fraud. Secure in the knowledge that most consumers will find the cost of litigation prohibitive, the fraudulant seller is encouraged to conduct his business on a large scale; reducing his occasional individual losses to a predictable cost of doing business.[48]

The judicial attitude toward unconscionable contracts further reduces the deterrent effect of a successful individual suit. In *Frostifresh Corporation v. Reynoso*[49] a sales contract was negotiated in Spanish but drafted in English, a language with which the buyer was not familiar. The salesman convinced the buyer that the product would cost nothing because the buyer would receive commissions on referral sales made to his neighbors and friends. However, the price, service charges, and credit charges were grossly excessive. Although holding the contract unconscionable, the court allowed the seller a reasonable profit (instead of wholesale costs) in addition to trucking and reasonable service and finance charges.[50] Thus, unless the buyer is able to return the sales item, a seller may be able to write unfair and illegal contracts confident he will recover at least his costs and a reasonable profit.[51]

A more liberal judicial attitude toward application of the unconscionable contract doctrine, modification of the puffing privilege and limitation of the parol evidence rule could do much to improve the lot of consumers. Nevertheless, case law alone cannot prevent fraud. Compensation of victims is ineffective to deter fraud because it involves only isolated individuals. Relief sought in individual cases does not enjoin fraudulent activities but only seeks compensation for the parties actually before the court. Unscrupulous sellers can still derive a significant long-term profit from their fraudulent dealings with consumers. Furthermore, changes in the substantive law of fraud may come too slowly when fraud is defined on a case-by-case basis. Also, factual variations in particular cases encourage litigation — the cost of which is often prohibitive. Finally, judicial conceptions of fraud lag behind the

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Uniform Deceptive Trade Practices Act (FLA. STAT. §§817.70-.75 (1969)). However, neither office has authority to seek a judicial recovery on behalf of defrauded customers. Despite lack of enforcement power, mediation succeeded in recovering $137,545 in Jacksonville and $75,000 in Miami during fiscal year 1969. JACKSONVILLE CONSUMER AFFAIRS DIVISION, ANNUAL REPORT 3 (1970); MIAMI CONSUMER PROTECTION DIVISION ANNUAL REPORT 2 (1970).

46. For example, the Florida Division of Consumer Affairs has no enforcement power of its own and serves only as a clearing house for complaints. FLA STAT. §570.283 (1969).

47. FLORIDA CONSUMER PROTECTION REPORT, *supra* note 4, at 31.

48. *See* Rice, *supra* note 2, at 563-67.

49. 54 Misc. 2d 119, 281 N.Y.S. 2d 964 (2d Dep't 1967), *rev'g* 52 Misc. 2d 26, 274 N.Y.S. 2d 757 (Dist. Ct., Nassau County 1966).

50. 54 Misc. 2d at 120, 281 N.Y.S. 2d at 965.

51. *But see* Gulf Shore Dredging Co. v. Hutto, 31 Fla. Supp. 24 (Cir Ct. Hillsborough County 1968), in which the court allowed the seller a reasonable profit but awarded the consumer interest on the excess profit as well as reasonable attorney's fees.

latest form of deception and do not serve to deter misconduct. Other methods of defining, preventing, and compensating victims of fraud are needed.

FLORIDA CRIMINAL AND CIVIL STATUTES

The inadequacy of private litigation has prompted many states to enact penal statutes designed to protect purchasers from fraudulent businessmen.[52] Florida has enacted statutes prohibiting misleading advertising[53] and making specific types of fraudulent activities illegal.[54] However, criminal convictions may be hard to obtain because of difficulties in proving criminal intent and in motivating local officials to bring criminal actions against businessmen. Consequently, the effectiveness of these statutes would seem questionable.

A number of civil statutes that regulate specific types of frauds[55] have generally been more successful than criminal statutes. An outstanding example is the 1969 Home Improvement Sales and Finance Act.[56] Home improvement frauds usually involve a contract for improvements on the home. The seller promptly sells the consumer's note to a bank or finance company. Work either never begins or is done poorly, and the seller then disappears leaving the consumer to pay the holder of the note.[57] The Home Improvement Act requires licensing of home improvement contractors[58] and regulates contract terms.[59] The Act also provides for a cooling-off period,[60] prohibits failure to perform or misrepresentation of any material fact in procuring the contract, proscribes other frauds incidental to home improvements,[61] and makes holders

52. *E.g.*, HAWAII REV. LAWS §§11373-74 (1968); MICH COMP. LAWS §750.33 (1948); WASH. REV. CODE ANN §9.05.010 (Supp. 1970).

53. FLA. STAT. §817.06 (1969). In addition, the 1970 Florida Legislature enacted a statute prohibiting advertisement of free gifts if such advertisement would "reasonably lead a person to believe that he may receive . . . something of value, entirely or in part without a requirement of compensation . . . ." FLA. STAT. §817.415 (2) (b) (Supp. 1970). A violation of the law entitles the person to whom the offer is made to receive the item without cost or further obligation. FLA. STAT. §817.415 (4) (Supp. 1970). Both the attorney general and the commissioner of agriculture are entitled to sue for an injunction against violations. The attorney general has construed the Act to encompass offers of gifts made for nominal consideration if hidden strings are attached (such as purchase of a high priced cabinet and a maintenance contract for a sewing machine). OP. ATT'Y GEN. FLA. 70-104 (1970). However, it is unlikely that the Act will be construed to reach more pernicious forms of free gifts such as inclusion of the price of the free item in the purchase of the required item. This deficiency is due to the fact that the Act aims only at eliminating hidden obligations inherent in accepting the free gift. Even though the consumer does not realize the price of the required purchase is exorhibtant, he is aware of the full amount to be paid if he is to receive his gift. Consequently, the Act probably does not apply to this situation.

54. *See generally* FLA. STAT. ch. 817 (1969).

55. *See, e.g.*, FLA. STAT. §559.25 (1969) (regulating going-out-of-business sales); FLA. STAT. §570.284 (1969) (unsolicited merchandise deemed a gift).

56. FLA. STAT. §§520.60-.992 (1969).

57. *See* W. MAGNUSON & J. CARPER, THE DARK SIDE OF THE MARKETPLACE 24-25 (1968).

58. FLA. STAT. §§520.60-.68 (1969).

59. FLA. STAT. §§520.71-.74, .81, .88 (1969).

60. FLA. STAT. §520.12 (1969).

61. FLA. STAT. §§520.90, .91 (1969).

of consumer notes subject to the same defenses for breach of contract and fraud as the seller.[62] The statute has virtually ended home improvement frauds in Florida.[63]

Although specific statutes may deal effectively with a particular problem, they do not provide satisfactory protection from frauds in general. For example, Florida has passed detailed legislation governing the sale of used television tubes as new — even requiring that the condition of the tubes as used or new be noted on sales receipts.[64] The law brings television tubes under control but leaves completely unregulated the sale of thousands of other products equally subject to deceptive selling practices. Rather than piecemeal legislation, a broader protective device is needed.[65] The remainder of this note considers such legislative provisions that may be useful to consumers: the cooling-off period,[66] the Uniform Deceptive Trade Practices Act,[67] the Federal Trade Comission Act,[68] and the Florida Unfair Trade Practices and Consumer Protection Act.[69]

Cooling-Off Period

Cooling-off legislation is aimed at neutralizing high pressure door-to-door sales techniques by granting the buyer a period of time in which to reconsider the sales contract outside the presence of the salesman. A statutory period is set during which the buyer retains the right to cancel the sales contract without regard to cause. The consumer need not risk litigation nor prove fraud in order to rescind. Consequently, a cooling-off statute provides consumers an important new protection from puffing and misrepresentation.[70]

The Florida cooling-off act is based on the home solicitation provision of the Uniform Consumer Credit Code.[71] The Act provides a three-day cooling-off period for all sales of foods and services[72] solicited at any place other than the seller's permanent business address.[73] Purchasers have until midnight of the

62. Fla. Stat. §520.88 (1969).
63. Florida Consumer Protection Report, *supra* 4, at 8.
64. Fla. Stat. §§817.53, .56 (1969).
65. *See* W. Magnuson &J. Carper, *supra* note 57, at 66.
66. Fla. Stat. §§501.021-.051 (Supp. 1970).
67. Fla. Stat. §§817.69-.75 (1969).
68. 15 U.S.C. §§41 *et seq.* (1964).
69. Fla. Stat. §§817.76-.85 (Supp. 1970).
70. Several jurisdictions have enacted cooling-off statutes: Conn. Gen. Stat. Rev. §42-137 (Supp. 1969); Hawaii Rev. Laws §476-5 (1968); Ill. Rev. Stat. ch. 121-1/2, §2628 (Supp. 1971); Mass. Gen. Laws Ann. ch. 255D, §14A (1968); Mich. Comp. Laws §445.1203 (*l*) (1967); N. J. Rev. Stat. §17:160-61 to -61.9 (Supp. 1970); Pa. Stat. tit. 73, §500-202(c)(4) (Supp. 1970); R. I. Gen. Laws Ann. §§6-28-1 to -8 (Special Supp. 1968); Vt. Stat. Ann. tit. 9, §2454 (Supp. 1969); Wash. Rev. Code §63.14.154 (Supp. 1970).
71. Uniform Consumer Credit Code §5.204.
72. Fla. Stat. §501.025 (Supp. 1970). Exceptions are made for the sale of insurance and farm equipment. Fla. Stat. §501.035 (Supp. 1970). The door-to-door sales act applies to cash sales in excess of $25. Fla. Stat. §501.021 (1) (Supp. 1970). In contrast, the Uniform Consumer Credit Code provision applies only to installment sales (4 or more payments). Uniform Consumer Credit Code §1.301 (8).
73. Fla. Stat. §501.021 (1) (Supp. 1970).

third business day after the sales contract is signed to cancel the transaction without regard to cause. The buyer has a right to withhold any goods in his possession if the seller fails to return the downpayment within ten days of cancellation and the buyer may keep the goods if the seller does not comply within forty days.[74] However, the seller may retain a cancellation fee amounting to the cash downpayment not to exceed fifty dollars or five per cent of the selling price, whichever is less.[75] Delivery of goods or partial performance of services does not cut off the right to rescind or entitle the seller to any compensation other than the cancellation fee.[76]

This statute extends the protection given Florida consumers under two other cooling-off statutes. The Federal Truth-in-Lending Act[77] provides for a three-day cooling-off period on any consumer credit transaction secured by an interest in the buyer's residence.[78] The federal legislation is broader than the Florida statute in that it extends to sales contracts wherever they are executed but it does not apply unless the seller seeks the security of a mortgage. In addition, the Florida cooling-off act supplements the cooling-off provisions of the Home Improvement Sales Act,[79] which provides a buyer forty-eight hours to rescind a home improvement contract, wherever executed, without payment of a cancellation fee.[80]

Although it would initially appear that the new cooling-off act has been carefully drafted to avoid loopholes, it has several serious weaknesses. First, the consumer may not realize he has a right to cancel or that cancellation must be done by mail.[81] The seller is placed under no obligation to inform the consumer of his right to rescind. Instead the Act requires a standard contract provision in conspicuous print to inform the consumer.[82] Despite the clear language of the notice clause, the experience with form contracts under installment sales legislation has been that consumers only occasionally read and seldom fully understand contract provisions.[83] This is particularly true of the poor and elderly who are the most frequent victims of high pressure sales. A more effective method to call attention to the right of rescission is to require a cancellation form separate from the contract form. Sellers, however, have opposed such a requirement on the ground that it "invites cancellation."[84]

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74. FLA. STAT. §501.021 (2) (Supp. 1970).

75. FLA. STAT. §501.021 (1) (Supp. 1970).

76. FLA. STAT. §501.031 (2) (b) (Supp. 1970).

77. Consumer Credit Protection Act, 15 U.S.C. §§1601-77 (Supp. 1970).

78. Consumer Credit Protection Act §125, 15 U.S.C. §1635 (Supp. 1970).

79. FLA. STAT. §§520.60-.99 (1969).

80. FLA. STAT. §520.72 (1969).

81. Written notice of cancellation must be given and shall be effective upon postmarking. "Notice of cancellation need not take a particular form and is sufficient if it indicates by any form of written expression the intention of the buyer not to be bound . . . ." FLA. STAT. §501.025 (Supp. 1970).

82. FLA. STAT. §501.031 (2) (Supp. 1970).

83. D. CAPLOVITZ, THE POOR PAY MORE 188, 189 (1963).

84. *See* Sher, *The "Cooling-Off" Period in Door-to-Door Sales*, 15 U.C.L.A.L. REV. 717, 762 (1968). As a result of "seller" resistance, only Hawaii and the federal act have adopted

Another limitation of the Act's effectiveness is that consumers may not discover the need to rescind until after the cancellation period has passed. For example, one of the advantages of cooling-off legislation is that it allows more leisurely examination of the terms of the contract. Accordingly, the Florida act requires that the seller leave a copy of the contract with the consumer.[85] However, if the seller delays compliance until after the normal three-day period has run, the buyer's right of cancellation will terminate immediately upon delivery of the contract, thus precluding the buyer's examination of its terms.[86] The Act would be more effective if the cooling-off period did not begin to run until the buyer received a copy of the contract.

An inherent limit on the effectiveness of the cooling-off legislation is that the cancellation period is too short to remedy or prevent many types of deceptive sales practices. A typical case would be the offer of a free food freezer in connection with a year's supply of food. In reality, the supply of food may be low grade and inadequate, and the price may include double or triple the retail value of the freezer. The poor quality of the food is often not discovered until delivery, and the excessive price may not be discovered until the consumer starts to make the payments.[87] These events usually do not occur until after the statutory period has run. However, an extended cancellation period would add great uncertainty to the sales process[88] and a slightly longer period is unlikely to provide sufficient time in which to discover the fraud.[89] Consequently, it is unlikely that the Act will affect deceptive sales practices where the desirability of cancelling the contract is not immediately apparent. Indeed, even in the case of high pressure sales, in which the consumer realizes an immediate desire to rescind, the effectiveness of the Act is likely to be diminished by inadequate notice of the rescission clause.

Enforcement of the cooling-off act also presents a problem. Unlike the Uniform Consumer Credit Code, which establishes an administrator with broad powers of enforcement,[90] no state officer is designated to enforce the Act. If sellers refuse to rescind contracts under the statute, the state would be unable to move for an injunction to secure compliance, and consumers would be forced to go into court to enforce their rescission rights. Thus, one of the primary purposes of the cooling-off legislation (to keep consumers out of court) would be defeated.

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this procedure. Consumer Credit Protection Act §125, 15 U.S.C. §1635 (Supp. 1970); HAWAII REV. LAWS §476-5 (Supp. 1970).

85. FLA. STAT. §501.031 (1) (Supp. 1970).

86. For a general discussion of this and other problems of cooling-off periods *see* Sher, note 84 *supra*.

87. *See* Note, *A Case Study of the Impact of Consumer Legislation: The Elimination of Negotiability and the Cooling-Off Period*, 78 YALE L.J. 618, 630 (1969).

88. *Id.*

89. *See* Sher, *supra* note 84, at 758.

90. Uniform Consumer Credit Code §6.198 (1). Violation of the seller's obligations is a misdemeanor. FLA. STAT. §50.051 (Supp. 1970).

DECEPTIVE TRADE PRACTICES LEGISLATION

Uniform Deceptive Trade Practices Act

One consumer protection idea receiving recent attention is the use of an injunction against deceptive sales practices.[91] If injunctive relief could be sought by private parties on behalf of the public it would be an effective method of combating fraud. Private suits, it should be noted, are necessary even where a public official is authorized to seek injunctions since public officials do not have the manpower to carry numerous fraud cases to trial.[92]

One theory of injunctive action is to classify deceptive sales practices as a public nuisance and to argue for private right of enforcement.[93] However, this theory has not received general recognition by the courts.[94] A more realistic method of establishing a private right to sue for injunctive relief against fraud is the utilization of the Uniform Deceptive Trade Practices Act, a modified version of which was adopted in Florida.[95]

Adoption of the Uniform Deceptive Trade Practices Act was prompted by the unsatisfactory condition of the law regulating unfair competition rather than by dissatisfaction with consumer remedies.[96] The Act establishes twelve classes of actionable conduct that may be enjoined by proper parties.[97] The injunctive relief provided does not require proof of monetary damage, nor does it exclude an injunction if a remedy for damages is available at law.[98] An injunction may be issued even though the defendant had no intent to deceive and even where the deceptive trade practice simply involved misleading rather than false statements of fact by the seller.[99] In addition, the Act permits the court discretion to award attorney's fees if the seller engaged in a deceptive trade practice with an intent to deceive.[100] Thus, the Uniform

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91. *See, e.g.*, Dole, *Merchant and Consumer Protection: The Uniform Deceptive Trade Practices Act*, 76 YALE L.J. 485 (1967); Rice, *Remedies Enforcement Procedures and the Duality of Consumer Transaction Problems*, 48 B.U.L. REV. 559, 579-83 (1968); Starrs, *The Consumer Class Action—Part I: Considerations of Equity*, 49 B.U.L. REV. 211, 241-45 (1969).

92. The Federal Trade Commission receives about 9,000 complaints yearly and can investigate only one out of 8 or 9. Of the complaints investigated, less than 10% result in a cease-and-desist order. *Hearings on H.R. 14931 and Other Class Action Bills Before the Subcom. on Consumer Protection of the House Comm. on Commerce and Finance*, 91st Cong., 2d Sess. at 46 (1970) (testimony of Congressman Corman) [hereinafter cited as *Hearings on H.R. 14931*].

93. This sort of procedure has been used to enjoin violations of state usury laws. *See* Comment, *Commercial Nuisance: A Theory of Consumer Protection*, 33 U. CHI. L. REV. 590 (1966).

94. *See* Rice, *supra* note 91, at 576-79.

95. FLA. STAT. §§817.69-.75 (1969). *See Uniform Deceptive Trade Practices Act* §2(12), 9A UNIFORM LAWS ANNOTATED (Supp. 1967).

96. *See* Starrs, *supra* note 91, at 243.

97. FLA. STAT. §817.71 (1969). Compare the common law approach in Builders Supply Co. v. Acton, 56 Fla. 756, 47 So. 822 (1908).

98. FLA. STAT. §817.72 (1969).

99. FLA. STAT. §817.72(1) (1969).

100. FLA. STAT. §817.72(2) (1969).

Deceptive Trade Practices Act has important potential as a consumer protection device.

Among the practices prohibited by the Act are: undisclosed substitution of goods for those requested by a consumer; misrepresentation of the source or sponsorship of goods or services; sale of second-hand goods as new; misrepresentation of the uses or benfits of a product; false special prices or going out of business sales; and false advertising and bait advertising.[101] Although many of these practices are regulated in some degree by other Florida laws,[102] the injunctive relief provided by the Act should provide a useful additional remedy to consumers. However, the Florida version of the Act does not include the model act's twelfth category of deceptive sales practices that encompasses conduct by the seller that "creates a likelihood of confusion or of misunderstanding."[103] Under the Florida scheme, such common practices as referral sales, sales resulting from undue influence, free gift schemes, violations of usury laws, and failure to observe prescribed installment sales contract forms cannot be enjoined. This restriction of the actionable types of consumer fraud greatly reduces the Act's usefulness. While it is arguable that the catch-all twelfth category would impose too much uncertainty on sellers seeking definite guidelines for behavior, it is likely that an elastic clause would be interpreted in a similar manner as the unfair trade practice clause of the Federal Trade Commission Act[104] or the unconscionability section of the Uniform Commercial Code.[105] Consequently, inclusion of this section would have added considerable utility to the Florida legislation.

Satisfying standing requirements of the Florida Deceptive Trade Practices Act is an even more serious problem. On the surface there would seem to be no question that a consumer could bring a class action pursuant to the Act.[106] If, however, a consumer who has discovered that a merchant is engaging in deceptive trade practices is not in danger of being deceived again and therefore is not "likely to be damaged" within the terms of the Act. This analysis is supported by two lower court decisions indicating that "a member of the public, as such" has no standing to sue under similar language of the Lanham Federal Trademark Act.[107] Nonetheless, the leading advocate and principal draftsman of the Uniform Deceptive Trade Practices Act supports the view that it allows consumer class actions to obtain injunctions.[108] "The social

101. FLA. STAT. §817.71 (1969).

102. *See, e.g.*, notes 53-55 *supra*.

103. UNIFORM DECEPTIVE TRADE PRACTICES ACT §2(12), 9A UNIFORM LAWS ANNOTATED (Supp. 1967).

104. 15 U.S.C. §45(a)(1) (1964).

105. UNIFORM COMMERCIAL CODE §2-302.

106. The Act provides that "any person likely to be damaged" may bring suit. FLA. STAT. §817.72 (1969).

107. Marshall v. Proctor & Gamble Mfg. Co., 170 F. Supp. 828, 835 (D. Md. 1959); Carpenter v. Rohm & Hass Co., 109 F. Supp. 739 (D. Del. 1952), *aff'd*, 201 F.2d 671 (3d Cir. 1953).

108. *See* Dole, *Merchant and Consumer Protection: The Uniform Deceptive Trade Practices Act*, 76 YALE L.J. 485 (1967).

interest in supression of commercial deception should . . . override the brittle logic of this legalistic paradox. Enlightened consumers should be allowed to satisfy the standing requirement . . . through a class suit on behalf of their less fortunate brethren."[109]

Unfortunately, there are no cases on point in those states that have had the Uniform Act for several years;[110] a fact that may argue against the existence of a consumer action. However, the argument on behalf of a consumer action has received some support in a recent Illinois case.[111] In a decision on the various pre-trial motions of the parties, the court determined that credit customers of a department store were entitled to sue as a class under the Uniform Act since the Act "being a remedial statute, must be liberally construed."[112] In view of the unclear language of the Act, Florida courts may be hesitant to adopt this interpretation. Although such an interpretation would be beneficial to consumers and involve little disadvantage to businessmen,[113] the existence of a consumer action under the Act remains an open question.

Federal Trade Commission Act

Types of Fraud Prohibited. The Federal Trade Commission represents a major governmental effort in fraud prevention. The Commission has jurisdiction over "unfair methods of competition" and "unfair or deceptive acts or practices in commerce."[114] The agency is given power to issue cease-and-desist orders and may seek permanent injunctions against fraud.[115] The language of the Federal Trade Commission Act is sweeping and leaves the task of defining unfair or deceptive acts in the combined hands of the Federal Trade Commission (FTC) and the courts. The broad language of the statute provides sufficient authority to regulate new types of fraud. For example, although no federal law prohibits lottery devices, the FTC has done so by administrative regulation.[116] The comprehensiveness of this statute contrasts favorably with the proliferation of specific state statutes that have left many areas of fraud unregulated.

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109. *Id.* at 500.

110. *See, e.g.,* CONN. GEN. STAT. REV. §§42-115 (c)-(f) (Supp. 1970); DEL. CODE ANN. tit. 6, §§2531-37 (Supp. 1970); GA. CODE ANN. §§106.701-.706 (1968); ILL. REV. STAT. ch. 121-1/2, §311-18 (Supp. 1968); OHIO REV. CODE §§4165.01-.04 (Supp. 1970); OKLA. STAT. tit. 78, §§51-55 (Supp. 1967).

111. Holstein v. Montgomery Ward & Co., 68 Ch. 275 (Cir. Ct., Cook County, Ill. 1969), *cited in* Starrs, *supra* note 91, at 242 n.198a.

112. Starrs, *supra* note 91, at 242 n.198a.

113. Injunctive actions against fraud involve relatively little disadvantage to businessmen in comparison with class actions for compensatory damages. A court judgment to enjoin fraudulent business behavior involves no monetary damages. Furthermore, there is little incentive to bring a nuisance suit against the business since no monetary judgment is involved.

114. 15 U.S.C. §45 (a) (1) (1964).

115. 15 U.S.C. §45 (b) (1964).

116. *See* FTC v. R. F. Keppel & Bros., 291 U.S 304 (1934).

The FTC Act also has other advantages over common law standards. There is no need to prove intent to deceive on the part of the seller; the mere likelihood of deception is enough.[117] Furthermore, the FTC is not bound by the reasonable man standard in measuring the likelihood that a statement will mislead. Instead, a statement may be misleading if it would be likely to deceive a significant number of persons of below average intelligence.[118] Literal truthfulness,[119] nondisclosure of material facts,[120] and sales exaggerations[121] may be prohibited if they tend to mislead. Thus, the Act protects a vast number of consumers disregarded by the common law.

Jurisdiction. One of the major weaknesses in the Federal Trade Commission Act is the limitation of jurisdiction to frauds "in commerce" rather than frauds "affecting commerce."[122] Purely intrastate activities are therefore not subject to regulation. The FTC also has limited manpower resources and is not able to adequately handle the volume of complaints reaching it every year.[123]

Enforcement Powers. The most serious limitation on the effectiveness of the FTC is the restricted scope of the Commission's enforcement powers. The Commission is not authorized to seek temporary injunctions but instead must rely on cease-and-desist orders, which may be appealed to the courts within sixty days after issuance.[124] If consent to the order is not obtained, the exhaustion of appeals may take several years, during which the seller is free to continue business as usual.[125] The classic example of enforcement delay is the *Holland Furnace* case,[126] which required twenty-nine years for successful termination by the Commission. In December 1936 the company agreed to an FTC consent order restraining misleading advertising claims.[127] Although complaints against the company continued, a second proceeding was not initiated by the FTC until 1954.[128] Four years later a cease-and-desist order was issued.[129] Holland ignored the court decree enforcing the order, and

117. D.D.D. Corp. v. FTC, 125 F.2d 679, 682 (7th Cir. 1942).

118. *See., e.g.*, Charles of the Ritz Distrib. Corp. v. FTC, 143 F.2d 676 (2d Cir. 1944).

119. Bennett v. FTC, 200 F.2d 362 (D.C. Cir. 1952).

120. Failure to reveal certain important information in the advertising of food, drugs, devices, and cosmetics may be considered unfair and deceptive. 15 U.S.C. §55 (a) (1) (1964).

121. Millstein, *The Federal Trade Commission and False Advertising*, 65 COLUM. L. REV. 439, 469 (1964).

122. FTC v. Bunte Bros., Inc., 312 U.S. 349 (1941).

123. *See* note 92 *supra.*

124. 15 U.S.C. §45 (b) (1964).

125. It is a relatively simple procedure to delay the imposition of an order for up to four years. *Hearings on S. 3074 Before the Consumer Subcomm. of the Senate Comm. on Commerce*, 91st Cong., 2d Sess. at 11 (1970) (testimony of FTC Chairman Weingardner).

126. This action was initially brought in 1936. Holland Furnace Co., 24 F.T.C. 1413 (1936).

127. *Id.* at 1414.

128. *See In re* Holland Furnace Co., 55 F.T.C. 55 (1958).

129. *Id.* at 90, *aff'd*, 295 F.2d 302 (7th Cir. 1961); Holland Furnace Co. v. FTC, 295 F.2d 302 (7th Cir. 1961).

in 1965 was fined 100,000 dollars for contempt of court.[130] The incentive to ignore the court order is apparent since the Holland Furnace Company made approximately $30 million a year from its operation.[131]

In view of the delays in obtaining enforcement of cease-and-desist orders, several statutes were proposed to Congress in 1969 allowing the FTC to seek temporary injunctions to prohibit questionable conduct until final disposition of the cause.[132] Violations of the injunction could be punished as contempt of court. None of these bills passed.

Unfair Trade Practices and Consumer Protection Act

Types of Fraud Prohibited. The original version of the unfair trade practices act proposed to the Florida Legislature adopted the FTC language and prohibited "unfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce."[133] This provision did not pass the legislature and the final bill limits deceptive trade practices to the same eleven types of misrepresentation prohibited by the Florida version of the Uniform Deceptive Trade Practices Act.[134] As a result, the Act shares one of the defects of the Uniform Deceptive Trade Practices Act: it fails to cover many common consumer frauds[135] and has no potential for expansion to new types of deception.

Businessmen have argued that deceptive trade practice statutes must specifically describe prohibited practices in order that affected parties will have sufficient notice to allow them to adjust their conduct. Under language

130. *In re* Holland Furnace Co., 341 F.2d 548 (7th Cir.), *cert. denied,* 381 U.S. 924 (1965). It is noteworthy that Holland Furnace Company continued its operations notwithstanding a number of instances in which it was successfully sued for common law fraud by individual homeowners. Holland simply went on defrauding others. *See, e.g.,* Holland Furnace Co. v. Robson, 157 Colo. 347, 402 P.2d 628 (1965).

131. W. MAGNUSON & J. CARPER, THE DARK SIDE OF THE MARKETPLACE 23 (1968).

132. *See Hearings on H.R. 14931, supra* note 92, at 2.

133. *See* Fla. H.R. 581, 4219 (3) (1970). An incidental effect of the "unfair competition" phrase, however, would be to incorporate a large body of federal antitrust law into Florida law. Several states have adopted statutes based on this language. *See, e.g.,* MASS. GEN. LAWS ANN. ch 93a, §§1-9 (Supp. 1969); MO. REV. STAT. §§407.010-.130 (Supp. 1969); N.M. STAT. ANN. §49-15-13 (Supp. 1969). Some statutes make unconscionable business practices subject to injunction. *See, e.g.,* N.Y. EXEC. LAW §63 (12) (McKinney Supp. 1967). While the UCC standard of unconscionability is suitably broad, it does not have the benefit of the large number of administrative regulations and court decisions that have interpreted the FTC Act.

134. *Compare* FLA. STAT. §817.77 (4) (a)-(k) (Supp. 1970), *with* FLA. STAT. §817.7 (1) (a)-(k) (1969).

135. For example, failure to honor repair warranties is the most common source of consumer complaints, but is not enjoinable under the Act. Similarly, of five common frauds listed by the FTC (bait advertising, phony special prices, referral sales, free gift frauds, and fear sales) only the first two are enjoinable under the Act. *See* W. MAGNUSON & J. CARPER, *supra* note 131, at 8. Under the present statute the *Holland Furnace Company* case, in which salesmen represented themselves as safety inspectors, dismantled furnaces, condemned them as hazardous, and then refused to reassemble them, would not be actionable. *See also* text accompanying notes 101-105 *supra* for a further discussion.

similar to the FTC Act, however, prohibited conduct is specifically defined by interpretive regulations or advisory opinions of a designated official.[136] The agency is then prohibited from instituting action against practices approved in the regulations without first giving reasonable notice that the regulation or opinion has been withdrawn.[137] Consequently, since the need for guidelines for businessmen is satisfied, there would appear to be no reason for not adopting language simply prohibiting "unfair and deceptive trade practices" without further legislative definition. The restricted approach of the present act severely limits its usefulness as a consumer protection device.

Enforcement Powers. The Florida Act was drafted with the enforcement problems of the FTC in mind. Thus, the Act provides for temporary as well as permanent injunctions.[138] The Commissioner of Agriculture is vested with powers to investigate suspected violations[139] and injunctions may be issued whenever the Commission has "probable cause to believe that any person is willfully and knowingly using or is about to use" a deceptive sales practice.[140] If the injunction is violated, a civil penalty of 1,000 dollars per violation may be exacted.[141]

The requirement that a violation be "willful and knowing" before it may be enjoined is a serious defect in the Act and imposes a substantial evidentiary burden on the state.[142] In some cases the circumstantial evidence available will be insufficient to establish the requisite intent. Even where intent can be proved, the gathering of circumstantial evidence imposes a considerable administrative burden on state officials and may delay prosecution of complaints.[143] In any event, the knowledge or intent of the seller is irrelevant to the central issue — whether the conduct in question deceives consumers.

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136. Power to make rules and regulations interpreting "unfair and deceptive trade practices" was assigned to the attorney general under the Florida Act as it was originally proposed to the legislature. Regulations were "not to be inconsistent with the regulations and decisions of the FTC and the federal courts." *See* Fla. H.R. 581, 4219 (3) (1970).

137. *See generally* Note, *Consumer Protection Under the Iowa Consumer Fraud Act,* 54 IOWA L. REV. 319, 335 (1968).

138. FLA. STAT. §817.79 (Supp. 1970).

139. FLA. STAT. §§817.77 (5), 817.79 (Supp. 1970).

140. FLA. STAT. §817.79 (Supp. 1970).

141. FLA. STAT. §817.82 (Supp. 1970).

142. *See generally* Comment, *Consumer Protection in Michigan: Movement towards Some Long-Needed Reforms,* 68 MICH. L. REV. 926, 973 n.301 (1970). The requirement of a showing of intent to enjoin consumer frauds is occasionally found in other state statutes. *See, e.g.,* IOWA CODE §713.24 (1966).

143. *But see* Note, *Consumer Protection Under the Iowa Consumer Fraud Act,* 54 IOWA L. REV. 319 (1968), which offers this appraisal: "As a practical matter, the intent requirement is less an obstacle to enforcement than might be supposed. The injunction and dissolution sanctions of the Act are aimed at those who exhibit a general pattern of fraudulent activity. In these cases intent can easily be shown by circumstantial evidence. Moreover, in cases where the violations are minor or the conduct is only questionable, the parties are almost always willing to enter into consent orders and make restitution, without resort to litigation, in order to avoid undesirable publicity and legal expenses." *Id.* at 326.

Another weakness of the proscribed procedure is that the statute does not permit an injunction against prospective deceptive trade practices. An injunction under the Unfair Trade Practices and Consumer Protection Act may not issue to prohibit future use by a merchant of a deceptive practice previously used if it cannot be proved he is presently using or contemplating use of the deceptive activity.[144] Thus, it may be possible for a dealer, by desisting temporarily from the illegal conduct, to defeat the issuance of an injunction unless the attorney general can show there is reason to believe that the dealer's deceptive practices will continue.[145] This poses significant evidentiary problems. A model statute drafted by the Council of State Governments provides for this situation by allowing an injunction to issue on the basis of past actions as well as present and future actions.[146] This useful addition to the Act was not included in the final Florida legislation.[147]

Enforcement of the Unfair Trade Practices and Consumer Protection Act is facilitated by a provision allowing the Commissioner to accept assurances of voluntary discontinuance of deceptive practices.[148] Assurances of discontinuance allow the businessman to agree informally to discontinue the disputed practices. Although the use of temporary injunctions reduces the need for voluntary discontinuances, such agreements obviate the necessity of litigation and can be a more expeditious and economical method of obtaining compliance.[149] Moreover, assurances of discontinuance provide a flexible tool for agreement in cases of a less serious nature.[150] The net effect of this provision is to allow a consumer protection office to more effectively aid consumers by handling an increased caseload.

Jurisdiction. Jurisdictional problems arise from the fact that the Florida Act is not restricted to the regulation of intrastate activities. The initial question is whether Congress has preempted regulation of interstate business fraud by passage of the Federal Trade Commission Act. In addition, it must be resolved whether an FTC cease-and-desist order against a specific business precludes seeking an injunction under the Florida Act and whether in a given instance, state regulations concerning unfair trade practices may be an unconstitutional burden on interstate commerce.

There seems to be little problem with the preemption question. Because of the inherent manpower and budget limitations that prevent the effective management of consumer protection on the national level, it is unlikely that federal legislation will be held to preempt state action against interstate sellers. This is particularly true since there appears to be no pressing need for

144. *See* FLA. STAT. §817.79 (Supp. 1970); *cf.* Comment, *supra* note 142, at 973 n.301.
145. Comment, *supra* note 142, at 973 n.301.
146. COUNCIL OF STATE GOVERNMENTS, MODEL UNFAIR TRADE PRACTICE ACT §5 (1969).
147. *See* FLA. STAT. §817.79 (Supp. 1970).
148. FLA. STAT. §817.80 (Supp. 1970).
149. Note, *supra* note 137, at 335.
150. Note, *supra* note 137, at 335.

national uniformity in deceptive trade regulations.[151] Similarly, the regulation of deceptive practices in the sales market is a matter of valid local concern and is unlikely to be held to be a burden on interstate commerce; at least where the transaction occurs primarily and substantially within the state seeking to regulate it.[152] Finally, possible state and federal action on the same case is more a question of duplication than of conflict.[153] Such duplication is unlikely to be a significant problem if there is communication between state and federal agencies on such matters. In many cases federal action is likely to be deferred to state action because of the advantage of a temporary injunction over a cease-and-desist order.

Compensation and Class Actions. Another area in which the Florida Act seems to be deficient is in securing compensation for defrauded consumers. At first glance the Act seems sufficient. Most complaints received by consumer protection agencies never reach the injunction stage,[154] but are informally settled by bringing the consumer and businessman together or by mediation of the complaint by the agency.[155] Such action can secure significant restitution to consumers; for example, the New York State Consumer Protection Bureau alone secured over $1 million for defrauded consumers in 1966.[156] These figures, however, can be misleading. Often the dollar recovery on a consumer complaint is inadequate because the agency is beset by more complaints than it can prosecute and is willing to settle for a small amount.[157] In cases where the complaint results in proceedings for an injunction, the Act does not provide for restitution to defrauded consumers. The Commissioner could be authorized to seek restitution or some other form of relief for consumers[158] and thereby

151. *See* People v. Arthur Murray, Inc., 238 Cal. App. 2d 333, 147 Cal. Rptr. 700 (1967): "Not only is there no conflict between the state and federal regulations, but there is nothing to suggest that Congress intended that its legislation in this field be exclusive. The operation of dance studios is primarily a local affair, as contrasted with fields . . . with which the pre-emption cases have been concerned. There is no reason to think . . . that Congress has yet decided to take over the field of fraudulent and unfair business practices to the exclusion of traditional state regulation under the police power." *Id.* at 345, 47 Cal. Rptr. 708. *See also* Double Eagle Lubricants, Inc. v. Texas, 248 F. Supp. 515 (N.D. Tex. 1965). For an example of a federal act that explicitly preempts state legislation see Consumer Credit Protection Act, 15 U.S.C. §1635 (Supp. 1970) (finance charge disclosure).

152. *See* MASS. GEN. LAWS ANN. ch. 93 A, § (3) (1) (a) (Supp. 1969), for statutory adoption of this in-state standard.

153. *See* Dixon, *Section 5 of the FTC Act and State Legislation Dealing with Deceptive Acts—Is There a Conflict?*, 1968 N.Y. STATE BAR ASS'N, ANTITRUST LAW SYMPOSIUM 76, 78, 86.

154. For example, approximately 95% of the complaints reported to the Iowa Consumer Fraud Division never reached formal action. *See* Note, *supra* note 137, at 337 n.120.

155. Note, *supra* note 137, at 337.

156. This amount is a compilation of mediation efforts, stipulations in voluntary compliance orders, and court awards. *See* L. Lefkowitz, *Enforcement of Laws Against Fraud and Deception Now—An Inside Look at the Functioning of the Attorney General's Office*, 1968 N.Y. STATE BAR ASS'N, ANTITRUST LAW SYMPOSIUM 89, 94.

157. *See generally* Schrag, *Bleak House 1968: A Report on Consumer Test Litigation*, 44 N.Y.U.L. REV. 115 (1969).

158. The more recent unfair trade practice statutes have included such a provision. *See, e.g.*, N.M. STAT. ANN. §49-15-13 (Supp. 1969).

eliminate the necessity for subsequent suits to obtain compensation. In the alternative, the Act could provide for assistance to consumers in private suits for compensation brought after the Government has obtained an injunction.

Several provisions could be adopted to aid the consumer in a private suit. First, in order to reduce the evidentiary burden on consumers any judgment against a seller issued by the court in a government suit for injunction could be made prima facie evidence in a subsequent consumer suit for compensation.[159] Thus, the consumer would only bear the burden of proving the extent of his damages. Second, an attempt could be made to remove the financial burden of suit by authorizing the award of triple damages or attorney's fees, at least in instances of intentional violations.[160] Neither attorney's fees nor punitive damages would appreciably benefit the consumer, however, if he were required to prove de novo the existence of an intentional violation.[161] Introduction of a successful government suit as prima facie evidence of fraud would remove the consumer's need to prove intent since intent is an essential part of a government injunction suit. Every consumer who could prove damages would consequently be assured of compensation as well as attorney's fees. Hence, the award of punitive damages or attorney's fees for willful violations would be useful within the context of the present Act.

The Act makes no provision for class actions, although class actions are perhaps the best hope of securing compensation for defrauded consumers. A class action reduces legal fees to individual consumers by spreading the cost among the members of the class and aids legal service organizations and consumer cooperatives by enabling them to represent a large number of clients in a single proceeding. In addition, consumer class actions eliminate wasteful multiplicity of suits and may encourage attorneys to undertake representation because of the possibility of significant remuneration. Although there is some ground for maintaining a class action under current law,[162] class actions in Florida,[163] as well as in most states,[164] would probably require statutory authorization.[165]

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159. *E.g.*, MASS. GEN. LAWS ANN. ch. 93a, §10 (Supp. 1969).

160. *E.g.*, MASS. GEN. LAWS ANN. ch. 93a, §9 (Supp. 1969) (knowing violation not required, award discretionary with the court); UNIFORM UNFAIR TRADE PRACTICES ACT §7 (1969) (final version not yet adopted by committee). *See also* FLA. STAT. §817.72(2) (1969) (award of attorney's fees for willful violation of Uniform Deceptive Trade Practices Act).

161. *See* Kripke, *Gesture and Reality in Consumer Credit Reform*, 44 N.Y.U.L. REV. 1, 46 (1969). The availability of attorney's fees to successful consumers has been criticized as placing too much of a burden on legitimate business. *See* Rice, *Remedies, Enforcement Procedures and the Duality of Consumer Transaction Problems*, 48 B.U.L. REV. 559, 570 (1968).

162. *See generally Rice, supra* note 91, at 579-83. *See also* Starrs, *The Consumer Class Action*, 49 B.U.L. REV. 211, 407 (1969); Note, *Federal Rules of Civil Procedure: Rule 23, The Class Action Device and Its Utilization*, 22 U. FLA. L. REV. 631 (1970).

163. *See, e.g.*, Osceola Groves, Inc. v. Wiley, 78 So. 2d 700 (Fla. 1955), where several plaintiffs who had entered into sales and lease agreements with defendants sought to bring an accounting and other relief on behalf of themselves and those similarly situated. The court refused to allow the action since there was no common right of recovery in the class. Florida class action cases are discussed in Starrs, *supra* note 162, at 450-53.

164. *See* Starrs, *supra* note 162 and Note, *supra* note 162 for a complete survey of class

Business has generally opposed consumer class actions by arguing that it would encourage unethical attorneys to solicit claims and increase the number of frivolous suits.[166] Nevertheless, there is no evidence that the new federal truth-in-lending statutory provision for class actions has been used to harass lenders; to this date less than one dozen actions have been filed under its provisions.[167] However, assuming arguendo that harrassment of business is a byproduct of class actions, disregarding this form of action entirely or requiring the government to first secure an injunction against the seller's deceptive practices seems unjustifiably severe.[168] Other alternatives are available. Any unethical practices incident to class actions could be minimized through the use of adequate discovery devices and supervision of the conduct of attorneys by bar associations.[169] Solicitation of class action members could be controlled by requiring court approval of attorney action at each stage of suit.[170] Fear of coerced out-of-court settlements could be allayed by requiring judicial approval of all settlements. Such a procedure would assure defendants freedom from having to buy off unfounded claims.[171] Consumer class actions would seem too effective in securing adequate compensation for small claimants and thereby deterring fraud to be omitted from comprehensive consumer protection legislation.

Conclusion

There is no single answer to the problems facing consumers. Two things are apparent, however. First, case law alone cannot effectively deal with the

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action cases. Consumer class actions are not used in federal courts because the $10,000 amount in controversy cannot be aggregated among the class. Snyder v. Harris, 394 U.S. 332 (1969).

165. Several proposals enabling consumers to bring class actions in federal courts were introduced in Congress in 1970. The Administration proposal requires a successful injunction to be obtained by the FTC before consumers can sue. It is also limited to eleven specific classes of fraud. Other bills provide a federal forum to hear state fraud cases and do not require the Government to sue first. These proposals are examined in Note, *Consumer Protection—The Proposed Class Action Statute,* 44 Tulane L. Rev. 580 (1970). *See also Hearings on H.R. 14931 and Other Class Action Bills Before the Subcomm. on Consumer Protection of the House Comm. on Commerce and Finance,* 91st Cong., 2d Sess. (1970).

166. *See generally Hearings on H.R. 14931, supra* note 165.

167. *Hearings on H.R. 14931, supra* note 165, at 354.

168. One defect of the latter proposal is that the Government can prosecute only a small fraction of consumer fraud cases. *See Hearings on H.R. 14931, supra* note 165, at 46. With government involvement limited to significant test cases and prior government action necessary, the normal consumer is unable to obtain compensation.

169. ABA Code of Professional Responsibility and Canons of Judicial Ethics, effective in Florida, forms one basis of disciplinary proceedings. Disciplinary Rule 2-104(5), for example, prohibits attorneys from soliciting participants in class action litigaton.

170. Once the attorney has established to the satisfaction of the court that a class action really exists he may ask the court for guidelines permitting interviews of the prospective members of the class in such a way as to insulate them from any possibility of solicitation. This procedure was suggested by the Committee on Legal Ethics and Grievances of the Bar Association of the District of Columbia in answer to an inquiry by one of its members. *See* Starrs, *supra* note 162, at 409.

171. This procedure is followed under the new Federal Rule 23. Fed. Rule Civ. P. 23(e).