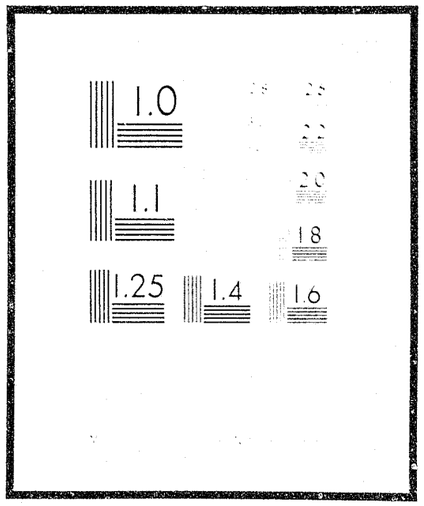
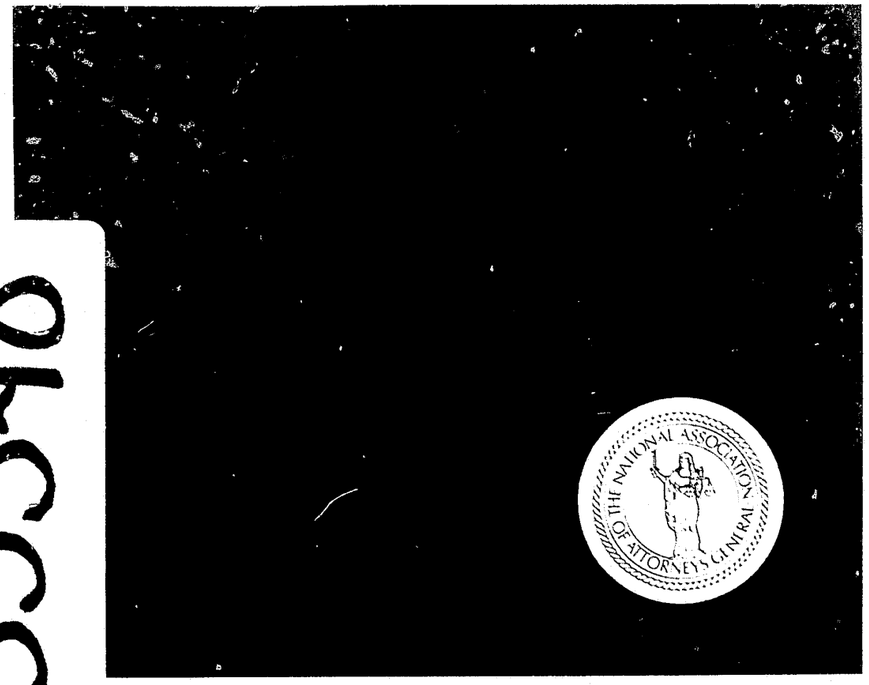


Analysis and Digest of Consumer Protection Case Law

June, 1976

The National Association of Attorneys General
Committee on the Office of Attorney General



Committee on the Office of Attorney General
3901 Barrett Drive
Raleigh, North Carolina 27609

Price: $3.50

The National Association of Attorneys General

Committee on the Office of Attorney General

ANALYSIS AND DIGEST

OF CONSUMER PROTECTION

CASE LAW

A grant from the Law Enforcement Assistance Administration of the U. S. Department of Justice has helped finance this report. The fact that LEAA is furnishing financial support does not necessarily indicate its concurrence in the statements herein.

Staff Attorney Reginald Watkins was primarily responsible for the 1976 update.

June, 1976

NATIONAL ASSOCIATION OF ATTORNEYS GENERAL

COMMITTEE ON THE OFFICE OF ATTORNEY GENERAL

Chairman

Attorney General Theodore L. Sendak, Indiana
President-Elect, National Association of Attorneys General

Vice-Chairman

Attorney General Rufus L. Edmisten, North Carolina
Member-at-Large, Southern Region

Other Members

Attorney General William Hyland, New Jersey
Vice-President, National Association of Attorneys General

Attorney General Larry D. Derryberry, Oklahoma
Chairman, Committee on Criminal Law and Law Enforcement

Attorney General John L. Hill, Texas
Chairman, Committee on Environmental Control

Attorney General Robert List, Nevada
Chairman, Committee on Welfare

Attorney General Daniel R. McLeod, South Carolina
Chairman, Committee on Commerce and Transportation

Attorney General Andrew P. Miller, Virginia
Chairman, Committee on Antitrust and Fiscal Affairs

Attorney General Jim Guy Tucker, Arkansas
Chairman, Committee on Consumer Protection

Attorney General Vernon B. Romney, Utah
Member-at-Large, Western Region

Attorney General Richard C. Turner, Iowa
Member-at-Large, Midwestern Region

OFFICERS AND EXECUTIVE COMMITTEE

THE NATIONAL ASSOCIATION OF ATTORNEYS GENERAL

President	President-Elect
Honorable Slade Gorton Attorney General of Washington	Honorable Theodore L. Sendak Attorney General of Indiana
Vice President	**Immediate Past President**
Honorable William F. Hyland Attorney General of New Jersey	Honorable A. F. Summer Attorney General of Mississippi

Other Executive Committee Members

Honorable Ronald Y. Amemiya Attorney General of Hawaii	Honorable M. Jerome Diamond Attorney General of Vermont
Honorable R. A. Ashley, Jr. Attorney General of Tennessee	Honorable Paul L. Douglas Attorney General of Nebraska
Honorable Bruce Babbitt Attorney General of Arizona	Honorable Frank J. Kelley Attorney General of Michigan
Honorable Arthur K. Bolton Attorney General of Georgia	Honorable Louis J. Lefkowitz Attorney General of New York
Honorable William J. Brown, Jr. Attorney General of Ohio	Honorable Daniel R. McLeod Attorney General of South Carolina
Honorable Francis B. Burch Attorney General of Maryland	Honorable Richard C. Turner Attorney General of Iowa
Honorable Larry D. Derryberry Attorney General of Oklahoma	

CONTENTS

1. INTRODUCTION

The prevention of economic crime has increasingly occupied the attention of Attorneys General in recent years. As the state officer most often charged with enforcement responsibility under his state's consumer protection statues, the Attorney General has been required to construe the legality of particular business practices in light of such statutes. Most statutes give him considerable discretion in determining what constitutes a violation and in choosing an appropriate remedy.

Most state unfair or deceptive trade practice laws are of recent enactment, and the process of developing reported precedent under them has just begun. Section 5 of the Federal Trade Commission Act is of substantial assistance in providing precedent as to what constitutes an unfair or deceptive trade practice. However, case law under similar state statutes is beginning to develop. This publication is intended to analyze and categorize such reported decisions. The report is divided into three sections: constitutional challenges, substantive statutory applications, and procedural questions. The analysis emphasizes constitutional challenges and analyzes cases raising questions of substantive statutory application and procedure.

2. CONSTITUTIONAL CHALLENGES

The most extensive litigation involving consumer protection statutes is in the area broadly referred to as constitutional challenges. Challenges to these statutes have invoked the various clauses that the federal and state constitutions afford. However, as this overview and analysis of cases shows, the success of such challenges has been minimal.

The ability of Attorneys General's offices to defend successfully state consumer protection legislation against constitutional challenges could be complicated. A litigant who challenges a state statute on the grounds of constitutional infirmity is faced with the heavy burden of overcoming the presumption of validity that is afforded legislative acts.[1] The courts which have considered constitutional attacks on unfair and deceptive trade practice laws have repeatedly cited this presumption as the starting point from which they have begun their analyses of the challenged language.[2] The general presumption of constitutional validity is enhanced where the courts are requested to review remedial legislation which is usually construed liberally to effect its purposes.[3] The courts are reluctant to invade the area of legislative authority and the burden of rebutting the presumption of constitutionality is heavy, in that constitutional invalidity must be demonstrated beyond a reasonable doubt.[4]

In the cases which have been reported to date, not one has reflected favorably on a constitutional challenge. The courts have viewed consumer protection statutes as necessary exercises of the states' police powers over strictly economic interests, and no court has accepted the argument that they constitute deprivations of substantial civil rights.[5] A review of the nature of the challenges to date will reflect this pronounced judicial attitude.

Void for Vagueness

The greatest source of challenge to unfair trade and deceptive trade practice acts has been the purported vagueness of the statutory language. This position has been cited in litigation in several jurisdictions.[6] Because the language of many states' acts is similar, the following decisions which uphold such language where a vagueness challenge is made provide readily applicable authority for sustaining another state's statute against a similar challenge.

The due process clause, found in the 14th Amendment of the United States Constitution, declares that no state shall "deprive any person of life, liberty, or property without due process of law." This provision limits the power of the states to legislate and is recognized as having both procedural and substantive aspects. Substantive due process requires that legislation be drawn in such a manner so that no person may be arbitrarily denied the enjoyment of life, liberty, or property. A statute violates due process if it either forbids or requires the doing of an act in terms so vague that men of common intelligence must guess at its meaning and may differ as to its application: due process requires that a person be given notice as to what constitutes prohibited conduct.[7] It is out of this constitutional basis that the judicial concept of "void for vagueness" has grown.

As stated in Grayned v. City of Rockford, 408 U.S. 104 (1972), the due process clause has never required mathematical preciseness of language in order to be constitutionally sufficient. Nor is a statute unconstitutionally vague merely because clearer and more precise language might have been chosen. The concept of "void for vagueness" assumes special importance when applied to criminal or penal statutes. However, in a decision in the case of Carpets By The Carload v. Warren, 368 F. Supp. 1075 (E.D. Wis. 1973), a U.S. Supreme Court decision in Mourning v. Family Publications Service, Inc., 411 U.S. 356 (1973) was interpreted as indicating that, where a regulatory statute is non-criminal, greater latitude is permitted with regard to the impreciseness of the challenged language.

In addition to the particular case with which penal statutes are required to be drawn for constitutional purposes, these decisions recognize universally-applied rule of statutory construction which requires the strict construction of penal statutes. The Model Unfair Trade Practices and Consumer Protection Law,[8] after which most state consumer protection acts are patterned, provides for a variety of remedies, including: injunction, restitution, appointment of a receiver, assurances of voluntary compliance, and civil penalties. In addition, at least one state has provided for criminal penalties in its act.[9] The provision of these remedies has raised the issue in some cases involving "void for vagueness" challenge of whether the act is penal and would therefore require strict construction of its terms.

The courts have responded in a variety of ways. In the case of People ex rel. Dunbar v. Gym of America, Inc., 177 Colo. 97, 493 P.2d 660 (1972), the Supreme Court of Colorado construed that state's statute to apply only to future conduct. The only remedies provided by statute were injunctions, restraining orders, and assurances of discontinuance; no civil penalties were provided. Thus, the only type of remedy available under the

statute was one which required an adjudication or voluntary compliance before the prohibition became effective. Such action served to provide notice of the prohibited conduct before any potential penalty could be imposed. Even if a penalty were present, there would be no vagueness problem.

State ex rel. Turner v. Koscot Interplanetary, 191 N.W.2d 624, (Iowa 1971), a decision of the Iowa Supreme Court, represents a second approach to the problem of deciding whether these acts are penal. The Iowa Consumer Fraud Act is found in the criminal section of the Iowa Code and, consequently, it was claimed that the Act was penal in nature and required strict construction. The court stated that most courts separate the remedial and penal portions of the legislation, giving liberal interpretation when a remedy is sought and strict construction when a penalty is sought. The court found the act to be remedial in nature because it provided regulations conducive to the public good in the intended suppression of fraudulent business practices. Therefore, a liberal interpretation was appropriate and the provision of injunctive and restitutionary relief did not make the act penal in nature.[10]

A third approach is that of the Supreme Court of Kansas set out in the case of State ex rel. Sanborn v. Koscot Interplanetary, Inc., 212 Kan. 668, 512 P.2d 416 (1973). Under the Kansas Buyer Protection Act, the enforcing agency could seek the following sanctions against persons engaged in unlawful practices under that act: (1) injunctive relief; (2) orders for the **return** of money or property; or (3) revocation of any license or certificate of authority to do business in Kansas.[11] Even though these sanctions are clearly not criminal or penal, the court cited an earlier Kansas case, Callaway v. City of Overland Park, 211 Kan. 646, 508 P.2d 902 (1973), which set out the "void for vagueness" test as it applied to a statute imposing criminal sanctions. The court went on to say, "even if we subject the statute to rules of strict construction generally applied to statutes defining crimes, the statutes do not appear to be void for vagueness." Thus, the court applied a strict construction standard, yet found the challenged language to be constitutionally permissible. As no penal provisions were found in the statutes interpreted this strict construction was not mandated.

Some persons advocate more active criminal enforcement of consumer protection laws by Attorneys General.[12] Such emphasis on the penal aspects of the laws would undoubtedly increase litigation on the question of whether these statutes are penal in nature and, therefore, subject to strict scrutiny of the courts. The authority on this point is presently entirely supportive of the position taken by the states that these statutes are remedial and not penal. However, the enactment of misdemeanor provisions within the consumer protection acts themselves, such as is found in the Nebraska Consumer Protection Act, or the attempted application of general penal statutes to violations of consumer protection legislation as has been attempted in Iowa[13] might result in a strict construction of the statutes' language.

This rule of strict construction might be avoided in instances where non-criminal sanctions were sought to be imposed. However, a sounder approach would appear to be that taken in State ex rel. Sanborn v. Koscot Interplanetary, Inc., supra, where the void for vagueness standard of criminal statutes was accepted, but was held to have been met by the statute.

This approach is implicit in those cases in which no discussion of the criminal versus the remedial nature of this legislation is found.[14] The requirement of strict construction of penal statutes is not an invitation to an abandonment of what has been the plainly stated intention of the legislature; where the statutes in question convey a clear and definite meaning there is no occasion for resorting to rules of statutory interpretation at all.[15]

The approach that courts have taken to due process challenges has varied according to the phrases which have been challenged as imprecise. The cases which have been decided are summarized and analyzed below.

California

People v. Witzerman, 29 Cal. App. 3d 169, 105 Cal. Rptr. 284 (1972), was a case involving a void for vagueness challenge to that portion of a false advertising statute which used the language "misleading" and "make or disseminate or cause to be made or dissiminated before the public of this state." The California Court of Appeals found nothing unclear at all in either phrase and merely cited The Random House Dictionary of the English Language. See also, People ex rel. Mosk v. National Research Company of California, 201 Cal. App. 2d 765, 20 Cal. Rptr. 516 (1961).

Colorado

People ex rel. Dunbar v. Gym of America, Inc., 177 Colo. 97, 493 P.2d 660 (1972), involved a challenge to that portion of the Colorado Consumer Protection Act reading "advertise," "bait-and-switch," "disparagement" and "tie-in sales." The court, before beginning an analysis of the particular terms, indicated that the subject matter of the legislation was the control of deceptive trade practices, an important public policy which required the drafting of legislation containing general standards of actionability. The court also acknowledged the general presumption of constitutional validity the act enjoyed.

"Advertise" was found to be associated with the word "advertisement" which was defined elsewhere in the Act and thereby sufficently defined. "Bait-and-switch" was again seen to be associated with a specifically defined term, "bait-and-switch advertising," and sufficiently defined by case decision in Colorado and other jurisdictions. "Disparagement" was not defined in the statute but the court found it adequately defined by the legal literature and sister states' case law. Finally, "tie-in sales" was specifically defined by statute in the Act, had long been prohibited by anti-trust laws, and, like the other terms, was not new or unfamiliar to most business enterprises.

Iowa

In State ex rel. Turner v. Koscot Interplanetary, Inc., 191 N.W. 2d 624 (Iowa 1971), that portion of the Iowa Consumer Fraud Act was challenged which declared referral sales to be unlawful unless made under certain circumstances under Iowa Code 1966, Section 713.24 (2b), and to be unlawful per se under the same statute as amended in 1970. The court stated its

unwillingness to review the wisdom of legislation, its presumption of constitutional validity, and its duty to adopt a liberal interpretation to effect the goals sought to be attained by the legislature. The court found the term "fraudulent conduct," although not subject to precise definition, did include "referral" or "pyramid" sales arrangements. And finally, as support, the court by analogy used the case of Sears, Roebuck & Co. v. Federal Trade Commission, 258 F.307 (7th Cir. 1919) in which a challenge for vagueness to the Federal Trade Commission Act, 15 U.S.C.A. Sec. 45(a)(1), language declaring "unfair methods of competition" and "unfair or deceptive acts or practices" illegal was denied.

Kansas

State ex rel. Sanborn v. Koscot Interplanetary, 212 Kan. 668, 512 P.2d 416 (1973), involved a challenge to the words in the Kansas Buyer Protection Act--"deception, fraud, false pretenses, false promises, misrepresentation"--as being imprecise. The court cited the general presumption of validity of legislative acts in the face of constitutional challenges. These terms were found to have such established meanings in the law that the court felt it need cite no authority for their meanings. The test of proper clarity was stated as "whether the language conveys a sufficient definite warning as to the proscribed conduct when measured by common understanding and practice;" these terms met that test.

Massachusetts

Commonwealth v. Gustafsson, No. 322 (Supreme Judicial Court). The court agreed with the Attorney General's argument that the lower court should not have ruled on the constitutionality of those sections of the mobile home statute which pertain to evictions and to the requirements for disclosures of the terms and conditions of occupancy, since these sections were not material to the case. However, the court disagreed with the state's contention that it could not consider defendant Gustafsson's argument that certain sections were so indefinite and vague as to offend due process.

The sections which were challenged as being indefinite and vague permit a mobile home park licensee to promulgate rules and regulations, "but no such rule shall be unreasonable, unfair, or unconscionable"; further, any rule or condition of occupancy which is unfair, deceptive, "or which does not conform to the requirements of this section" is declared unenforceable. The court stated that although terms such as "unfair" or "unconscionable" may appear to lack specificity, it felt that their meaning could be determined from the circumstances in each case. Here, the court felt that the standards set forth in the challenged sections were sufficiently definite to satisfy due process requirements.

New Jersey

Kugler v. Market Development Corp., 124 N.J. Super. 314, 306 A.2d 489 (1973) concerned NJSA 56:82.3 which reads as follows: "the notification to any person by any means, as part of an advertising plan or scheme that he has won a prize and requiring him to do an act, purchase any other item or submit to a sales promotion effort is an unlawful practice and a violation of the act to which this act is a supplement." The court found the language

to be sweeping, broad and all-encompassing. Also, the court acknowledged the presumption of constitutionality. The challenged phrases were seen as "neither unique nor the work of an esoteric draftsman." The meaning of "advertising plan or scheme" was easily understood. In order to determine the meaning of "act" the businessman need only look to the context and scope of the Consumer Fraud Act to determine legislative intent. "That which the recipient must do to unattach the 'strings' is the 'act' contemplated by the statute." (306 A.2d at 492.)

The court applied the vagueness test of Connally v. General Construction Co., 269 U.S. 385 (1926), wherein it was stated that a statute meets the due process standard if the terms are not so vague that men of common intelligence must necessarily guess at their meaning and differ as to their applications.

Washington:

State v. Ralph Williams N.W. Chrysler Plymouth, Inc., 82 Wash. 2d 265, 510 P.2d 233 (1972); State v. Reader's Digest Association, Inc., 81 Wash.2d 259, 501 P.2d 290 (1972). These cases challenged the constitutionality of RCW 19.86.020, which reads as follows: "Unfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce are hereby declared unlawful." They also challenged that portion of RCW 19.86.920 which reads, "reasonable in relation to the development and preservation of business" and "not injurious to the public interest."

The court found neither set of phrases to be unconstitutionally vague. In setting out the standard to be applied, the court quoted from Justice Frankfurter's dissent in Winters v. New York, 333 U.S. 507, 524 (1948), which reads as follows:

> The requirement is fair notice that conduct may entail punishment. But whether notice is or is not "fair" depends upon the subject matter to which it relates . . . . That which may appear to be too vague and even meaningless as to one subject matter may be definite as another subject matter of legislation permits. . . .

The court further noted that greater leeway is allowed in applying the "common intelligence" test in the field of regulations governing business activities. Also, statutes "which employ special or technical words or phrases well enough known to enable those expected to use them to correctly apply them or statutes with a well settled common law meaning, will generally be sustained against a charge of vagueness . . . ." Reader's Digest, supra, at p. 300.

The language of section 5 of the FTC Act is very similar to the challenged language, and the court used this similarity in its finding of the challenged language to be constitutional:

> The language of the amended federal act, from which RCW 19.86.020 is taken, has been with us since 1938. The federal courts have amassed an abundance of law giving shape and definition to the words and phrases challenged by respondent. Now, more than 30 years after the Supreme Court said that the phrase "unfair methods of competition" does not admit to "precise definition," we can say that phrase, and the amended language has a meaning well settled in federal trade law. Thus, in interpreting the language of RCW 19.86.020 we must hold that the phrases 'unfair methods of competition' and 'unfair or deceptive acts or practices' have a sufficiently well established meaning in common law and trade law, by which we are guided, to meet any constitutional challenge of vagueness. State v. Reader's Digest, supra at p. 301.

Wisconsin

H.M. Distributors of Milwaukee, Inc. v. Dept. of Agriculture, 55 Wis. 2d 261, 198 N.W.2d 598 (1972). Under the Wisconsin unfair trade practices act, the Department of Agriculture has the authority to adopt orders prescribing methods of competition deemed fair. This case was a challenge to such rules defining "chain distribution schemes" as unfair trade practices.[16] The court applied a statutory vagueness standard to these administrative orders: "unless a statute is so vague and uncertain that it is impossible to execute it or to ascertain the legislative intent with reasonable certainity, it is valid . . . ."

Forest Home Dodge, Inc. v. Karns, 29 Wis. 2d 78, 138 N.W.2d 214 (1965). As to the words "promoter," "promotion," "recruiting," "recruit" and "recruiting for profit" the court found that a standard or law dictionary sufficiently defined them. The two other terms, "investment" and "chain distribution scheme," were defined with sufficient specificity elsewhere in the rules.

Carpets by the Carload v. Warren, 368 F. Supp. 1075 (E.D. Wis. 1973). This is a federal district court decision of a challenge to a Wisconsin statutory scheme which proscribed "untrue, deceptive and misleading" practices in advertising.

The terms "untruthful," "deceptive" and "misleading" in reference to advertisements were seen as reasonably well-defined terms in commercial law and regulations, citing Donaldson v. Read Magazine, 333 U.S. 178 (1947). The court regarded this challenge for "facial vagueness" from the "notice" or "imprecision" perspective as inappropriate where, as here, a statutory scheme provides for rule promulgation by an administrative agency and application to a court before formal sanctions are imposed. Thus, the entire statutory scheme provides the necessary cure to any alleged imprecision.

Holiday Magic Inc. v. Warren, 497 F.2d 687 (7th Cir. 1974). The same administrative rules were challenged in this suit, in which the district court had found the argument that they were void for vagueness to be insubstantial and had dismissed the complaint. [Holiday Magic, Inc. v. Warren, 357 F.Supp. 20 (E.D.Wis. 1973)]. The plaintiffs appealed, and the court of appeals vacated the order of dismissal and remanded the case for determination by a three-judge court. The appellate court noted that the only questions before it were whether the allegations in the complaint present a substantial federal question and whether there is a question fairly open to debate which would entitle the plaintiffs to the relief requested. It was in this light that the court examined the case before it.

The court of appeals found that the district court's decision "erroneously invaded" the province of a three-judge court by going to the merits of the issues raised. The district court had considered the question before it to be whether the state may constitutionally prohibit chain distributorship schemes. The judge's inquiry should properly have been confined to the issue of the substantiality of the constitutional question raised. The appellate court concluded that the constitutional issues, including the challenge that the rules were void for vagueness, were not so clearly without merit as to make them insubstantial.

Even though the Wisconsin supreme court considered and rejected the void for vagueness argument in H M Distributors of Milwaukee, Inc. v. Dept. of Agriculture, 55 Wis. 2d 261, 198 N.W.2d 598 (1972), that decision alone does not preclude a review of the regulations in a federal court. In support of this position, the court cited the decision of Goosby v. Osser, 409 U.S. 512 (1973), which stated that "[i]n the context of the effect of prior decisions on the substantiality of constitutional claims, ... claims are constitutionally insubstantial only if the prior decisions inescapably render the claims frivolous; previous decisions that merely render claims of doubtful or questionable merit do not render them insubstantial for the purposes of 28 U.S.C. § 2281 [the three-judge court statute]."

Wisconsin

In State v. Lambert, 68 Wis.2d 523, 229 N.W.2d 622 (1975) the defendant challenged his conviction for promoting a chain distribution scheme in violation of a regulation promulgated pursuant to the state unfair trade practices law. The statute does not specifically define the prohibited unfair practices, and the defendant argued that the statute's failure to give more detailed notice of the practices forbidden makes it unconstitutionally vague. The statute delegates to an administrative agency the authority to issue regulations prohibiting specified practices determined to be unfair, and the court held that the statute and the regulations implementing it must be looked at together to determine whether the defendant had fair notice. It found that the regulation under which the defendant was convicted gave him adequate notice of what was forbidden and therefore rejected his void for vagueness claim.

Florida

A recent case decided in Florida analyzed several aspects of the "void for vagueness" arguments that are leveled against state statutes. Department of Legal Affairs v. Lee Rogers d/b/a/ American Holiday Association, 329 So.2d 257 (Fla. 1976), was an appeal from a state circuit court which found Sections 501.204 and 501.205, Florida Statutes, to be unconstitutionally vague and indefinite and an unlawful delegation of legislative authority. The latter challenge will be discussed in the delegation section.

The Attorney General's office had initiated an administrative cease and desist action against American Holiday Association on the grounds that the company was soliciting Florida consumers to engage in an unlawful gambling puzzle game in violation of the general prohibitory language of Section 501.204, Florida Statutes, and Rule 2-9.07, Florida Administrative Code. Section 501.205, Florida Statutes, provides that the Department of Legal Affairs and the Florida Cabinet may adopt rules which define what

constitutes unfair or deceptive trade practices under Section 501.204, Florida Statutes. The administrative proceeding was removed to the circuit court and that court determined that the statute and rules defining unfair or deceptive trade practices were constitutionally deficient.

The state supreme court held that the statutes are constitutional. It reversed the judgment of the trial court dismissing the Attorney General's complaint and remanded the case for further proceedings.

The court relied on State of Washington v. Reader's Digest Association, Inc., 81 Wash.2d 259, 501 P.2d 290 (1972), in which the Supreme Court of Washington upheld that state's "little FTC Act" against a constitutional attack on the basis of void for vagueness. The Washington court stated "... in interpreting the language of RCW 19.86.020 we must hold that the phrases 'unfair methods of competition' and 'unfair or deceptive acts or practices' have a sufficiently well established meaning in common law and federal trade law ... to meet any constitutional challenge of vagueness.

In a concurring opinion, Judge England said that the following circumstances were persuasive in upholding the Florida legislation: (1) the act provides only civil, as opposed to criminal, remedies; (2) Florida had a "laundry list" of prohibited activities before the "little FTC Act" was enacted, and it proved inadequate; (3) the act governs merchants and businessmen, not citizens in general, and the terms used have meaning for such persons; and (4) the phrases under attack are no less precise than some which had existed previously under Florida's fraudulent practices statute.

From these decisions emerge a series of factors which have successfully combined to counter "void for vagueness" challenges. Aside from those already discussed, most important is judicial recognition of the remedial nature of this type of legislation in an area primarily affecting economic interest only. Consequently, in order to effect the recognized public policy inherent in the prevention of economic crime, the courts are willing to accept less precise language. The courts have recognized the need to draw broad statutory prohibitions in order to deter inventive perpetrators of consumer fraud.

Often, the courts have found the language which is challenged to be of such common meaning that the only reference required is a standard dictionary. Additionally, where the legislature has sought to define challenged terms, the courts will regard such terms as curing any alleged unconstitutional impreciseness.[17] Finally, references to the common law and trade regulation case law authority of other states and the federal government have been used as guides to provide precision to the challenged terms. Such references apprise those businesses affected by unfair and deceptive trade practices acts as to the nature of prohibited behavior. Consequently, substantive due process is not violated despite the general standards of actionability which characterize the consumer protection statutes of the states.

Police Powers: Right To Contract

The existence of a sovereign government presupposes the existence of a police power. The power has been variously defined, but the import of most

definitions is that it is the power inherent in the state to prescribe, within the limits of the state and federal constitutions, reasonable regulations necessary to preserve the public order, health, safety and morals. By means of this power the legislature exercises supervision over the public welfare, making certain that individuals in the exercise of their individual freedoms recognize the duties they owe to others and society.

Since the exercise of police power is dependent upon the enactment of "reasonable" regulations or use of reasonable means, it is recognized as a flexible power, capable of development and modification.[18] If, for example, the use of consumer credit were to expand enormously so as to create new social ills or the potential for such ills, the state could legislate new creditor-debtor relationships. Such legislation might not have been reasonable under prior circumstances in which less credit had been extended.

The argument most often made by businessmen challenging unfair and deceptive trade practices is based on the reasoning that such acts are excessive uses of police power because they impinge on the liberty of contract.[19] Liberty of contract is found in the due process clauses of the 5th and 14th Amendments to the United States Constitution and in state constitutions. A related argument is made regarding the effect of such acts on the right of a person to engage in a chosen profession or business. The right to earn a livlihood by means of a ligitimate business is seen as a fundamental right guaranteed again by the 14th Amendment to the United States Constitution.

The courts have uniformly rejected these arguments. Due to the unique public interest in the suppression of fraudulent, unfair or deceptive trade practices, the statutes have been uniformly found to be reasonable exercises of valid police power, as the following cases in point demonstrate.

New York

State v. I.T.M., Inc., 275 N.Y.S. 2d 303, 52 Misc. 2d 39 (1966). This is a supreme court (trial court) decision in which the Attorney General sought to enjoin promoters of a referral-type of pyramid sales program from engaging in fraudulent and illegal practices. The court found the sales program tantamont to "false representation." The case reads:

> It is difficult to conceive of a more deliberately fraudulent and maliciously dishonest pattern of doing businss with the public. They gorged themselves on their ill-gotten gains from highly credulous consumers. They engaged in practices in which duplicity was the keynote and fraud the keystone of a commercial enterprise designed to pillage the public. None has a right to earn his livelihood in this fashion . . . . Legislation designed to protect the consuming public against persistent fraud and illegality is certainly considered the rightful domain of the state and the wrongdoer will not be heard to shield himself behind the cloak of alleged unconstitutionality of a meritorious statute. (275 N.Y.S.2d at 319.)

No cases are cited for this proposition, nor are the specific grounds of constitutional objection set out in the decision.

Iowa

State ex rel. Turner v. Koscot Interplanetary, 191 N.W.2d 624 (Iowa 1971). This case involved a requested injunction against a pyramid sales operation (Glenn W. Turner's businesses). The court cited extensive Iowa Supreme Court and United States Supreme Court case authority to the effect that the state may, under its police power, regulate a legitimate business which is detrimental to the people if not properly conducted or may prohibit a business activity found to be injurious to the public welfare. This includes sales promotion legislatively determined to be fraudulent. Also, the court found no infringement of the right to contract by this law, making pyramid sales schemes an unlawful practice. "It is well established, laws having for their purpose the legitimate protection of health, safety, morals and welfare of the people are not constitutionally prohibited. And where, as here, state legislation addressed to that end is reasonable and appropriate, all contracts are subject thereto." (191 N.W.2d at 630.)

Colorado

People ex rel. Dunbar v. Gym of America, Inc., 177 Colo. 97, 493 P.2d 660 (1972). This was a challenge to the entire Colorado Consumer Protection Act on the basis that it exceeded "that which a state may lawfully do under its police powers." The court, in a strongly-worded and well-supported statement, reasoned as follows:

1. The United States Supreme Court has continually upheld the proposition that states have authority to safeguard the interests of their citizens.
2. The Supreme Court has indicated that the state legislatures have wide discretion to determine how best to preserve the general welfare.
3. If a particular business or trade practice affects the public interest it may be subjected to state control.
   > "Reasonable state restraints are a part of the price we must pay for an ordered society. The corollary to this is that the unrestricted privilege to engage in business or to conduct it as one pleases is not guaranteed by the Constitution .... Were it otherwise, the public's welfare might often become the forgotten orphan of commercial expediency." (493 P.2d at 667.)
4. The right to regulate in the name of the police power is particularly clear when it is the legislative intent to regulate commercial activities which may prove offensive, injurious or dangerous to the public.
5. This relates also to financial well-being of the people, to protect the public from financial loss or abate evils rising from pursuit of business.

The court then turned to an analysis of whether the provisions of the Consumer Protection Act and the prohibitions contained therein were reasonably related to the public welfare. Deceptive trade practices were seen to affect injuriously both honest businessmen and consumers. Injunction of such practices was seen as a reasonable response to such evils. State court cases and FTC case authority were relied upon for support of the

proposition that false and misleading trade practices are injurious to the public welfare and therefore subject to the state's police power and application for injunctive relief.

Kansas

State ex rel. Sanborn v. Koscot Interplanetary, 212 Kan. 668, 512 P.2d 416 (1973). A challenge to the Kansas Buyer Protection Act on the grounds it violated the right to carry on a business and to contract. The court found a right and duty of the state to protect its citizens from injurious business practices under its police powers. Citing Breard v. Alexandria, 341 U.S. 662 (1951), and Frisbie v. United States, 157 U.S. 160 (1895), the court stated that even a legitimate business could be restricted or prohibited in the public interest, as could contracts which affected that interest. The case went on to hold that the state could impose regulation or prohibition of sales practices or promotional schemes deemed injuriously fraudulent. Turner v. Koscot, supra, was cited as support for finding pyramid sales schemes, such as that sought to be enjoined in this case, to be injuriously fraudulent.

The potential violation of an individual's due process right to work under the 14th Amendment was again raised in the case of Holiday Magic, Inc. v. Warren, 357 F.Supp. 20 (E.D. Wis. 1973), vacated, 497 F.2d 687 (7th Cir. 1974). This was an action filed in federal court by a corporation and an individual seeking a declaratory judgment that a Wisconsin Department of Agriculture regulation making chain distributorships an unfair trade practice was unconstitutional. The district court found nothing in the Constitution which prohibited a state from outlawing a trade practice merely because others had profited from it in the past, if current conditions made the legislation necessary to protect the public welfare. The court held further that a regulation affecting previous vocations need not be supported by a more compelling state interest than that supporting any other regulation.

The district court next considered the argument that the regulation outlawing chain distributorship schemes violated the contract clause (Art. I, Sec. 10, Clause 1) of the Constitution. That clause, which prohibits a state from passing any law which may impair the obligation of contracts, is called into question when, as here, legislation affects interests guaranteed by a contract entered into prior to the enactment of legislation. This clause has been interpreted as not restricting the power of the states to legislate in the interest of the morals, health, and safety of the public. The district court quoted with favor from Home Building and Loan Association v. Blaisdell, 290 U.S. 398, (1934) in which the public policy behind allowing impairment of contracts in order to further the public welfare is explained as follows:

> Not only is the [contract clause] qualified by the measure of control which the state retains over remedial processes, but the state also continues to possess authority to safeguard the vital interests of the people .... Not only are existing laws read into contracts in order to fix obligations as between the parties, but the reservation of essential attributes of sovereign power is also read into contracts as a postulate of the legal order.

In Holiday Magic, those persons who had already paid money for the right to recruit others into the chain distributorship scheme unquestionably had the value of their contract impaired. The district court saw the relevant question as whether the challenged regulation was reasonably related to a valid state purpose. The court cited the presumption of constitutionality, the presumption that the regulation served the public interest and the regulation's preamble, § 122.01, in which the Department set forth the social evils sought to be cured by the regulation, as persuasive support for the constitutionality of the regulation.

On appeal, the court of appeals vacated the order dismissing the action for lack of a substantial federal question, and it ordered the convening of a three-judge district court. It did not reach the question of whether the regulation improperly impaired the plaintiffs' right to contract, and it noted that the district court should not have reached that issue either since such a question may be properly considered only by a three-judge court and not by a single district court judge.

Whenever confronted with these arguments the proponent of the statute ought to focus on the gravity of the ill sought to be remedied. Outright prohibition of certain businesses or impairment of contracts is an appropriate exercise if the state's police powers of the law is reasonably applied. Thus, legislation which has the public purpose of preventing fraudulent or deceptive trade practices has consistently met due process contract clause challenges successfully.

Due Process: In Personam Jurisdiction

The marketing of goods and services in our modern society has required most large businesses to operate in more than one state. Frequently trade practices declared unlawful in one state are not specifically prohibited in others. However, when incidents of the marketing scheme occur within the forum in which a prohibition against them exists, the question arises as to whether sufficient contact with that state has occurred so that the forum state has jurisdiction to impose sanctions on the offending business. The due process clause of the 14th Amendment to the United States Constitution is violated if a state court seeks to impose its jurisdiction over a nonresident party who has insufficient contacts with the forum state.[20]

The enforcement of unfair or deceptive trade practices acts often is attempted against corporations with minimal contacts in the forum state. In analyzing the sufficiency of these contacts two steps must be taken. First, the activities of the company within the forum state must fall within the categories set out by state statute as areas where the state has chosen to exercise its judicial power over nonresident parties. Secondly, if the state jurisdiction statute is satisfied, then the constitutional requirement of "minimum contacts" with the forum state must be met.[21]

The first of these two steps requires an analysis of the statutory language in each of the fifty states, a task which is beyond the scope of this report. However, a number of jurisdictions have adopted statutory language which conforms entirely with the dictates of the due process clause. For example, California Code of Civil Procedures 4.10.10 provides as follows: "A court of this state may exercise jurisdiction on any basis not inconsistent with the Constitution of this state or of the United

States." In such a state, the statutory jurisdictional standard is the same as the constitutional standard, and the only question facing the court is whether the 14th Amendment is satisfied.

Those cases decided under unfair and deceptive trade practices acts discussing this type of challenge have focused solely on the second of these two steps. If the company has entered into the marketplace in a concerted fashion for the purpose of realizing economic gain it is unlikely that a court would find the exercise of in personam jurisdiction over it to offend "traditional notions of fair play and substantial justice."[22] In the case of Hanson v. Denckla, 357 U.S. 235 at 253 (1958), the Supreme Court indicated the basis for exercise of jurisdiction over a nonresident party was whether the party has "purposefully avail[ed] itself of the privilege of conducting activities within the forum state, thus invoking the benefits and protections of its laws." The solicitation practices of foreign corporations have repeatedly met this standard despite minimal or no physical presence within the forum state.

Missouri

State ex. inf. Danforth v. Reader's Digest, 527 S.W.2d 355 (Mo. 1975). This suit involved a claim that the Reader's Digest "Sweepstakes" was a lottery. Reader's Digest filed a motion to quash service claiming that the Consumer Protection Division had no jurisdiction under Missouri's long-arm statute, which motion was overruled by the trial court. The Supreme Court of Missouri affirmed the trial court's action with respect to the motion to quash service, finding that a corporation which makes contact with Missouri residents only by United States mail is amenable to suit in Missouri if it violates Missouri law in the process.

New Jersey

Kugler v. Market Development Corporation, 124 N.J. Super. 314, 306 A.2d 489 (1973), was a case involving direct interstate mail solicitation of New Jersey residents through a form congratulatory letter which advised the recipient he had won a contest; it also requested a $15 "service charge." No other corporate activities within the state were found.

The court cited an earlier superior court, appellate division decision for the following proposition:

> Direct mail solicitation of New Jersey residents is a sufficient warrant to sanction in personam jurisdiction without offending traditional notions of fair play and substantial justice. Schaffer v. Granite Hotel, Inc., 110 N.J. Super. 1, 264 A.2d 240 (1970).

The jurisdictional statute under which service was made had previously been interpreted broadly so as to extend jurisdiction over foreign corporations to the outer limits permitted by due process. Thus, a concerted mail solicitation program for an unlawful act under the New Jersey Consumer Fraud Act was seen as sufficient contact with the state to satisfy the demands of the due process clause.

Washington

State v. Reader's Digest Association, Inc., 81 Wash. 2d 259, 501 P.2d 290 (1972), involved the mailing by Readers Digest Association, Inc., of sweepstakes information directly to Washington residents -- two and one-half million mailings annually. The purpose of the mailings was to promote the sale of magazines and other goods. The court found the scheme to be an unfair trade practice and turned to the question of minimum contacts. The company had no agents, employees, offices or other property within Washington.

The long-arm provision found in the Washington Consumer Protection Act reads,

> Personal service of any process in an action under this chapter may be made upon any person outside the state if such person has engaged in conduct in violation of this chapter which has had the impact on this state which this chapter reprehends. Such persons shall be deemed to have submitted themselves to the jurisdiction of the courts of this state . . . . (RCW 19.86.160.)

The court noted the discernible trend in United States Supreme Court decisions to liberalize the requirements for establishing personal jurisdiction over nonresidents. The minimum contacts test propounded by the U.S. Supreme Court had previously been analyzed in a prior case, Tyee Construction Company v. Dulier Steel Products, Inc., 62 Wash. 2d 106, 381 P.2d 245 (1963), and was found to require three basic factors:

> (1) The nonresident defendant or foreign corporation must purposefully do some act or consummate some transaction in the forum state; (2) the cause of action must arise from, or be connected with, such act or transaction; and (3) the assumption of jurisdiction by the forum state must not offend traditional notions of fair play and substantial justice, consideration being given to quality, nature and extent of the activity in the forum state, the relative convenience of the parties, the benefits and protection of the laws of the forum state afforded the parties, and the basic equities of the situation. (381 P.2d at 251.)

In applying this analysis to the facts before it, the court noted that the entire operation was based in New York (where it was not illegal) and only mailings came into the state of Washington to effect the lottery there (where it was unlawful). The illegal activity arose out of this exploitation of the economic market within the forum state. This purposeful availment of Washington's economic market was sufficient to satisfy the second factor. Finally, the traditional notions of fair play and substantial justice factor was discussed as follows:

> Respondent solicited Washington business and derived substantial profits from Washington residents by clearly illegal methods. It is the duty of the state to protect its residents from such unfair practices. If our courts are not open, the state will be without a remedy in any court and the Consumer Protection Act will be rendered useless. (381 P.2d at 303.)

A federal case, Murphy v. Erwin-Wasey, Inc., 460 F.2d 661 (1st Cir. 1972), lends further support to the positions taken in New Jersey and Washington. The case involved an intentional misrepresentation under general tort law rather than a deceptive trade practices act; the minimum contacts question arose under a general long-arm jurisdiction statute for "tortious injury by an act or omission in this commonwealth." A misrepresentation contained in a single mailing was seen as sufficient to meet the minimum contacts test since intent to misrepresent and induce reliance within the forum state was found.

Pennsylvania

Aldens, Inc. v. Israel Packel, Attorney General, 524 F.2d 38 (3rd Cir. 1975). This action was initiated by Alden's Inc., seeking a declaratory relief against enforcement of the Pennsylvania Goods and Services Installment Sales Act, 69 P.S. §§ 1101-23-3 (Supp. 1975). A counterclaim was filed by the Attorney General seeking injunctive relief enforcing the Act against the plaintiff upon a declaration of its constitutionality. The federal district court upheld the constitutionality of the Act's application and refused injunctive relief to the Attorney General on the theory that he could not obtain similar relief in a Pennsylvania court. Cross-appeals were taken and the opinions of the court of appeals upheld the district court's determination as to the constitutionality of the Act. This decision is an important affirmation of the states' authority to impose interest limitation on out-of-state sellers dealing on credit with their residents.

Aldens is an Illinois corporation operating a mail order business. By catalogs and flyers mailed from its headquarters in Chicago, it solicits orders in fifty states, including Pennsylvania. There are no agents, salesmen, canvassers or solicitors within the state. The corporation has no telephone listing in Pennsylvania and does no media advertising there. The credit of Pennsylvania customers is checked through a credit reporting agency in Chicago which does resort to inquiries of credit bureaus in Pennsylvania. However, there is no direct use of Pennsylvania credit verification sources to determine credit ratings of customers within that state. All merchandise orders are filled from outside Pennsylvania and shipped F.O.B. from a point or origin in another state. Alden's is not required to collect or remit Pennsylvania use tax nor to qualify nor to register to do business in Pennsylvania. It accepts or rejects all orders for merchandise in Chicago.

Only the Chicago office grants credit, and all credit application forms and credit agreements are mailed by Pennsylvania residents seeking credit to Chicago. Aldens has standard nationwide charges which exceed those allowed by the Pennsylvania Act. Aldens' credit agreements provide for the retention of a purchase money security interest in merchandise sold on credit, but it does not file any security interest documents and does not enforce any security interests. The security agreement does not comply with Pennsylvania law, but does comply with Illinois law and the Federal Truth in Lending Act. Annual sales to Pennsylvania residents approximate $14,900,000 (73 percent on credit) which represents about 7.6 percent of Aldens' annual sales.

Aldens contended that Pennsylvania could not apply its law to these credit transactions which Aldens maintained were Illinois contracts performed wholely outside Pennsylvania and in interstate commerce. The precise

question considered was whether Pennsylvania's choice of its own law under § 1103 of the Act was within its power as a sovereign state under the fact situation set out above and whether such action was consistent with the requirements of the federal Constitution.

In regard to the due process clause challenge, the court stated that since McGee v. International Life Insurance Co., 355 U.S. 220 (1957), it has been clear that the due process clause defines a rather low threshold of state interest sufficient to justify exercise of the state's soveregin decisional authority with respect to a given transaction. The state's interest was seen as clear in this instance, where Pennsylvania citizens were required to pay $750,000 more annually in interest charges than they would pay if Pennsylvania law were applied to these credit transactions. The court distinguished National Bellas Hess, Inc. v. Department of Revenue, 386 U.S. 753 (1967) as being a tax case and consequently subject to "special due process scrutiny" not appropriate herein.

Wisconsin

Aldens, Inc. v. Warren, et al., No. 72-C-405 (USDC-W.D. Wis., March 16, 1976). A similar decision was derived in this case from almost identical facts as in Aldens, Inc. v. Israel Packel, Attorney General.

Vermont

Turner v. Baxley, 354 F.Supp. 963 (D. Vt. 1972), involved the alleged conspiracy of twenty-six Attorneys General to stay the Glenn Turner businesses from operating and to deny them certain constitutional rights.

Rule 4(e) of the Vermont Rules of Civil Procedures states a person is subject to personal service outside the state if activities imputable to him were such as to support a personal judgment against him. The theory argued by Turner's attorneys was that since the Vermont Attorney General has acted in furtherance of the alleged civil conspiracy within the state and his acts were imputable to all his co-conspirators, each of them was amenable to in personam jurisdiction within Vermont under Rule 4(e).

The court stated the rule must be read compatibly with the Constituion and specifically with the due process minimum contacts tests of International Shoe Co. v. Washington, 326 U.S. 310 (1945). The court isolated its requirements that the defendants have taken a voluntary action calculated to have an effect in the forum state and that the assertion of jurisdiction must be fair and reasonable taking inconveniences of defense into consideration.

In discussing the first requirement, the court noted that the mere presence of a co-conspirator in the forum state or overt acts there in furtherance of a conspiracy were insufficient to place liability on the nonresident co-conspirators. Instead, the complaint should have alleged that each co-conspirator's actions outside Vermont would have an intended effect in Vermont. There was also no "substantial connection" between the alleged conspiracy and Vermont, nor were any unusually severe damages sustained there. Thus, an intent to take voluntary action in the forum state was not present.

The court found it not unreasonable for the plaintiffs to pursue their action in another forum. It noted that no evidence crucial to plaintiffs' claims or witnesses was present in Vermont, and that allowing the suit to be brought wherever an alleged overt act had occurred would encourage forum shopping. That the plaintiffs would be forced to bring individual actions was not seen as unduly burdensome because the plaintiffs did business in each of the potential forums, had pending actions in each state, and had sufficient financial resources to bring such actions. Thus, the fairness requirements of International Shoe were not met, and the action was dismissed against the twenty-five non-resident Attorneys General.

This case contains a helpful discussion of the policy reasons behind the minimum contacts test for the constitutional propriety of an exercise of in personam jurisdiction. As a rejection of such exercise it indicates what factors might militate against holding a nonresident participant in a deceptive trade practice personally responsible for the acts of his co-participant within the forum state. Whenever such a question is posed, the "flexibility" of the due process clause requires a marshalling of all facts which tend to show a purposeful availment of an economic market within the forum, the extent of damage or potential damage in the forum, and the equities of bringing the action within the state.

Full Faith and Credit Limitation

Pennsylvania

Aldens, Inc. v. Israel Packel, Attorney General, 524 F.2d 38 (3rd Cir. 1975). This case involved a challenge to the constitutionality of applying Pennsylvania's Goods and Services Installment Sales Act in Pennsylvania on the grounds that the corporation charged with violating the statute had insufficient contacts with that state to satisfy the Due Process Clause of the U. S. Constitution. However, the court took the due process boundary one step further by imposing a limitation based on the "Full Faith and Credit Clause." In recognizing that certain considerations involved in the two areas overlap, the court held that the Full Faith and Credit limitation "applies, even to a state with a sufficient interest in the transaction to satisfy the due process threshold when, upon an analysis of competing factors, a sister state has a greater interest in regulating the transaction. In this case the court found no conflict of law or policies with regard to these substantially Illinois contracts since Illinois had not specified the terms on which Illinois sellers could contract. Consequently, nothing prohibited the application of Pennsylvania law. On the other hand, had Illinois actually specified the terms on which sellers of that state could contract, the court would be faced with a delicate balancing of competing interests brought on by a full faith and credit issue.

Wisconsin

In State v. Advance Marketing Consultants, Inc., 66 Wis.2d 706, 255 N.W.2d 887 (1975), the Attorney General's office filed a complaint which charged the defendant with misleading advertisements in connection with distributorship contracts. Judgment had been taken against the corporate defendant, but Ginsburg, an officer of the corporation, appealed to the supreme court on the issue of his individual liability alleging a lack of

personal jurisdiction. The Wisconsin Supreme Court affirmed a finding of personal jurisdiction by the trial court.

The decision first analyzed the issue of whether or not Mr. Ginsburg's contracts with Wisconsin were of the nature that they were covered by the state's "long-arm" statute. Under the statute, the jurisdictional facts required are 1) an act or omission within the state by the defendant; and 2) a claim of injury to person or property alleged to arise out of the local act or omission. The court found the placing of advertisements in newspapers circulated in Wisconsin, the contracting with persons responding to those advertisements and the taking of earnest money deposits, all to be acts within the state by the defendant. The necessary injury was found in the deception alleged to have taken place.

The court then cited its previous decision of Zerbel v. H. L. Federman and Co., 48 Wis.2d 54, 179 N.W.2d 872 (1970), in which a five-part test was formulated to determine whether fair play and substantial justice are met by finding jurisdiction to exist. These factors -- quantity of the contacts; nature and quality of the contacts; the source and the connection of the cause of action with the contacts; the interest of Wisconsin in the action; and convenience -- were examined by the court individually. It concluded that extending personal jurisdiction over Mr. Ginsburg satisfies the constitutional requirements of due process.

Equal Protection: Prosecutorial Discretion

The enforcement provisions of unfair or deceptive trade practices acts typically place considerable remedial discretion in the hands of the Attorney General or other enforcing officer. The remedy may range from administrative assurances of compliance to criminal sanctions. A number of challenges to unfair and deceptive trade practices acts have cited the placement of such discretion in prosecutorial officers as a denial of equal protection. The courts have noted that such a challenge might be appropriate if it were alleged that the enforcement officer had unreasonably abused his discretion in some manner.[23] However, they have uniformly rejected such claims if no abuse is alleged. Cases raising such issues and the treatment afforded the arguments follow.[24]

Colorado

People ex rel. Dunbar v. Gym of America, Inc., 177 Colo. 97, 493 P.2d 660 (1972), construed a statute which gave the Attorney General the authority to file for a court injunction against an alleged violation of the Colorado Consumer Protection Act or accept an assurance of voluntary compliance instead.

The court first indicated that the conferring of the power to execute the law to the executive was not an unlawful delegation of legislative power to make the laws. As support for the public policy of delegating such responsibility, the court cited the example of the Federal Trade Commission's use of "consent orders" which were the genesis for the "assurances of discontinuance" in Colorado. Also, in support of the Colorado statutes, the court looked at similar provisions in nineteen other states which allowed for the use of an assurance of discontinuance in lieu of formal court action. Continuing, the court stated:

> The above discussion should make apparent the well-established and extensively sanctioned grant of discretion to the state enforcement officer to settle controversies arising under consumer protection statutes in either a non-adjudicative or injunctive fashion. There is an important reason behind this widely accepted grant of discretion. Where a deceptive trade practice exists, individualized treatment of the particular offender is usually the most fair and efficient means of effectively terminating the practice . . . . (493 P.2d at 669.)

Giving such discretion to the Attorney General does not constitute a violation of equal protection unless abuse of discretion is alleged. Such abuse was not alleged in this case.

California

People v. Witzerman, 29 Cal. App. 3d 169, 105 Cal. Rptr. 284 (1972), involved a suit by the Attorney General to obtain civil penalties for false advertising and an injunction against violation of the corporate securities law. Among other challenges, it was asserted that the prohibition against false advertising was unconstitutional because the Attorney General had unlimited discretion in choosing the means of enforcing the law: injunction, civil penalty or criminal prosecution. The court treated this argument in a terse footnote:

> We perceive no constitutional problem in this respect and have been cited to no authority indicating otherwise. Prosecutors normally are granted considerable discretion in how they will prosecute. (105 Cal. Rptr. at 291, fn. 9.)

Wisconsin

Holiday Magic Inc. v. Warren, 357 F.Supp. 20 (E.D. Wis. 1973), involved several constitutional challenges to an administrative rule which made chain distributor schemes unlawful, including a contention that it resulted in discriminatory enforcement.

The district court noted that, while it is true equal protection is violated if the administration of a regulation is done in bad faith or in a manner which unreasonably discriminates, it saw no allegation of such discriminatory enforcement. Rather, the plaintiffs were seeking to enjoin all enforcement of a law which on its face was no more discriminatory than any other law. The law in question applied to all who attempted to involve another person in a chain distributor scheme, but excluded from its scope those actually brought in under a chain distributorship scheme. Citing Skinner v. Oklahoma, 316 U.S. 535 (1942), the district court concluded that it was unreasonable that the latter were not among those persons who "promote, offer or grant participation" in chain distributorship schemes.

The Seventh Circuit Court of Appeals vacated the decision of the district court and ordered reconsideration of the case by a three-judge court [Holiday Magic, Inc. v. Warren, 497 F.2d 687 (7th Cir. 1974)]. It did not review the district court's holding that the rule is not enforced in a discriminatory manner, citing the general rule that only three-judge courts may consider the merits of constitutional claims, and that the decisions they render are directly appealed to the Supreme Court.

Right to Jury Trial: 6th and 7th Amendments

The right to trial by jury is a basic tenet of the common law of England. It was also recognized in the Magna Carta, the Declaration of Independence and the 7th Amendment to the United States Constitution. The 7th Amendment specifically guarantees the right to jury trial in all suits at common law in federal courts where the value in controversy exceeds $20. In civil matters, this 7th Amendment guarantee has not been made applicable to the state courts through the due process clause of the 14th Amendment. The public policy of the states with respect to jury trials is determined by their respective constitutions.

The right to jury trial in civil matters is peculiar to actions "at law" involving predominantly rights and remedies which are "legal" as contrasted with "equitable" in character.[25] If the case is clearly one involving equitable issues the trial of questions involved belongs to the court alone and a demand for jury trial is inappropriate. Additionally, if equitable issues are presented and the court has assumed jurisdiction it will maintain jurisdiction to decide not only the equitable issues but also legal issues as well.

Those cases involving challenges to unfair and deceptive trade practices acts because a state constitutional provision paralleling the 7th Amendment guarantee to right of jury trial has allegedly been infringed have typically been analyzed as involving equitable remedies. Consequently, the right to jury trial guaranteed at common law as of the time of adoption of the state constitution in question has not been successfully invoked.

New Jersey

The two cases which have raised this issue were both decided under a New Jersey constitutional provision which reads "the right of trial by jury shall remain inviolate," 1947 New Jersey State Constitution, Article 1, paragraph 9. The court in Kugler v. Banner Pontiac-Buick, Opel, Inc., 120 N.J. Super. 572, 295 A.2d 385 (1972) interpreted this provision as coextensive with the 7th Amendment to the United States Constitution as written in 1776. Thus, the right to trial by jury is extended only to issues triable at law as they existed at that time.

The court in Banner, supra, indicated that the New Jersey Consumer Fraud Act provides for the seeking of injunctive relief, revocation of licenses, and orders restoring to any person money or property wrongfully acquired in violation of the act. The remedies of injunction, restitution and appointment of a receiver were stated to be all clearly equitable in nature and consequently no constitutional right to a jury trial was found by the court to exist, citing United States v. Louisiana, 339 U.S. 699 (1950). Even if financial restitution is a part of the equitable relief available no right to jury trial exists. NLRB v. Jones and Laughlin, 301 U.S.1 (1937).

In addition the court went on to find that no right at common law existed at the time of adoption of the United States Constitution for jury trial in this type of case:

> The matter before the court is an action completely unknown to the common law. It arises out of a statute evidencing the Legislature's recognition of the complexities of commercial bargaining in contemporary society and the need for the protection of the consumer.
>
> Defendants are not entitled to a jury trial. (295 A.2d at 390.)

Kugler v. Market Development Corp., 124 N.J. Super. 314, 306 A.2d 489 (1973), a case on the same issue, where only an injunction was sought, reached the same result.

There are additional guarantees to a jury trial found elsewhere in the United States Constitution. Article 3, section 2 provides that the trial of all crimes, except in cases of impeachment, shall be by jury, and the 6th Amendment to the Constitution provides that in all criminal prosecutions the accused shall enjoy the right to a speedy trial by an impartial jury. The due process clause of the 14th Amendment imposes upon the states the requirement of the above provisions that jury trials be available to criminal defendants.[26] At least one case brought under a statute which provided sanctions against false advertising has resolved this issue in favor of the statute's constitutional regularity.

California

People v. Witzerman, 29 Cal. App. 3d 169 105 Cal. Rptr. 284 (1972), involved an action by the Attorney General against a cattle care operation under statutes providing for civil sanctions against false advertising and advertising and injunctive relief against violations of corporate securities law.

The cattle care operation was in operation until July 26, 1966 when a temporary restraining order was obtained against it pursuant to the filing of this lawsuit. The lawsuit proceeded to trial and an injunction was demanded. Assuming for the sake of argument that the penalties were legal rather than equitable, the court found the basis for the civil penalties to be the same as for the injunction. The misconduct alleged as a basis for each sanction was identical, and therefore trial of the two issues could not be severed even if the civil sanctions were "legal."

The statute imposing the civil penalties also presented possible criminal sanctions which were not sought in this action. The court reasoned that the civil penalties did not convert this into a criminal action as follows:

> It is true that a civil penalty is identical in its purpose and monetary effect to a fine. Both are punitive exactions by the government from a person for misconduct imposed to deter such misconduct in the future. But a fine ordinarily carries with it a criminal stigma and much more frequently than not is an alternative punishment to involuntary confinement of the person of the defendant. In other words, in the usual criminal proceeding a defendant faces the peril of the loss of his liberty as well as that of his property . . . . In short, the punitive nature of a civil penalty does not make an action to obtain it completely criminal in nature . . . . This being so, the right to a trial by jury "in all criminal prosecutions" guaranteed by the Sixth Amendment to the United States Constitution does not apply in this case . . . . (105 Cal. Rptr. at 289.)

Freedom of Speech: 1st Amendment

The 1st Amendment to the Constitution of the United States contains a prohibition against laws which would abridge the freedom of speech. Many states provide for similar protection in the bills of rights in their respective constitutions, and the 14th Amendment due process clause makes this guarantee a fundamental right applicable to the states. This area of constitutional protection is perhaps the most sensitive of all since the viability of our democratic institutions depends directly on the free flow of ideas.

The business community relies heavily on the use of the printed and spoken word to publicize its products. The line between creative advertising and misleading advertising is often a delicate one. The enactment of unfair and deceptive trade practices acts has required Attorneys General's offices to evaluate such commercial exercise of speech and demarcate the line. Because some practices which were previously "good business" have now become unlawful, a number of challenges have been brought on the basis that such acts are unconstitutional infringements on freedom of speech. The simple response to such challenges is that the United States Supreme Court has held that the constitutional protection afforded by free speech does not apply to commercial advertising.[22] One federal district court has recently held that a free speech challenge by a corporate plaintiff would not be entertained favorably because a corporation was not a "person" within the meaning of the privileges and immunities clause of the 14th Amendment and was thus unable to assert alleged violations of rights to freedom of speech.[28]

An excellent discussion of the clarity of the rule and the ambiguity of the reasoning behind it is found in the following Wisconsin Federal District Court decision.

Wisconsin

Holiday Magic, Inc. v. Warren, 357 F.Supp. 20 (E.D.Wis. 1973), involved a challenge to an order and regulation of the Department of Agriculture which made chain distributor schemes unfair trade practices on the grounds that such a regulation was an infringement on free speech. The regulation prohibited "promotion" of chain distributorship schemes, and the plaintiffs argued it was invalid unless imminent lawless behavior of a serious nature was likely to ensue from such promotion.

Although the district court found that the regulation in question was not overly broad and did not affect any areas of free speech, thereby violating the First Amendment, the court of appeals vacated this conclusion. In Holiday Magic, Inc. v. Warren, 497 F.2d 687 (7th Cir. 1974), the appellate court said that the district court should not have reached this conclusion, but should have merely determined whether this and other constitutional claims were substantial enough to warrant the convening of a three-judge court.

H.M. Distributors of Milwaukee, Inc. v. Department of Agriculture, 55 Wis. 2d 261, 198 N.W.2d 598 (1972), was a suit for declaratory judgment challenging a series of Department of Agriculture rules making chain distributorships unfair trade practices. One of the arguments raised against the rules was a free speech challenge. The court stated:

> Nor can the proposition that a con man has a constitutional right to defraud the public so long as he reveals the details of his scheme to the victim be based on the claim that the First Amendment right of freedom of speech is invaded by regulating or prohibiting unfair trade practices . . . . Speaking is involved, but the right to prohibit as an unfair trade practice the chain distributorship scheme derives from what is being peddled and how it is being peddled. (198 N.W.2d at 605.)

The case cited Banzhaf v. Federal Communications Commission, 405 F.2d 1082 (D.C. Cir. 1968), cert. denied, 396 U.S. 842 (1969), for the proposition that the inapplicability of the 1st Amendment extends to the promotion of products.

The Wisconsin Department of Agriculture's regulations prohibiting chain distributorship schemes were again challenged on free speech grounds in State v. Lambert, 68 Wis.2d 523, 229 N.W.2d 622 (1975). The defendant had been found guilty of intentionally participating in a chain distribution scheme, in violation of state administrative code regulation Ag. 122.03. He challenged his criminal conviction on several grounds, among them that the prohibition against chain distributor schemes infringes on protected areas of free speech and is therefore unconstitutional by reason of the First Amendment.

The court rejected Lambert's argument, citing in its decision H.M. Distributors of Milwaukee, Inc. v. Department of Agriculture, 55 Wis.2d 261, 198 N.W.2d 598 (1972). In H.M. Distributors the court noted that:

> ... the United States Supreme Court had held that the constitutional protection afforded free speech does not apply to commercial advertising, and we find entirely and obviously correct the federal appeals court holding that the nonapplicability extends to the promoting of products. (55 Wis.2d at 272-73.)

This absolute holding that the First Amendment does not protect commercial speech has been subsequently modified, but the court also noted the decision Pittsburgh Press Co. v. Pittsburgh Commission on Human Relations, 413 U.S. 376 (1973). That case stated that the fact some commercial speech is entitled to First Amendment protection does not protect speech "when the commercial activity is itself illegal and the restriction on advertising is incidental to a valid limitation on economic activity." (413 U.S. at 389.) Thus, the rule in question is not unconstitutional by reason of the First Amendment, for "speech used to promote a criminal scheme is not entitled to First Amendment protection." (229 N.W.2d at 627.)

New Jersey

Kugler v. Market Development Corp., 124 N.J. Super. 314, 306 A.2d 489 (1973), supported its finding of no infringement of free speech by declaring

a vacation-contest mail solicitation scheme unlawful under the Consumer Fraud Act and with citations to cases relying on Valentine v. Chrestensen, 316 U.S. 52 (1942), without further discussion.

This is an area where the nature of the interest sought to be protected by the 1st Amendment guarantees varies greatly from those interests traditionally protected by that amendment. Normally, the scheme's basic purpose is patently commercial, and the court need merely be introduced to Valentine and its progeny to defeat the 1st Amendment-based challenges in this area.

Federal Preemption Problems

In those areas where the federal government and the states each have valid interests in legislating, and the authority to do so, each may act. The question faced is whether the federal government intended to fully occupy the field so as to preempt the states legislating in that area.[29] This is an issue which has been often raised in constitutional challenges to unfair and deceptive trade practices acts since both the federal government and the states have attempted to protect the public interest. Inevitably, the courts, recognizing the benefits of concurrent state-federal action in this field, have found no federal intention to preempt the field of unfair or deceptive trade practices legislation.

Missouri

State ex. inf. Danforth v. Reader's Digest, 527 S.W.2d 355 (Mo. 1975). The Attorney General's complaint charged that Reader's Digest "Sweepstakes" was a lottery. The trial court sustained the defendant's motion to dismiss the complaint. It ruled that the U. S. Postal Service's determination that the sweepstake materials could be mailed because they did not violate federal lottery laws, preempted any state action. The Supreme Court of Missouri overruled the trial court by stating that the issuance of a "certificate of mailability" did not immunize a magazine publisher from a state's action to enforce its own lottery laws. It also stated that the enactment of federal lottery laws did not evidence an intent and purpose to preempt lottery laws.

Wisconsin

Ritholz v. Ammon, 240 Wis. 578, 4 N.W.2d 173 (1942) was an early decision concerning an optical store which lured potential purchasers of glasses into the Wisconsin store with fraudulent misrepresentations as to price of the glasses. The court was required to consider whether the Federal Trade Commission Act has preempted the regulation of unfair or deceptive methods of competition in business practices in interstate commerce.

The court avoided decision of the preemption question by concluding that the business operation was substantially local and intrastate in character, involving interstate activities only incidentally. The court found no intention in the FTC Act to exclude state control over the unfair practices of a concern which was essentially local in nature.

State v. Texaco, 14 Wis. 2d 625, 111 N.W.2d 918 (1961), involved an action by the state to enjoin a gasoline wholesaler from violating administrative regulations relating to unfair competition and advertising in gasoline.

In a concurring opinion, Justice Fairchild addressed Texaco's argument that a complaint had been issued by the FTC and was pending at the time this action was commenced, so that state authority to enforce its laws in the same area was precluded. The justice stated that the acts complained of in the FTC proceeding might have been, but weren't necessarily, the same ones before the Supreme Court. He concluded:

> It does not seem to me that congressional provisions for administrative determination of the occurrence of a violation of law nor the actual commencement of a quasi-judicial proceeding to make such determination necessarily excludes state enforcement of the state law governing the same conduct, if the state and federal laws are not in conflict.
>
> . . . It seems to me that the federal trade commission proceeding has the character of a quasi-judicial proceeding for enforcement of the federal act and that if the Wisconsin regulation is sufficiently consistent with the federal act so that the Wisconsin regulation is not suspended, the institution of the federal trade commission proceeding does not prevent enforcement of the state regulation. (111 N.W.2d at 924.)

Holiday Magic, Inc. v. Warren, 357 F.Supp 20 (E.D. Wis. 1973), involved a challenge to an administrative rule on a number of constitutional grounds, including the alleged federal preemption of the field by virtue of an FTC suit against Holiday Magic. The court responded:

> In passing the Federal Trade Commission Act, Congress certainly did not intend to bar states from stopping unfair business practices which might injure their own citizens. Indeed the Act which authorized the Federal Trade Commission to proceed against unfair practices committed in interstate commerce impliedly encouraged states to develop their own laws. (357 F.Supp. at 28.)

The court noted further that Holiday Magic had agreed that the FTC and the states had coordinate authority in the "field" of unfair business practices. The court reasoned that once this concession is made, the existence of an action at one level has no bearing on, and is not a basis for enjoining, an action on another level.

The district court decision was vacated on appeal in Holiday Magic, Inc. v. Warren, 497 F.2d 687 (7th Cir. 1974). The issue of preemption will be considered along with the plaintiff's other constitutional claims by a three-judge district court.

Washington

State v. Sterling Theaters, Co., 64 Wash. 2d 761, 394 P.2d 226 (1964), involved a state action seeking an injunction against certain local monopolizing activites of a motion picture theater chain under the Consumer Protection Act. The issue of preemption of the field by virtue of the Sherman and Federal Trade Commisson Acts was raised successfully by the defendants at the trial court level.

The Supreme Court of Washington found no expression in either federal act which would indicate an intention to preempt state action in the field. The court outlined the factors considered as follows:

> Uniformity of regulation was expressly foregone when antitrust enforcement was permitted by not only the United States Attorney General and the Federal Trade Commission, but also by the private litigants. The nearly identical wording of the Consumer Protection Act and Sections 1 and 2 of the Sherman Act indicates that the motive or goal of federal and state regulation is the same, and leads to the conclusion that state enforcement, far from frustrating or interferring with federal purpose or national policy will actually further it. (394 P.2d at 228.)

State v. Reader's Digest Assn., 81 Wash. 2d 259, 501 P.2d 290 (1972), involved the mailing of sweepstakes announcements and magazine sales solicitations to Washington residents. An argument was put forward by Reader's Digest Association that federal statutory authority over lotteries by mail preempted the regulation of such lotteries by the states. The court responded that:

> While it is true that a state is without power to regulate the mail, it is not powerless to prevent respondent from using unfair trade practices within its borders . . . . The state cannot enjoin the mails, but it can enjoin respondent from conducting the Sweepstakes within its borders, subjecting respondent to the penalties of the Consumer Protection Act for refusal to comply. (501 P.2d at 303.)

The courts, then, have come to recognize that in the area of regulating unfair and deceptive trade practices the states and the federal government each have a role and no preemption is intended. See Holiday Magic, supra, and Sterling Theaters, supra. When faced with language which may evidence an intent to preempt, the court will tend to distinguish the facts of the case before it, finding local incidents which avoid the necessity of reaching the preemption question as in Ritholz, supra, and Reader's Digest, supra. The exercise of concurrent jurisdiction is a particularly important factor here as the control of economic crime requires concerted efforts on all levels of government. The courts are aware of this, and consequently a preemption argument will be strictly scrutinized.

Commerce Clause

The regulation of foreign and interstate commerce is exclusively within the power of the Congress[30] and exercisable only by that body where the subject of regulation is national in character and requires uniformity of regulation. However, the states have a concurrent power to meet local problems in fields where national uniformity is not essential so long as the action taken by the state serves local ends and does not discriminate against interstate commerce.

Congressional regulation of a business or activity does not negate state regulation of the same business or activity if there is no inconsistency between the two legislative acts being enforced. If there is only

partial regulation by Congress then the state may also regulate, as the power of Congress to distribute such regulatory authority over commerce is plenary. Thus, where an act of Congress merely purports to establish minimum standards, the state may impose stricter standards on different criteria.[31] There have been challenges to the unfair and deceptive trade practices acts of the states on this ground in Washington, Wisconsin, New Jersey, and Massachusetts.

Washington

State v. Sterling Theaters Co., 64 Wash. 2d 761, 394 P.2d 266 (1964), involved a challenge to an Attorney General's injunction against certain monopolistic activities of a motion picture chain obtained on the ground that it was a burden on interstate commerce. The court saw no intent in the Sherman Act to preempt the field of antitrust and consequently analyzed the attempt at state regulation in light of the balancing test irrespective of a federal statute.

The incidental effect that state regulation of local activities might have on interstate commerce was seen as constitutionally valid.

> The exhibition of motion pictures is a prime example of an industry which has a primarily local impact, regardless of the interstate activities of film distributors in making the films available . . . . The existence of the predominantly local interest dispels the contentions of the respondents that the federal interest in antitrust enforcement should be considered so dominant as to render concurrent state jurisdiction an impermissible interference.

Wisconsin

Ritholz v. Ammon, 240 Wis. 578, 4 N.W.2d 173 (1942), involved a commerce clause challenge to the State Department of Agriculture's seeking an injunction against certain deceptive trade practices of an optical service company.

The company contended it operated solely in interstate commerce and thus was subject to regulation only by the federal government. The court analyzed the nature of the plaintiff's business as involving (1) furnishing prescriptions when necessary; (2) preparation of lenses to fit the prescription of plaintiff's doctor or those brought in by the patient; (3) furnishing and fitting of a frame for the lenses. Although the prescribing doctor may not have been located in Wisconsin, the lenses were fitted in Wisconsin. Therefore, the court found the local activities involved to be more than mere incidents to transactions in interstate commerce. The court stated:

> While under the cover of exercising its police power Wisconsin cannot undertake what amounts to regulation of interstate commerce, police regulations reasonable in themselves, and addressed to local activities and bearing a genuine relation of the welfare of people of this state, are not invalid by reason of the fact that they incidentally effect interstate commerce. (4 N.W.2d at 177.)

The court went on to state that the Federal Fair Trade Act was not intended to exclude state control over the unfair trade practices of a concern that is essentially local in its operation merely because some of its transactions considered separately constituted interstate commerce.

The Wisconsin Department of Agriculture's regulations which prohibit chain distributorships were challenged as unconstitutionally burdening interstate commerce in Holiday Magic, Inc. v. Warren, 357 F.Supp. 20 (E.D. Wis. 1973), vacated, 497 F.2d 687 (7th Cir. 1974).

The district court noted first that the regulation did not discriminate against interstate commerce because it prohibited all chain distributorship schemes, whether intrastate or interstate in nature. The court also noted that the state's interest in protecting its citizens against fraud or other unlawful business practices was great enough to warrant upholding the regulation even if there were considerable impact on interstate commerce. In the last analysis, however, the district court found the regulation did not burden interstate commerce and, in fact, had little impact at all.

Pennsylvania

Aldens, Inc. v. Israel Packel, Attorney General, 524 F.2d 38 (3rd Cir. 1975). This case involved, among other issues, a challenge to the constitutionality of applying Pennsylvania's Goods and Services Installment Sales Act in Pennsylvania on the grounds that the corporation involved had insufficient contacts with that state to satisfy the Due Process Clause of the U. S. Constitution.

Aldens claimed that the exclusively interstate aspect of its credit transactions precluded any state regulation of those transactions. The court, however, focusing on the balance between local and national interests, found that Congress has not adopted a national scheme requiring uniform state interest rates even though it has acted comprehensively in the field of retail installment credit in the Federal Truth in Lending Act. Sepcific exemption for differing interest rates is found in Truth in Lending which indicates no uniform national rule is necessary. The court found no discrimination against interstate sellers in the statutory interest scheme which allowed a single maximum interest charge to all persons dealing with Pennsylvania residents. Finally, the court found sufficient local impact in the increased interest Pennsylvania residents would have to pay to outweigh the slight inconvenience to interstate commerce created by application of Pennsylvania usury limits to Alden's credit transactions.

The Attorney General's counterclaim for injunctive relief under the Act was dismissed without prejudice to his right to seek such relief in a state court.

Wisconsin

Aldens, Inc. v. Warren, et al., No. 72-C-405 (USDC-W.D. Wis., March 16, 1976). Similar decisions were derived in this case from almost identical facts as found in Aldens, Inc. v. Israel Packel, Attorney General.

Self-Incrimination: 5th Amendment

Most unfair trade or deceptive trade practices acts have provisions which allow for investigative demands or subpoena procedures. Responses to such investigative inquiries raise the issue of whether the 5th Amendment of the United States Constitution's guarantee against compulsory self-incrimination might be violated. The 5th Amendment provides in relevant part that "No person shall . . . be compelled in any criminal case to be a witness against himself . . . ." The courts have consistently held that this is a personal privilege which is not assertable by a corporation, (See United State v. Kordel, 397 U.S. 1 (1969), and cases cited therein.)

The only case arising under an unfair or deceptive trade practices act which has yet discussed this point is State ex rel. Sanborn v. Koscot Interplanetary, Inc., 212 Kan. 668, 512 P.2d 416 (1973). This was an action brought by a district attorney under the Kansas Buyer Protection Act to enjoin practices and seek restitution of moneys of Koscot Interplanetary and Glenn W. Turner indvidually. One of the challenges on appeal was that the Act was unconstitutional because § 50-604 required any person complained against to file a statement under oath as to all the facts (concerning the unlawful practice) which the Attorney General might deem necessary. This was alleged to violate the 5th Amendment guarantee against self-incrimination.

The court first noted that the Kansas Constitution's language concerning compelled self-incrimination was identical to the 5th Amendment. Then, an analysis of the proceeding and manner in which the disclosures were required indicated that the proceeding was inquisitorial in nature. Thus, it was a preliminary investigation to gather information. The court cited State ex rel. Londerholm v. American Oil, 202 Kan. 185, 446 P.2d 754 (1968), as support for the proposition that under such circumstances the corporation would have no right to prohibit disclosures by its employees.

Additionally, the court noted that the corporation was not a person within the meaning of the 5th Amendment and thus could not invoke its protection:

> Assuming arguendo that the proceedings are brought to impose criminal or penal sanctions and are of such a nature that the privilege may be claimed, Koscot and Midway as corporations hold no such privilege, and Glenn W. Turner at no time appeared or took part in the proceedings below. The sanction applied in any case where the constitutional privilege against self-incrimination has been violated is suppression of the compelled disclosure. Glenn W. Turner disclosed nothing. (512 P.2d at 424.)

A recent case also considered the effect of the availability of a plea of self-incrimination. The Supreme Court of California in People v. Superior Court of Los Angeles (Kaufman), 115 Cal. Rptr. 813, 525 P.2d 716 (1974) decided that if a defendant in a consumer protection action takes the Fifth Amendment at a deposition or in answering interrogatories, the trial court has jurisdiction and authority to fashion a protective order which compels the defendant to testify, but which give "use immunity to any testimony he gives at said deposition." Such an order prohibits the use of the testimony or its fruits against the defendant in any criminal proceeding

With such an order, the court can then require the defendant to testify, answer the interrogatories or be held in contempt. This decision was based upon the Code of Civil Procedure which allows protective orders to prevent parties or witnesses from "annoyance, embarrassment or oppression." The opinion stated that no specific legislative authorization for judicial grants of immunity is required.

This statute is similar to those of many states which have patterned their civil discovery procedure after the original federal rules of discovery. This protective order device is useful in overcoming the frequent spurious uses of the Fifth Amendment to cut off discovery by the state in civil consumer protection litigation.

The court also rejected the defendants' argument that their testimony cannot be compelled in this proceeding, even with a grant of immunity from subsequent criminal prosectuions, because the substantial penalty to which they are liable here is actually criminal in nature. Although the penalty has a deterrent purpose and is a "severe punitive exaction by the state," it is not to be deemed criminal in nature for such reasons, the court said. There is no stigma of criminal conviction involved here; no alternative punishment of imprisonment is provided. The penalty here and the process by which it is imposed were clearly intended by the legislature to be civil in nature.

Delegation Problems

An important feature of the American constitutional system is that governmental functions are divided among the three departments of government, the legislative, executive and judicial. Each branch possesses powers which are peculiar to it, and the principle of separation of powers operates to the effect that each branch generally exercises its power exclusively. This principle may be expressly stated, as in the constitutions of several states, or it may be created by implication, as in the federal Constitution. However created, its purpose is the maintenance of the constitutionally created governmental bodies as viable entities with none exercising powers greater or lesser than those granted it by the Constitution. A similar concept exists in the separation of powers between the states and the federal government which maintains the exercise of power where the respective constitutions of these levels of government place it.

Since the Constitution places the responsibility and authority for promulgating legislation in the legislative branch of government exclusively, any attempt at delegating such power to another body or authority would be unconstitutional. This is a limitation only on the exercise of "legislative" powers so that if an executive body is given the discretion to adopt rules and regulations under a law which is essentially complete and pursuant to adequate legislative standards, such a law would not be unconstitutional. Two types of delegation problems have been discussed in cases arising under unfair and deceptive trade practices acts. The first is an attempted delegation through state law of certain discretionary authority to state executive offices. The second is the attempted delegation of state legislative authority to Congress. Generally, state courts have held that the adoption by a state statute of prospective federal legislation or federal administrative rules constitutes an unconstitutional delegation of state legislative power.

One recent case discussed both types of delegation problems in one opinion. In the case, Department of Legal Affairs v. Lee Rogers, d/b/a American Holiday Association, 329 So.2d 257 (Fla. 1976), the Florida Supreme Court rejected a charge that the state's "little FTC Act" constituted an unlawful delegation of legislative authority. The court stated that "adequate standards have been announced in the act to guide the administrative agency in the exercise of the delegated powers consistent with constitutional dictates" and cited several Florida cases relating to such delegation authority.

The court noted that the legislature's intention to incorporate future decisions of the Federal Trade Commission and federal court decisions was also at issue. The statute held that "due consideration and great weight" should be given to these interpretations in construing the statute. The court said that, "to preserve the constitutional validity of the act, we would have to say that the legislative enactment intended only decisions made prior to its enactment."

Wisconsin

State ex rel. Attorney General, 264 N.W. 633 (Wis. 1936), involved a challenge to the constitutionality of Chapter 110. Statutes 1935 (Wisconsin Recovery Act) as being an impermissible attempt at delegation of legislative powers to the Governor and administrative agencies. The law empowered the Governor and state agencies to "investigate, ascertain, declare and prescribe reasonable codes or standards of fair competition and trade practices for various trades and industries."[32] The court noted that the existence of emergency conditions might easily expand the areas in which state police powers may be properly exercised, but such conditions in no way affect the authority of the legislature to delegate its legislative powers.

The court cited the then recent decision of A.L.A. Schecter Poultry Corp. v. United States, 295 U.S. 495 (1935), which struck down the National Industrial Recovery Act because Congress had attempted to delegate the authority to make codes for the government of trades without specifying any specific standards to the executive. The Wisconsin court reasoned that the "FTC has not been delegated the power to make law but only the authority to enforce it." (264 N.W. at 638.) The court found, however, that the Wisconsin statute set sufficient standards for exercise of the powers delegated and upheld its constitutionality.

The second, slightly different, issue mentioned above is whether the state legislature has delegated its legislative power to Congress or some other federal administrative body. Most state unfair or deceptive trade practices acts have language similar to that of the Uniform Deceptive Trade Practices Act, Section 3, which indicates that the interpretations of the Federal Trade Commission and federal courts concerning the nature of unfair or deceptive trade practices under 15 U.S.C. 45(a)(1) shall be given great weight and due consideration when construction of the state statute occurs. This language raises the delegation issue.

The one case discussing the issue arose under a Washington statute which read, in part:

> The purpose of this act is to complement the body of federal law governing restraints of trade, unfair competition and unfair, deceptive and fraudulent acts or practices .... It is the intent of the legislature that, in construing this act, the courts be guided by the interpretation given by the federal courts to the various federal statutes dealing with the same or similar matters .... (RCW 19.86.920.)

The case, State v. Reader's Digest Association, Inc., 81 Wash.2d 259, 501 P.2d 290 (1972), involved in part a claim by Reader's Digest that only those federal precedents in existence at the time of enactment of RCW 19.86.920 should be considered as precedent since, "the adoption of future federal rules, regulations or statutes would be an unconstitutional delegation of legislative power." (501 P.2d at 301.)

The court readily distinguished this principle on the basis that state courts under the statute were only to be guided by federal precedent, there being no adoption of future federal precedents. Since there is no binding precedent on the state courts, there has occurred no unconstitutional delegation of authority, and all relevant federal precedent including that arising after enactment of RCW 19.86.920 might properly be considered.

Delegation arguments, while very popular in the early 1930's, have not met with judicial favor recently. The proliferation of rulemaking authority in federal and state administrative agencies is evidence of the extremely difficult task which faces legislative bodies in drafting legislation to meet often very complicated social ills. The difficulty of defining "unfair trade practices" with any specificity has been noted earlier, and in this regard the legislature has, with the enactment of broad guidelines, turned the definitional task over to executive agencies and the courts. A meaningful solution requires the delegation of certain rulemaking authority to the courts and enforcement officers. It is very likely such delegation would meet constitutional standards.

Here, the court found an expressed legislative purpose of ceasing unfair trade practices and methods of competition.

> We should be obliged either to assume that the Legislature did not consider the decision in the Schecter case or that it proceeded in willful disregard of it ... We shall make no such assumption, but on the contrary assume that the Legislature intended in light of these decisions to lay down a definite standard .... We find that the standard laid down is embodied in these words - 'unfair methods of competition in business and unfair trade practices in business are hereby prohibited.' (264 N.W. at 637.)

Thus, the Governor had authority by code only to proscribe certain unfair practices rather than the unrestricted legislative power to determine what constituted fair methods of competition, which was condemned in Schecter. This power was seen as sufficiently definite and restricted so as to not constitute a general delegation of the legislature's authority to legislate to the exeuctive.

A second challenge on the same basis was made to that portion of section 110.02 which provided that the chapter would cease on July 25, 1937 unless before that the Governor determined the emergency declared to exist in the Act to have ended, in which case all codes would be sooner terminated. The court stated that the determination of emergency conditions having ended before July 25, 1937 was a finding of fact which power could clearly be given to the executive by the legislature.[33] Finally, the authority in the Governor to revoke a code which he has been constitutionally empowered to promulgate was not seen as constitutionally prohibited.

Ritholz v. Ammon, 240 Wis. 578, 4 N.W.2d 173 (1972), in construing 100.20(1) Wis. Stats. (which set out unfair trade practices as prohibited) against a challenge that it constituted an unlawful delegation of legislative power, merely cited State ex rel. Attorney General, supra, as deciding the statute's constitutionality.

Wisconsin

In State v. Lambert, 68 Wis.2d 523, 229 N.W.2d 622 (1975), the defendant was found guilty of intentionally participating in a chain distribution scheme, in violation of state administrative code regulation Ag. 122.03. That regulation was promulgated pursuant to the state unfair trade law, which delegated to the Department of Agriculture the authority to "issue general orders forbidding methods of competition in business or trade practices in businesses which are determined by the department to be unfair." (§ 100.20, Stats.) Lambert argued that since the administrative code, rather than the statute, set the standards for conviction, an unconstitutional delegation of legislative power to an administrative agency was involved.

The court found the argument to be without merit: "The issue is not whether legislative power may be delegated, but whether the legislature has sufficiently limited and defined its delegation of power to an administrative agency, so that it is the will of the legislature that is being carried out and not that of the agency." The court cited its decision in Petition of State ex rel. Attorney General, 220 Wis. 25, 264 N.W. 633 (1936), that the statutory language here sets sufficient standards for the exercise of the power delegated.

It was also noted by the court that the Wisconsin legislature had itself assigned criminal sanctions for the violation; therefore, the agency was carrying out the legislative intent rather than making its own determination that violations of agency rules should be punished as crimes. United States v. Grimaud, 220 U.S. 506 (1960) was relied upon for the proposition that criminal sanctions can be constitutionally imposed for violation of a properly enacted administrative regulation. The court held there that Congress could confer limited powers to an administrative agency to "fill up the details" necessary to enforce statutory guidelines by promulgating rules whose violation would be punishable by congressionally fixed penalties.

Colorado

People ex rel. Dunbar v. Gym of America, Inc., 177 Colo. 97, 493 P.2d

General might choose between various enforcement remedies, reached this issue:

> It is the general rule of law that while a legislative body may not delegate the power to make or define a law, it may delegate the power, authority, and discretion as to the execution and enforcement of the law. Because the power to make law necessarily involves a discretion as to what the law shall be, this authority may not be delegated from the legislature. Once the law has been made, however, the conferring authority as to how it shall be executed is a proper function of the legislative function. Colorado Anti-Discrimination Commission v. Case, 151 Colo. 235, 380 P.2d 34 (1962).
>
> This important principle of law has been recognized by the federal courts, especially with regard to the Federal Trade Commission. Joseph A. Kaplan & Sons, Inc., v. FTC, 347 F.2d 785 (D.C. Cir. 1965).

Florida

Department of Legal Affairs v. Lee Rogers d/b/a American Holiday Association, 329 So.2d 257 (Fla. 1976). The Florida Department of Legal Affairs and the Florida Cabinet have the statutory authority to adopt rules which define unfair and deceptive trade practices in that state. A state circuit court had found this authority to constitute an unlawful delegation of legislative authority, and the state appealed. On appeal, the Florida Supreme Court reversed.

The Attorney General's office had initiated an administrative cease and desist action against American Holiday Association on the grounds that the company was soliciting Florida consumers to engage in an unlawful gambling puzzle game in violation of the general prohibitory language of Section 501.204, Florida Statutes, and Rule 2-9.07, Florida Administrative Code. The administrative proceeding had been removed to the circuit court, and determined that the statutes and rules defining unfair or deceptive trade practices were constitutionally deficient. The supreme court disagreed, however, stating that "adequate standards have been announced in the [little FTC] act to guide the administrative agency in the exercise of the delegated powers consistent with constitutional dictates."

Penumbral Rights

The ingenuity of persons charged with unfair or deceptive trade practices is only matched by that of their attorneys in arguing their client's legal positions. Two cases involving constitutional challenges have raised particularly innovative arguments which were dealt with in equally interesting manners by the courts. Neither argument prevailed.

The first was raised in H. M. Distributors of Milwaukee, Inc. v. Dept. of Agriculture, 55 Wis. 2d 261, 198 N.W.2d 598 (1972), a challenge to Wisconsin Department of Agriculture codes which prohibited chain distributorship schemes. The attorney argued that "upon proper disclosure of information a person has the right to make the economic investment he chooses."

As support for his position he cited Griswold v. Connecticut, 381 U.S. 479 (1965), which found a constitutionally-protectable right of "privacy and repose" in the penumbra of those rights specifically protected by the first eight amendments to the federal Constitution. The court could not find the asserted right anywere:

> The proverb stated that 'a fool and his money are soon parted,' but we did not suspect the accelerating the parting enjoined constitutional protection. The plaintiff-appellant does concede the government the right to 'protect the public from fraud' but contends 'it cannot prevent a citizen from knowledgeably investing in a project he may be aware is speculative': because, as the brief puts it, 'clearly, freedom includes the notion of making one's own economic decisions ....'
>
> ... The right of the sheep to be sheared at a roulette wheel or in a chain distributorship scheme is not constitutionally placed beyond the reach of legislative action and administrative regulations based thereon. (198 N.W. 2d at 604-05.)

Whatever the arguments prompted in literary allusions, the courts made short work of the constitutional bases alleged.

The second case, Holiday Magic, Inc. v. Warren, 357 F.Supp. 20 (E.D. Wis. 1973), vacated, 497 F.2d 687 (7th Cir. 1974), involved the same administrative codes and a contention by the individual plaintiff that the prohibition of chain distributorships schemes denied him his constitutional right to work in his chosen profession. He cited cases holding that a person could not be denied the opportunity to work in a lawful profession because of his beliefs or exercise of his First Amendment rights.

The district court dispensed with the argument by noting that the state could make unlawful a vocation deemed inimical to the public interest.

> Plaintiff may respond with Falstaff who met the charge of 'purse-taking' with the answer, 'But 'tis my vocation, Hal, 'tis no sin for a man to labor at his vocation.' ... But sin or not, nothing in the Constitution prevents a state from outlawing activities because others have profited from them in the past. (347 F.Supp. at 29.)

This aspect of the case, along with the other issues raised in Holiday Magic will be reconsidered on remand.

Mobile Home Parks:
Florida Legislation-Constitutionality

States have frequently passed legislation which protects against specific types of abuses in the commercial market place. An example of such legislation is the mobile home park legislation originally passed by the Florida legislature in 1972 and amended in 1973.[34] The legislation was drawn with the economic facts of mobile home ownership in Florida in mind. The sales of mobile homes are increasing as the cost of conventional housing soars. The locations available for placement of the units are limited,

and owners of such facilities can exert substantial pressure on their tenants on the threat of eviction. These are problems which are likely to face other states if they are not presently being felt.

The Florida Legislature's response was to enact legislation limiting the available grounds for eviction from a mobile home park by the park owners. Section 83.271 (subsequently renumbered 83.69, Florida Statutes, 1973) allowed eviction only for nonpayment of rent, a violation of federal, state or local ordinance which created a safety hazard to other park dwellers, or violation of a rule or regulation of general applicability established by the park owner.[35] The 1973 legislation added as an additional ground the change of use of the land on which a mobile home to be evicted is located.[36]

Two actions were brought before the Supreme Court of Florida to determine the effect of this legislation in circumstances when a lease expired and the tenant offered the rental due for a subsequent term, Palm Beach Mobile Homes, Inc. v. Strong, 300 So.2d 881 (Fla. 1974); and in another instance where eviction was threatened on grounds other than those specified in Section 83.271, Stewart v. Green, 300 So.2d 889 (Fla. 1974). The challenges to the statute were that it unconstitutionally impinged on the right of contract, that it was an excessive use of the state's police power in violation of the due process clause, and that it denied equal protection since mobile home park owners and operators were singled out from other landlords by the legislation. The court found each of the arguments to be unpersuasive and upheld the statutes constitutionality in the companion decisions.

The court in Stewart v. Green, supra, addressed the due process and equal protection arguments. The court first analyzed the unique relationship between mobile home purchasers and dealers which, because of space shortage, often results in the dealer or his associate becoming the "landlord" of the purchaser. Under prior law the "tenant" was subject to eviction on fifteen days notice and often had no alternative location to move to again because of space shortage. The societal danger sought to be ameliorated was seen as:

> If mobile home park owners are allowed unregulated and uncontrolled power to evict mobile home tenants, a form of economic servitude ensues, rendering tenants subject to oppressive treatment in their relations with park owners and the latter's overriding economic advantage over tenants.

The equal protection argument that a legislative classification of mobile home park owners apart from apartment landlords was unreasonable was next decided. The classfication was seen as rational and nondiscriminatory. Citing Adams v. Sutton, 212 So.2d (Fla. 1968), reh. denied, 393 U.S. 1124 (1969), and Daniels v. O'Connor, 243 So.2d 144 (Fla. 1971), appeal dismissed, 406 U.S. 902 (1972), the court stated that unlike the apartment dweller who merely had to move personal effects upon eviction, the mobile home owner would be faced with moving an entire home at great expense. Furthermore, if space were short a mobile home dealer might resort to eviction of present tenants in order to make space available for new purchasers unless the law's protection was afforded to mobile home park dwellers. These distinctions supported the law's classification, and the legislation bore a reasonable and just relation to the public purposes intended.

The court next analyzed the question presented as to whether the state had exceeded its police powers in violation of due process. The property rights of the mobile home park owners were seen as necessarily limited in the interest of public welfare. The court found, "Reasonable restriction on the use of one's property to promote the public welfare is an accepted principle of law," and cited City of Miami Beach v. Ocean and Inland Co., 3 So.2d 364 (Fla. 1941); Hav-A-Tampa Cigar Co. v. Johnson, 149 Fla. 148, 5 So.2d 433 (1941); and Euclid v. Ambler Realty Co., 272 U.S. 365 (1926). In addition the court accepted the general rules of statutory construction and presumptions of constitutional regularity in its review of this constitutional challenge to the legislature's enactment.

In addition to the due process right of property argument addressed previously in Stewart v. Green, supra, the Court answered the contract clause argument in Palm Beach Mobile Homes, Inc. v. Strong, supra.

> This legislation was enacted to provide mobile home owners with security in dealing with mobile home park owners and at the same time impose the least restrictions on the landlord. By enactment of Section 83.271, Florida Statutes, no impairment of contract rights has occurred since the contract clause must be construed in harmony with the reserved power to safeguard the vital interest of the people. [Citing Mahood v. Bessemer Prop., Inc., 18 So.2d 775 (Fla. 1944)].

The court went on to note that the 1972 legislation might be subject to serious challenge because it would have the effect of permanently depriving the owner of the land upon which a mobile home park is located, of the use of his land for other purposes than as a mobile home park. However, the 1973 amendment noted above cured this potential defect in the court's view.

The finding of constitutionality of this legislation emphasizes the willingness of the courts to bow to the legislature's judgment as to how social evils found in the marketplace may best be cured. The Constitution is a flexible instrument, and legislative responses to control unfair or deceptive trade practices will almost always meet constitutional challenges successfully.

3. STATUTORY APPLICATIONS

The first portion of this study discussed in detail the constitutional challenges to state consumer protection legislation. The remainder will be devoted to a categorization of cases arising under unfair or deceptive trade practices acts or similar consumer protection statutes. Statutory applications of particular enactments will involve interpretations of specific statutory language and so are directly applicable only in those states with substantially similar language. Additionally, the general law principles and their interpretation may vary from state to state. However, the policy reasons behind many of the decisions in other jurisdictions support a similar result in many instances of economic crime, even where specific language may differ. This section will be divided roughly along substantive versus procedural question lines.

A. Substantive Questions

Pyramid Sales/Chain Distributorships

There are three predominant manners in which states have attempted to prohibit the use of pyramid sales schemes: (1) declaring them to be a violation of the deceptive trade practices act; (2) declaring them to be lotteries which are constitutionally or statutorily outlawed; or (3) declaring them to involve securities and consequently finding a violation of securities law. Some courts have combined two of these rationales in attempting to put these schemes out of business.

Florida

Florida Discount Centers, Inc. v. Antinori, 226 So.2d 693 (Fla. App. 1969), aff'd, 232 So.2d 17 (Fla. 1970), involved a challenge to a pyramid sales club by the Attorney General's office under a law prohibiting chain letters and pyramid clubs (F.S.A. § 849.091) and the state securities laws (F.S.A. § 517.01 et seq.).

The court of appeals decision held that a scheme under which purchasers of products might earn commissions for recruitment of other purchasers constituted a forbidden pyramid club. Under another scheme, purchasers of products might, at a point at which capital from sales to purchasers justified opening a store, earn commissions on stores' sales to third persons whose names would be supplied by the purchasers. The court held that the scheme involved interests in a profit-sharing agreement which fell within securities regulation requirements.[37] Contra, Koscot Interplanetary, Inc. v. King, 452 S.W.2d 531 (Tex. Civ. App. 1970).

Bond v. Koscot Interplanetary, Inc., 276 So.2d 198 (Fla. App. 1973), involved Glenn W. Turner's business operations in Florida in a private action for restitution of monies paid to purchase directorships. The Florida Supreme Court held that under F.S.A. 517.01, contracts providing that persons who paid sums to defendant would become distributors who had the right to receive bonuses for recruiting others were securities requiring registration. Also under F.S.A. 849.091, the contractual relations constituted an illegal lottery.

In the matter of Securities and Exchange Commission v. Koscot Interplanetary, Inc., 497 F.2d 473, (5th Cir. 1974), the S.E.C. brought an action against Glenn Turner and his corporation to bar marketing products through a pyramid sales scheme. The court of appeals held that the determination of whether an investment scheme constitutes an investment contract hinges on whether the efforts made by those other than investors are undeniably significant ones. Significant efforts are essential management efforts which affect the failure or success of the enterprise.

A pyramid sales scheme was seen by the court as constituting such an investment contract for purposes of the securities laws. Here the promoters retained immediate control over the essential managerial conduct of the enterprise, and the investors' realization of profits was inextricably tied to the success of the promotional scheme. That the defendants-promoters claimed profits derived solely from the efforts of individuals other than investors proved to no avail. This decision reversed a district court opinion reported at 365 F.Supp 588.

Hawaii

State v. Market Center, 52 Haw. 642, 485 P.2d 105 (1971), involved an action by the Attorney General to enjoin violations of the Uniform Securities Act, HRS § 485-1(12), by promotion and execution of "founder-member purchasing contract agreements."

The supreme court held that:

1. An investment contract is created whenever an offeree furnishes initial value to an offeror, a portion of this value is subjected to the risks of the enterprise, the furnishing of the value is induced by representations that benefit greater than the initial value will accrue to the offeree as a result of the operation of the enterprise and the offeree is not given the right to control the managerial decisions of the enterprise.

2. The purchasing contract agreement requiring a purchase of goods with a market value of $70, for $320, which makes the purchaser eligible to earn income through recruiting new purchasers and, after the enterprise becomes operational, through commission on sales to customers solicited by founder-member constituted an investment contract which falls within the Uniform Securities Act necessitating registration prior to distribution.

Iowa

State ex rel. Turner v. Koscot Interplanetary, Inc., 191 N.W.2d 624 (Iowa 1971), decided under § 713.24, Iowa Code 1966 and an amendment thereto, Iowa Code 1971, § 713.24(2)(b). An injunction was sought against Koscot Interplanetary and Glenn W. Turner under a statute making sales of merchandise with a rebate contingent upon the procurement of other customers unlawful unless the contingent rebate agreement was in writing. In 1971 an amendment made all such sales, regardless of disclosure, unlawful under the Iowa Consumer Fraud Act. The pyramid referral sales scheme of Glenn Turner's

operations, under which individuals considering cosmetic merchandising position purchases were induced to buy upon the assurance that once "bought in" they would have the right to bring or refer other prospective merchandise-position buyers to the company for a referral fee, falls within the ambit of the statute as written before and after amendment.

Kansas

State ex rel. Sanborn v. Koscot Interplanetary, Inc., 212 Kansas 668, 512 P.2d 416 (1973), was an action for violation of the Kansas Buyer Protection Act, K.S.A. 50-601 et seq. Two violations were alleged to exist: K.S.A. 50-602 prohibited false advertising in connection with the sale of merchandise; and K.S.A. 50-603 prohibited chain referral of pyramid sales' programs. The court found actual deception not to be required by the statute. The court found Turner's interrelated merchandising and recruitment program to have constituted violations.

Michigan

People ex rel. Kelley v. Koscot Interplanetary, Inc., 37 Mich. App. 447, 195 N.W.2d 43 (1972), involved a challenge to Koscot's marketing of distributorships scheme on the basis that it was in violation of the state's deceptive advertising statute (M.C.L.A. §§ 445.801, 445.803), the state's lottery statute (M.C.L.A. § 750.372), and the public policy of the state. The Attorney General sought an injunction against the scheme.

The court held:

1. The marketing plan violated the deceptive advertising statute where promises of success to be enjoyed were unrealistic, where prospects were told that the number of distributorships were limited but not that any designated geographical area was unlimited except by the overall state limit, and in that the available market was such as to insure only minimal profits in comparison with promised income.

2. A marketing plan where the main thrust of a plan (which cost to join) was an open-ended referral sales scheme rather than the sale of goods to ultimate consumers so that the success of participants involved earning commissions on those over whom he exercised no control, and so that at some time saturation of the market would occur, involved the elements of consideration and prize and consequently constituted a lottery.

3. The marketing plan whose main thrust was the sale of franchises through an open-ended referral sales scheme rather than the sale of the product to the ultimate consumer was in violation of public policy.

New Jersey

Kugler v. Koscot Interplanetary, Inc., 120 N.J. Super. 216, 293 A.2d 682 (1972), involved an action against Koscot and Glenn W. Turner for violations of the Consumer Fraud Act, the Antitrust Act, and the Corporation

Act. The court generally held that the manufacturer's multilevel distribution system, based on pyramid sales, violated the Consumer Fraud Act and the Antitrust Act, and that the defendants were subject to a fine for doing business in the state without so qualifying. Specifically, the court held:

1. Statements made to prospective purchasers, which are aimed to induce purchases by them, may not be characterized as mere puffery.

2. The Consumer Fraud Act may be violated even though one has not, in fact, been misled or deceived by an unlawful act or practice.

3. Manufacturers' referral or pyramid sales practices are prohibited by the Consumer Fraud Act.

4. The fact that the manufacturers' distribution system had a quota on the number of distributors in state did not save it from violation of the Consumer Fraud Act.

5. Federal decisions interpreting sections 1 and 2 of the Sherman Act provide the court with guidelines for interpreting similar sections of the state antitrust act.

6. Koscot's rules and regulations, insofar as they restrict or limit (a) the persons to whom and from whom distributors may purchase and sell Koscot products; (b) the manner and method by which they may sell or advertise their products; and (c) the right of distributors to associate and cooperate with other distributors constitute an unlawful restraint of trade and commerce in violation of the state antitrust act.

7. No certificate of authority for conducting business in the state was applied for or issued, so a civil penalty was assessed.

8. Turner's close affiliation and identification with Koscot allowed the corporate veil to be pierced and him to be held personally liable for the violations of these acts.

Texas

Wesware, Inc. v. State of Texas, 488 S.W.2d 844 (Tex. Civ. App. 1972), construing Article 5069-10.01 et seq., Vernon's Ann. Civ. St., the Texas Deceptive Trade Practices Act.

An action was brought to enjoin the defendant, an alleged operator of a pyramid selling scheme marketing stainless steel cookware. The injunctions were granted for violations of the Deceptive Trade Practices Act and the state lottery statute, the court holding:

1. There was evidence sufficient to find a per se violation of the Deceptive Trade Practices Act in the operation of a pyramid sales scheme notwithstanding the fact that the scheme was fully explained, that there was no deception as to its nature,

and that the only element of chance involved was that attendant to any business venture dependent upon sales of goods.

2. A lottery under Texas law has three elements: a prize, award of a prize by chance, and the payment by the participants of consideration for the privilege or right of participating.

3. The chain-referral or pyramid selling scheme under which the sponsoring participant gambled for recovery of his investment on the motivation, success and efforts of each of his recruits over whom he had no control, constituted a lottery.

4. FTC precedent was used as authority in determing the nature of pyramid selling as a deceptive trade practice.

Wisconsin

H.M. Distributors of Milwaukee, Inc. v. Dept. of Agriculture, 55 Wis. 2d 261, 198 N.W.2d 598 (1972), involves the applicability of an administrative rule declaring chain distributorships to be an unfair trade practice. No dispute was offered that this scheme, which allowed for a rebate of a fee to a "general distributor" who recruited a new general distributor, fit into the prohibited category of chain distributor scheme set out in Agriculture Code 122.03.

Advertising

California

In People v. Superior Court of Los Angeles County (Jayhill), 107 Cal. Rptr. 192, 507 P.2d 1400 (1973), the Attorney General brought suit against various door-to-door salesmen charging them with false and misleading advertising and unfair competition. The suit sought injunctive relief, civil penalties, exemplary damages, and restitution to all of those people defrauded. The trial court issued an injunction in futuro but struck all other relief sought, since at the time the complaint was filed California law provided that false or misleading advertising may be enjoined but said nothing about ordering restitution.

The California Supreme Court ruled that ordering restitution was permitted under the statute, which did not restrict a court's equity powers either explicitly or implicitly. In the absence of such a restriction a court of equity may exercise any or all of its inherent powers in order to accomplish complete justice between the parties. It concluded, however, that exemplary damages would not be permitted since the Attorney General sought them on behalf of the people of the state generally. In the absence of statutory direction, however, exemplary damages are allowed only to the immediate person injured.

Wisconsin

State v. Automatic Merchandisers of America, Inc., 64 Wis.2d 659, 221 N.W.2d 683 (1974). The issue in this case was whether a statute prohibiting

the making of misleading statements to the public in connection with the sale of a product applied to oral misrepresentations made privately to individuals. The deceptive statements which the state's complaint sought to have enjoined were made by defendant reading machine sellers to prospective purchasers who had responded to defendants' newspaper ads. The court held that these persons were members of the public "within the meaning of the statute since their only relationship with the defendants was through the newspaper ads. The opinion observed that "[t]he use of the term "the public" does not mean that the statements be made to a large audience .... The fact that the alleged untrue, deceptive or misleading representations were made individually to different members of the public is not controlling."

The court noted that the false advertising statute prohibited statements made to the public not only by various enumerated methods (newspaper, letter, radio, etc.), but "in any other way similar or dissimilar." The court concluded therefore that the statute's reach is not limited to media advertising, but includes the face-to-face oral representations at issue here.

Bait-and-Switch

Colorado

People ex rel. Dunbar v. Gym of America, Inc., 177 Colo. 97, 493 P.2d 660 (1972), involved a constitutional challenge to the asserted vagueness of such terms as "bait-and-switch" and "advertise." Though the court did not reach the issues, the alleged violation of the Colorado Consumer Protection Act was the result of the defendant health club's refusal to comply with terms of its advertisements when customers agreed to purchase services. Secondly, the advertised health course was only available to persons willing to become regular members. Thirdly, the advertised course was subsequently disparaged in favor of a longer "more helpful" (more expensive) course. The "free" $60 membership could only be used in conjunction with a discount on a regular membership.

New Jersey

Riley v. New Rapids Carpet Center, 61 N.J. 218, 294 A.2d 7 (1972), again did not decide the ultimate factual issues as to the existence of bait-and-switch, but set out the allegations of the complaint with regard to that issue.

> Defendant Ideal Designs, Inc. advertised on WOQ-TV that it would sell 150 square feet of nylon carpet for $77, with a "free gift" of an upright vacuum cleaner or an 8' x 12' rug. The complaint charges the commercial was merely bait, the advertised product being disparaged by the visiting salesman who pushed more expensive products, and indeed without the advertised "free gift." In short, the complaint alleged bait-and-switch, a sales tactic denounced as unlawful by the Consumer Fraud Act. (N.J.S.A. 56:8-2.2.)

See also: State v. AAMCO Automatic Transmissions, 293 Minn. 342, 199 N.W.2d 444 (1972).

Motor Vehicles

Delaware

In Re Brandywine Volkswagen, Ltd., 306 A.2d 24 (Del. Super. Ct. 1963), involves the application of the Delaware Consumer Fraud Act to a failure by an automobile dealer to disclose what it knew about an incorrect odometer reading. The Department of Community Affairs, Division of Consumer Affairs, had charged misrepresentation under the following statute:

> § 2513 Unlawful practice:
>
> (a) 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 facts with the 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. (6. DEL. CODE ANN. Sec. 2513.)

The salesman sold an auto to a consumer representing that it had been driven 13,786 miles, as noted on the odometer. However, the company records noted that the auto actually had 21,000 miles at the date of sale. The company defended the action claiming that its salesman had no knowledge of the discrepancy. Thus intent to misrepresent was not present.

The court noted that equity did not require the finding of intent to misrepresent as law does, and determined that the former rule would be properly applied. The court held that intent to misrepresent mileage of a used automobile is not necessary for a dealer which has information as to the vehicle's true mileage in order to constitute a violation of the deceptive trade practices law.

Brandywine Volkswagen, Ltd. v. State, 312 A.2d 632 (Del. 1973), construing 6 DEL. CODE ANN., Sec. 2513. This is an appeal from the above case wherein the court held that failure of an automobile dealer to disclose what he knew, regarding the true odometer reading on an auto, to a consumer constituted a misrepresentation. Further, when the misrepresentation was made with the intent that the consumer would rely upon it, and the consumer did so rely, the dealer's conduct is an "unlawful practice" in violation of the Delaware Consumer Protection Act.

Minnesota

State v. AAMCO Automatic Transmissions, 293 Minn. 342, 199 N.W.2d 444 (1972). The state brought an action against AAMCO and its local distributors to enjoin certain deceptive advertising practices in connection with its auto repair business. This resulted in a consent order of injunction.

Subsequently, by means of cross-claim, a local franchisee sued AAMCO for its use of deceptive trade practices which had ruined his business. The court found both parties to be guilty of creating and using deceptive "bait-and-switch" advertising techniques. Thus, because of pari delicto and the public policy behind it, the court denied recovery to either party

saying that the public purpose of consumer protection would not be served by awarding damages.

Missouri

State ex rel. John C. Danforth v. Independence Dodge, 494 S.W.2d 362 (1973), construing MO. ANN. STAT. §§ 407 et seq. Action was brought by the Attorney General to enjoin an automobile dealer from acts alleged to be illegal under the Missouri Merchandising Practices Act. Defendant had allegedly sold a used automobile to a consumer misrepresenting that the automobile was new and had only been driven 3,000 miles. The court held that the evidence was that the automobile was represented as virtually new, when in fact the automobile had been acquired at an auction, had been in a wreck, and had previously been leased to a rental company. This evidence supported the lower court's holding that the defendant had committed an unlawful merchandising act.

Further, the court held that even if the defendant's salesmen did not have specific knowledge that the automobile had certain defects, they were still guilty of fraudulent conduct in making affirmative statements while conscious that they were actually without knowledge as to the truth or falsity of the statements made.

Washington

State v. Ralph Williams N.W. Chrysler Plymouth, Inc., 82 Wash.2d 265 510 P.2d 233 (1972). At pages 236 to 237 of this decision, the supreme court outlines the allegations in the state's complaint which read like a primer in automobile sales fraud. The court did not pass on these but remanded for trial.

Mobile Homes

Massachusetts

Commonwealth v. Decotis, 316 N.E.2d 748 (Mass. 1974). The Supreme Court of Massachusetts has issued a decision which determines that the charging of "service charge" or "resale fee" to tenants of a mobile home park when no services are provided is an unfair and deceptive trade practice under G.L. c. 93A, § 2(a). This was found to be the case everywhere the tenant was informed as to the existence of the fee at the time the tenancy was initiated. The court stated in analogizing to the U.C.C. concept of unconscionability that:

> In our case the defendants furnished no goods or services in connection with the resale of mobile homes in Pine Grove. They undertook to impose an arbitrary provision on persons of limited means and limited choice for residences. The defendants were able to collect the resale fees solely because their tenants were in a position in which they had no reasonable alternative but to pay and to agree to pay. It was financially preferable to sell a mobile home on site in Pine Grove for ninety percent of its fair market value (or for $250 less than its fair market value) than to sell that home for relocation. The willingness

> of tenants to pay resale fees, does not make the collection of such a fee fair. It merely demonstrates the extent to which the defendants had their tenants at their mercy. The extraction of a resale fee for no services rendered in these circumstances was an unfair act or practice under G.L. c. 93A, § 2(a).

The supreme court modified the trial court's judgment by ordering restitution of resale fees paid to lessors. (See also, pp. 35-37.)

Private Right of Action

The unfair and deceptive trade practices acts normally provide public enforcement remedies. Consequently, the courts have had to construe the statutes as to whether or not they provide private enforcement remedies as well when there is no specific language granting a private right of action. Many statutes specifically provide for such private right of action in their consumer protection acts.[38]

Arizona

Sellinger v. Freeway Mobile Home Sales, 110 Ariz. 537, 521 P.2d 1119 (1974), involved an action by the purchasers of a mobile home against a seller and manufacturer, based on asserted violation of the Arizona Consumer Fraud Act, A.R.S. § 44-1521 et seq., and the Fraudulent Advertising Practices Act, § 44-1481. The court in determining a private right of action did exist under the Consumer Fraud Act looked to the intent of the legislature and considered the context of the statute, language used, the subject matter, the effects, consequences and the spirit and purpose of the law.

No express language creating the private right of action was found to exist under the Consumer Fraud Act. Such a right was seen to be inferentially created in § 41-1533 A.R.S., which provides: "The provisions of this article shall not bar any claim against any person who has acquired any monies or property, real or personal, by means of any practice declared to be unlawful by the provisions of this article."

The court felt that without effective private remedies the widespread economic losses that result from deceptive trade practices would remain uncompensable.

Illinois

Rice v. Snarlin, 131 Ill. App.2d 434, 266 N.E.2d 183 (1970), was a private action by a model and her mother for alleged advertising violations of the Consumer Fraud Act (Ill. Rev. Stat. 1967 ch. 121 1/2, §§ 261-272). The court found the act to have inferentially created a private right of action.

The sections declaring various practices unlawful were seen to expand the consumers' rights beyond the common law. By creating such potential liability the legislature intended to invest the consumer with the right to enforce his claim. To deny such right would release the seller from liability.

Iowa

Sauerman v. Stan Moore Motors, Inc., 203 N.W.2d 191 (Iowa 1972), was a suit seeking repayment of the purchase price of a used automobile. The trial court awarded the purchase price to the buyer and did not reach the issue raised elsewhere in plaintiffs' pleadings as to a violation of the Consumer Fraud Act creating a private right of action.

The supreme court declined to rule on the question presented by brief amicus curiae of the Attorney General as to whether a private right of action exists as the question was not squarely before it.

Oregon

Scott v. Western International Surplus Sales, Inc., 267 Ore. 512, 517 P.2d 661 (1974), involved an instance where the statute clearly provided a private right of action to any person who purchased goods and suffered an ascertainable loss. (ORS 646.638.)

The question presented for decision was whether an "ascertainable loss" has occurred when a tent, purchased for $38.36, did not have certain of the features it had been represented to have. The plaintiff had proven the tent he was given was not as represented, but the court stated he need not prove the value the tent was reduced in order to show "ascertainable loss." The plaintiff was awarded $200.00 minimum damages as provided by statute.[39]

Exemptions From Coverage

The forceful administration of the state consumer protection laws often requires testing the outer parameters of the law's coverage. A number of cases have raised the issue of wheter the law was intended to cover the type of transaction in question.

Kansas

Hunter v. Haun, 210 Kan. 11, 499 P.2d 1087 (1972), construing KAN. STAT. ANN. Sec. 50-610 et seq. Action was brought to enjoin a county attorney from proceeding against plaitiff for violations of the provisions of the Kansas Buyer Protection Act. Plaintiff had allegedly defrauded a Kansas real estate owner in the sale of land situated in Kansas. The supreme court ordered the county attorney to halt all proceedings against the plaintiff. The court held that, within the meaning of the Buyer Protection Act, a provision defining "merchandise" as including any objects, wares, goods, commodities, intangibles, real estate situated outside Kansas or services did not include real estate situated within Kansas.[40]

Massachusetts

Commonwealth v. Decotis, 316 N.E.2d 748 (Mass. 1974), raised the question of whether rental agreements allowing the imposition of resale fees by lessors of lots for mobile homes were exempt under the Massachusetts' Consumer Protection Act which does not apply to transactions permitted under laws as administered by any regulatory board. The defendants contended that

the terms of their rental agreements were subject to regulation by the local board of health under G.L. c. 140, SS 32A-32L. However, the court concluded that the defendants were not entitled to the exemption defense because they failed to prove that under laws "as administered" by the board of health, the imposition and collection of a resale fee was permitted.

Washington

There have been a series of cases interpreting the following statutory language found in the Consumer Protection Act: "Exempted transactions . . . Nothing in this chapter shall apply to actions or transactions otherwise permitted, prohibited or regulated under laws administered by the insurance commissioner of this state, the Washington public service commission, the federal power commission or any other regulatory body or officer acting under statutory authority of this state or of the United States." (RCW 19.86.170.)

In State v. Sterling Theaters Co., 64 Wash.2d 716, 394 P.2d 226 (1964), it was argued that, since the Attorney General of the United States acting under the Sherman Act could regulate the alleged antitrust violations of a local film exhibitor, the statute exempted the defendant. The court noted that few businesses of any size were theoretically not subject to the reach of the Sherman Act. The court found the Attorney General of the United States to not be intended as covered by the term "regulatory officer" in his capacity of enforcing federal laws.

Federal antitrust consent decrees, primarily in the distribution end of the movie industry, do not make the movie business a "regulated industry" within RCW 19.86.170 and thus exempt.

Williamson v. Grant County Public Hospital Dist. No. 1, 65 Wash.2d 245, 396 P.2d 879 (1964) was an action by an osteopathic physician alleging violation of the Consumer Protection Act by a municipal hospital district in denying him admittance to the district staff. The court noted that the District was a municipal corporation created by state statute. Its powers were seen as vested in its duly elected officials and medical staff and regulated by statute within the meaning of RCW 19.86.170.

State v. Reader's Digest Association, Inc., 81 Wash.2d 259, 501 P.2d 290 (1972) involved an argument that the FTC was a "regulatory body" within the meaning of the statute. The court found the preceding specific words to modify and restrict the term "regulatory body."

> The specific agencies or bodies mentioned in the statute all regulate areas where permission or registration is necessary to engage in an activity. Once the requisite permission or registration is obtained, the activity is subject to monitoring and regulation. The FTC, however, is not such an agency. It has no controls over entry into its area of concern. It merely monitors the business practices of those who freely enter its domain. (p. 303.)

The FTC was held not to be a regulatory body within the terms of the statute.

Dick v. Attorney General, 9 Wash. App. 586, 513 P.2d 568 (1972), involved an action to enforce a civil investigative demand on a person engaged in drugless healing under the Washington Consumer Protection Act. The appellate court held the healer to be exempt as he was required to obtain a license and his activities were subject to monitoring and regulation by the Director of Licenses.

On appeal, Dick v. Attorney General, 83 Wash.2d 684, 521 P.2d 702 (1974), the Washington Supreme Court affirmed the appeals court's decision but partially rejected its reasoning. The fact that the drugless healer was involved with a trade or business that is generally regulated does not mean that the Consumer Protection Act automatically exempt that trade or business. Rather, "[i]f a particular practice found to be unfair or deceptive is not regulated, even though the business is regulated generally, it would appear to be the legislative intent that the provisions of the act should apply." (521 P.2d at 705.) This, therefore, put the burden on the Attorney General to prove that the respondent's actions were not covered by the generally applicable regulations. Since he failed to do this, the dismissal of the case by the court of appeals was proper.

Usury

Iowa

State ex rel. Turner v. Younker Brothers, Inc., 210 N.W.2d 550 (1973). The state through the Attorney General brought suit for monetary damages, declaratory judgment and injunctive relief against a retail department store for violations of the Iowa usury statute, I.C.A. § 535.1 et seq. The defendant charged 18 percent on its revolving charge plans and 16.25 percent on retail installment sale transactions. The four essential elements of usury are: (1) a loan or forbearance, either express or implied, of money or of something circulating as such; (2) an understanding between the parties that the principle shall be repayable absolutely; (3) the exaction of a greater profit than is allowed by law; and (4) an intention to violate the law.

The court found that the department store's "finance charges" on retail installment contracts and revolving charge accounts were in violation of the usury statute thus constituting a public nuisance. This nuisance could be enjoined and the retailer enjoined from charging interest in excess of 9 percent. There was no right to recover usurious interest in Iowa, so no monetary damages were awarded.

Wisconsin

State v. J. C. Penney Co., 48 Wis.2d 125, 179 N.W.2d 641 (1970) construing WIS. STAT. ANN. Sec. 138.05(1). Action by the state seeking injunctive relief for alleged violations by the defendant retailer of the state's usury statutes. Defendant allegedly had charged one and one-half percent monthly interest on the declining unpaid balance of its revolving charge accounts. Wisconsin law provided for a maximum interest charge of 12 percent. The Wisconsin Supreme Court held that the one and one-half percent charges were for "forbearance" of money within the meaning of the

usury statute. Further, the company was not exempt from the usury statute on the theory that the monthly charge was a "time-price differential." A permanent injunction was issued against the scheme as a public nuisance.

Attorney General Liability

Not infrequently, members of the enforcing officer's staff face the threat of suit against them for actions taken in their official capacities under consumer protection legislation. This issue has been discussed in the following cases.

Kentucky

In Hearing Aid Assn. of Kentucky v. Bullock, ___F.Supp.___ (E.D. Ky. 1976), the plaintiffs sued two Assistant Attorneys General for damages alleging that the two officials deprived them of their property without due process and equal protection of the laws. The plaintiffs asserted that they were forced into signing assurances of voluntary compliance by the defendants, who also allegedly issued derogatory news releases to the media. At issue was the Association's use of the trademark "Certified Hearing Aid Audiologist"; the defendants claimed that plaintiffs met neither the qualifications or licensing procedures for audiologists contained in Kentucky Law.

The defendants moved the court to dismiss the action for three reasons. (1) The doctrines of abstention and comity should preclude the court from acting, since the same or similar action is pending in the state court system. (2) The plaintiffs have failed to state a cause of action, inasmuch as any property rights they have in the use of a trademark cannot be used to deceive the public. (3) The defendants enjoy a quasi-judicial immunity, which precludes money damages being obtained against them.

The court granted the motion to dismiss on the abstention and comity grounds, but also discussed the other two reasons cited in case the matter should not have been dismissed. It concluded that there was no set of facts which would support plaintiffs' claim and entitle them to relief, therefore it would also dismiss under Fed. R. Civ. P. 12(b)(6). With respect to the quasi-judicial immunity claim regarding monetary damages, however, the court held that further evidence would be necessary before it could decide that issue.

Michigan

Bennett v. Attorney General, 65 Mich. App. 203, 237 N.W.2d 250 (1975). Plaintiff's suit against the Michigan Attorney General for defamation, abuse of process, and malicious prosecution arose out of an action (a consumer protection matter involving land sales) against plaintiff filed by defendant. The court of appeals affirmed the trial court's summary judgment in favor of the defendant for failure to state a claim upon which relief could be granted. The sovereign immunity of the state, an absolute defense, was held applicable here in the absence of any express statutory waiver of such immunity. As to the defamation claim, the court found that the Attorney General was also protected by judicial privilege, which attaches to pleadings filed in any lawsuit, if relevant to the issue of the case.

Nebraska

Ledwith v. Fennell, No. 76-0-148 (D.Neb., complaint filed April 13, 1976) and Parker v. Fennell, No. CV 76-1-75 (D.Neb., complaint filed April 16, 1976) are § 1983 actions which charge Assistant Attorney General Fennell with libel and malicious publication. Fennell had drafted a complaint for the state which charged the plaintiffs filing the § 1983 suits with false and misleading advertising in connection with the operation of their charm school.

The suits allege that Fennell wrote a letter to Charles Ledwith, husband of one of the plaintiffs and a practicing attorney in Nebraska, on March 30, 1976. The letter contained a copy of the draft petition, which had not yet been filed with any court. According to the plaintiffs, such filing would have the effect whereby "false statements would become allegations and would be rendered privileged, and whereby the immunity of the defendant ... for ... such defamatory words would be invoked ...." The plaintiff's husband had not been employed by either Ms. Parker or his wife with respect to the matter described in the draft petition, therefore the suits allege that sending the statements to him amounted to malicious publication, libel, and (with respect to Mrs. Ledwith) an invasion of her marital relationship and an attempt to alienate her husband's affections. Each plaintiff has asked the court to award damages in the amount of $25,000 plus punitive damages of $250,000 each.

Vermont

Turner v. Baxley, 354 F.Supp. 963. (D.Vt. 1972) involved Glenn Turner's action against twenty-six Attorneys General for conspiring to stop his business and violate his civil rights. Counts I, II and III of the complaint are directed to the actions of the State of Vermont, its Attorney General, James M. Jeffords, and his assistant Howard Goldberg. It charged the promulgation of a regulation which violated plaintiffs' constitutional rights, conspiracy to violate constitutional rights, malicious prosecution and the publication of news releases intending to deprive plaintiffs of their constitutional rights.

The court found no waiver of the state's sovereign immunity, and so the 11th Amendment protected it from suit. The injunction requested against state enforcement of the consumer protection act was denied on the grounds of Younger v. Harris, 401 U.S. 37 (1971).

The court turned to the damages actions against Attorney General Jeffords and Assistant Attorney General Goldberg. Immunity protects state judicial and legislative officers from acts within the scope of their authority. This applies also to public prosecutors. Also, a state official is immune from suit if the action against him is in reality an action against the state he served. The court found that the promulgation of rules, prosecution of plaintiffs and publication of news releases as alleged were all acts taken by officials in furtherance of their governmental functions as prosecutors. As such, the Attorney General and Assistant Attorney General enjoyed immunity from suit.

Washington

Gold Seal Chinchillas, Inc. v. State, 69 Wash.2d 828, 420 P.2d 698 (1966), involved an action for libel against the state for alleged defamation by the Attorney General's office in connection with the filing of a complaint for violation of the consumer protection law against the plaintiff and issuing a press release concerning the filing. The issue presented for decision was whether an executive officer of the state and his staff are absolutely privileged with respect to the publication of allegedly libelous statements.

The statements contained in the pleadings were seen as absolutely privileged as being pertinent to the redress sought in a judicial proceeding. The court then analyzed the press release concerning the complaint filing and the competing interests of freedom from attacks on business reputations versus the free flow of information concerning the activities of government. The court found that the Attorney General had an implicit duty by virtue of his position to inform the public of actions taken in his official capacity. The court held that allegedly libelous statements made by state officials must have some relation to general matters committed by law to the control or supervision of a particular state official in order to be absolutely privileged. The actions of the Attorney General through his staff were absolutely privileged in this instance.

Massachusetts

Golden Book of Values, Inc., Bull Investment Group, Inc., James Sanford and Ronald Kimball v. Robert Killiam, Attorney General, Connecticut, et al., Case No. 750385 (United States District Court, District of Massachusetts, filed January 1975). A suit has been filed by the above named plaintiffs against the Attorneys General of seven Northeastern states, numerous Assistant Attorneys General, and various Better Business Bureau employees, county attorneys, police personnel, Federal Trade Commission personnel, Securities and Exchange Commission personnel, FBI personnel, and media persons, totalling approximately 135 defendants. The suit alleges that the actions of the defendants specified in the complaint constitute an ongoing conspiracy to deprive the plaintiffs of their constitutional and civil rights under state law. The suit is brought pursuant to Title 28 U.S. Code, sections 1331, 1332 and 1343, and Title 42 U.S. Code, sections 1983, 1985 and 1986.

Allegations are included in a state-by-state synopsis of actions of the state Attorneys General, Better Business Bureaus and other named defendants which are claimed to amount to unconstitutional harassment of the plaintiffs in the operation of their businesses. The businesses have been determined by a Connecticut Supreme Court judge to constitute a "referral sales" or "horizontal pyramiding" sales scheme in violation of Connecticut law. The complaint alleges numerous instances where mis-statement of facts concerning the procedural stance of various legal actions taken by the Attorneys General's offices against the plaintiffs were made by representatives of those offices and Better Business Bureaus with the intention of "putting them out of business." It is further alleged that the confidentiality of certain information concerning plaintiffs' businesses was violated by its being shared between Attorneys General's offices, Better Business Bureaus and federal agencies. Also alleged was the use of law enforce-

ment personnel to harass individuals who had rented rooms to the plaintiffs for "opportunity meetings" and to intimidate persons dealing with the plaintiffs.

As to each of the Attorney General defendants, the allegations as to conspiracy read substantially as follows:

> The Massachusetts Attorney General (substitute each Attorney General) and his office in conjunction with all or some of the following: the Attorneys General of Connecticut, Maryland, New Hampshire, New York, Pennsylvania and Rhode Island; the Securities and Exchange Commission and other state and federal agencies induced an interstate pattern of harassment.
>
> The activity alleged in paragraph (above) was conducted through telephone calls, transfer of documents, improper use of the news media and dissemenation of material as part of an effort to cause unwarranted investigation and vexatious litigation directed against the plaintiffs.

The complaint, ninety pages in length, concludes with a prayer for a temporary restraining order and permanent injunction against such activities. Finally, actual damages in the amount of one hundred million dollars ($100,000,000.00) and punitive damages are sought.

Agency and Intra-Corporate Liability

The complexity of modern business entities often raises substantial issues as to who ought to properly be named in lawsuits, and once a decision is rendered, against whom it is enforceable. Also, the courts have concerned themselves with when one person's activities are legally attributable to another. The following cases address these issues:

Delaware

In Re: Brandywine Volkswagen, Ltd., 306 A.2d 24 (Del. Super. 1973), involved a salesman making unknowing false representations as to the mileage of a used automobile to a buyer. The court stated a principal is legally responsible for the fraud of an agent even though the fraud was committed without the knowledge, consent or participation of the principal, if the fraud is done within the course of the agent's employment and within his apparent authority. Here the agent was unaware of the knowledge the principal had, but the principal is charged with the agent's actions in conjunction with the knowledge he (the principal) had. Thus, the court held that the untrue statement is treated legally as having been made by Brandywine, the principal.

Iowa

American Security Benevolent Association, Inc. v. District Court, 259 Iowa 983, 147 N.W.2d 55 (1966), involved an enforcement proceeding in which contempt of court was alleged against three corporate officers and a salesman for violations of a temporary injunction entered pursuant to the Consumer Fraud Act. The court found the officers not to be in contempt. The court

stated that mere knowledge, acquiescence or approval of an act without cooperation or agreement to cooperate did not constitute a conspiracy to violate the injunction. The court also found the evidence of the existing supervisory capacity over the salesman and a sharing in the proceeds to be insufficient in its view to sustain a finding of contempt.41

An Iowa district court case considered questions of the liability of an employee of a corporation found guilty of an illegal pyramid sales scheme. The Attorney General filed suit against Willex Products, Inc., the corporation's founders, and one of the employees of the corporation, charging them with consumer fraud and an illegal pyramid sales scheme. Judgment was entered at that time against the corporate defendant and the two founders. The decision in Iowa v. Willex Products and Murphy, (Polk County District Court, 1975), extends that liability to the company's employees.

The court ruled that the employee Murphy was partially liable for money he had obtained in salary even though he was not responsible for developing the pyramid scheme and even though he was not in a position to make policy decisions. The court's ruling held that the employees of the company were liable for 25 percent of each claimant's loss, and that Murphy would be held liable to pay his share of this loss "in a ratio as his income bears to the other employees on the date the individual claimant paid his money to the Willex Company." The court also held that Murphy's liability should in no event exceed his total income from the Willex Company.

New Jersey

Kugler v. Romain, 110 N.J. Super. 470, 266 A.2d 144 (1971), involved a proceeding brought by the Attorney General pursuant to the Consumer Protection Act alleging that the agents for a dealer in children's books had committed prohibited sales practices. The court held that the salespersons employed by the book seller for the sole purpose of representing him in transactions arising out of his business, and who made no investment of capital incident to a separate business and assumed no financial business risks, were agents of the book seller. The principal is responsible for the authorized or ratified acts of his agents. Here the principal was apprised of misrepresentations and took no affirmative action to cure them. The court found authority in defendants knowledge of, and acquiescence in, repeated deceptions by his sales personnel. Here, the bookseller was held legally accountable for his sales representatives' acts.

New York

People v. Abbott Maintenance Corp. and Installment Dept., Inc., 11 App. Div.2d 136, 201 N.Y.S.2d 895, aff'd., 9 N.Y.2d 810, 215 N.Y.S.2d 761, 175 N.E.2d 341 (1961), involved an attempt to revoke the corporate charters of two corporations allegedly involved in a fraudulent advertisement and floor waxing machine sales scheme. The issue involved was whether the defendant Installment Department, Inc., a finance company, was so involved in the scheme as to be held responsible in addition for Abbott's sales activities. The court, after reviewing in detail the finance interworkings of the two companies, determined Abbott's actions were not legally attributable to Installment Department, Inc.

Lefkowitz v. Compact Associates, Inc., 22 App. Div.2d 129, affirmed, 17 N.Y.2d 758 (1966), involved an appeal by a corporation and its individual officers from a decision holding it and them responsible for the fraudulent sales practices of its salesmen. The lower court had enjoined the sale of vacuums and use of referral selling. The Attorney General alleged that defendant's salesmen had sold vacuum cleaners door-to-door through fraudulent means which purposely exceeded their authority. This method of exceeding their authority was purposely used and the corporate defendants were consequently held legally responsible and bound by the injunction against such activity.

Pennsylvania

Tolleson v. Commonwealth, ____ Pa. ____, 189 C.D. 1973 (Commonwealth Ct. 1973) construing 73 P.S. § 201-1 et seq. involved an action to enforce civil penalties against agents who were not named as parties in the original action out of which the civil penalties arose.

A case was originally brought against Glenn Turner and Koscot Interplanetary, Inc., in which the court found Koscot guilty of violating the Unfair Trade Practices Act and ordered Turner, Koscot and all agents and assignees to halt violations of the Act. Subsequently an action was brought against Koscot, Turner and the Tolleson brothers for violation of the court's original order. All parties were held jointly and severally liable for civil penalties in the amount of $55,000.

The court held that the Tollesons were agents of the defendants with knowledge of the entry of the original decree and could therefore be properly held liable for civil penalties arising for violations of the decree. Any other result would make an injunction against a corporation ineffective in the court's view.

Texas

Bourland v. State, 528 S.W.2d 350 (Tex. Civ. App. 1975). The court of appeals has held that an attorney who, in addition, was a corporate principal of a company which had engaged in deceptive sales of land could be held responsible on a conspiracy theory for the payment of restitution ordered to be paid to deceive consumers. The court's analysis centered on the factual basis for the trial court's decision that Bourland was a participant in the conspiracy. The trial court's decision was not found to be so contrary to the great weight of evidence so as to be manifestly unjust. The decision provides a good summary of a factual setting where a participant in a scheme which violates a state unfair or deceptive trade practices statute may be held financially responsible for the more active involvement of his co-conspirators in the scheme. The decision also confirms the Attorney General's authority under Texas law to obtain restitution for defrauded individuals when the deception occurs in a land marketing scheme.

Holder In Due Course

Household Finance Corp. v. Mowdy, 13 Ill. App. 822, 300 N.E.2d 863 (1973), construing ILL. REV. STAT. 1971, ch. 121 1/2, par. 262D in the context of an action on a promissory note by a finance company who, but for the above statutory provision, would have been a holder in due course.

The statute (2D) required notice on any negotiable instrument of the right to assert defenses within 5 days of delivery against the assignee of the instrument. This notice was not given. A notice which was included in the contract, providing for cancellation within 3 days if signed at a location other than the seller's place of business, did not suffice to satisfy 2D. The court found the implied waiver of defenses against an assignee when both a negotiable instrument and a security agreement is signed (U.C.C. 9-206) was ineffective to waive the remedial provisions of 2D.

Landlord and Tenant

Commonwealth v. Monumental Properties, Inc., 329 A.2d 812 (Pa. 1974). The Supreme Court of Pennsylvania has recently issued an opinion which held that the leasing of housing was intended to fall within the purview of the Consumer Protection Law. It was argued by defendants that a lease of housing was not "the conduct of any trade or commerce." The court held that the remedial purposes behind the law mandated a liberal construction of the law's terms so that the prevention of unfair or deceptive trade practices might be accomplished. As support for its finding, the court cited similar language in § 5 of the Federal Trade Commission Act and the Lantham Trademark Act and court decisions under the former statute which had applied § 5 to the leasing of property.

The court next considered the statutory language which defined "trade or commerce" and reviewed the defendants' contention that the lease of real property did not fall within the phrase's definition. The definitional section spoke in terms of "sale" rather than lease. An extensive review of modern case law in other jurisdictions, traditional common-law conceptions of the nature of a lease, the pragmatic and functional approach of the legislature when attempting to solve societal problems, and the consequences of a contrary holding all contributed to the court's holding that the term "trade or commerce" includes the business of leasing housing services. The court held:

> Functionally viewed, the modern apartment dweller is a consumer of housing services. The contemporary leasing of residences envisions one person (landlord) exchanging for periodic payments of money (rent) a bundle of goods and services rights and obligations ....
>
> The purchaser of this bundle (tenant) is as much a consumer as is the purchaser of an automobile, household appliance, or any other consumer good .... (p. 15.)

The U.C.C. concept of "sale" being defined in terms of title passage (§ 2-106(1) was seen as inappropriate in the context of the Consumer Protection Law. Finally, a broad reading of "trade or commerce" was necessitated in the court's view by the repeatedly acknowledged existence of a social crisis caused by the lack of suitable housing. The inclusion of leases of residential housing within the term "trade or commerce" was seen as effecting the salutary antifraud purposes of the Consumer Protection Law and equalizing otherwise unequal bargaining positions in the marketplace.

Next, the court analyzed the state's argument that the specific practices were prohibited by the statutory proscription against "any other fraudulent conduct which creates a likelihood of confusion or of misunderstanding." Pennsylvania has a "deceptive trade practices" type statute which contains broad language prohibiting unfair or deceptive trade practices and then proceeds to set out specific prohibited acts as well. The court recognized the ever changing nature of fraudulent business practices and held that a reading of the statutes which limited prohibited conduct to only those specifically enumerated examples of unfair trade practices would thwart the legislative intendment.

The case was remanded for further proceedings on the question whether an unfair or deceptive trade practice was created by the use of leases with "archaic and technical language beyond the easy comprehension of the consumer of average intelligence" or by the failure of the defendants to inform tenants in leases of the existence of statutory tenant remedies. FTC authority on the general duty to affirmatively disclose information which would prevent misrepresentation was cited as support for this latter point.

Credit: Debt Collection

Ledisco Financial Services, Inc. v. Viracola, 533 S.W.2d 951, (Tex. Civ. App. 1976). The debtor filed suit under the collection statute which prohibits certain collection practices. Ledisco Financial Services, Inc. contended that there was no evidence or jury finding that Ledisco was a debt collector or was engaged in an attempt to collect a debt within the meaning of the collection statute. The basis of this argument was that Ledisco was only attempting to retrieve the debtor's credit card and was not attempting to collect any money. In rejecting this contention, the appellate court held that the obligation of a consumer to return a credit card upon cancellation was a debt within the statute, and that "attempts of Ledisco to retrieve the card appear to have been so intimately connected to the entire consumer transaction as to be properly considered an integral part of the part of the debt collection process within the meaning of the statutes." However, the trial court decision favoring the debtor was reversed on other grounds, and the case was remanded for a new trial.

Health Spas: Lifetime Memberships

Joseph v. Norman's Health Club, Inc., et al., 532 F.2d 86 (8th Cir. 1976). This decision handed down by the Eighth Circuit Court of Appeals constitutes a consolidated appeal from two cases decided by the United States District Court for the Eastern District of Missouri. The case involved a health club which sold "lifetime memberships" to persons on credit for $360.00 while claiming that there was no finance charge. In fact, almost all contracts are sold on a time payment and are immediately negotiated to a finance company.

The court of appeals reversed the district court, finding that the relationship between the finance company and the health club was such that the finance company came under the provisions of the Truth In Lending Act and was responsible for the failure of the health club to make proper disclosures under Regulation Z. The court further found that the rather exorbitant discounts at which the finance company purchased these notes from

the health club constituted a "finance charge." The case was remanded to the district court for a determination of damages against the finance company.

Consumer Fraud

The remainder of this section consists of summaries of specific categories of consumer fraud as determined under particular statutory provisions.

Air Pollution Control Devices - Advertising Fraud

R.E.I. Industries Inc. v. State, 477 S.W.2d 956 (Tex. Civ. App. 1972), construing TEX. REV. CIV. STAT art. 5069-10.01. This was an action by the state for a temporary injunction against a corporation which manufactured and marketed an alleged air pollution device named "Paser Magnum" through a pyramid sales mechanism. The "Paser Magnum" was claimed to reduce hydrocarbons by up to 100 percent. The temporary injunction was issued and the supreme court upheld it. Testimony of a mechanical engineer established that the automobile accessory had no significant effect in either increasing or decreasing auto emissions. Thus, a likely violation of the Texas Deceptive Trade Practices Act had been shown.

Contests

Kugler v. Market Development Corporation, 124 N.J. Super. 314, 306 A. 2d 489 (1973) construing N.J. STAT. ANN. sec. 56:8 et seq. involved a scheme where congratulatory letters were sent out advising the recipient that he was a Sweepstakes winner and needed to send a $15.00 "service charge" in order to evidence his intent to accept his prize. In fact, there was no contest and bogus prizes were worth less than $15.00. This scheme constituted a violation of the New Jersey Consumer Fraud Act and no defense was set up in that "value" was received for the $15.00. The only "prize" which would have been legitimate was one which came with no strings attached, in the court's view.

Divorces

Kugler v. Haitian Tours, Inc., 120 N.J. Super. 260, 293 A.2d 706 (1972), construing N.J. STAT. ANN. Sec. 56: 8-2 involved an action by the Attorney General to enjoin the defendants, a travel agency, from misrepresenting that legal divorces could be obtained by purchasing a package tour to Haiti from the defendant. The court held that the sale of the travel package, the purpose of which was to procure Haitian divorces, was a fraud upon the purchasers since divorces obtained were for all practical purposes worthless, thus a violation of the Consumer Fraud Act and enjoinable.

Funerals

New York v. J. S. Garlick Parkside Memorial Chapels, Inc., 23 N.Y.2d 754, 296 N.Y.S.2d 952, 244 N.E.2d 467, 296 N.Y.S. 2d 952 (1968), construing N.Y. PUB. HEALTH LAW Sec. 3440-a. This was an action by the Attorney General pursuant to a New York law requiring funeral directors and homes to furnish written itemized statements of merchandise and services provided in conjunction with a funeral. Defendant alleged that he need only supply a

total price rather than itemization. The court held that under the Public Health Laws, the defendant must provide an itemization of all charges. The court further upheld an injunction against the defendant's doing business until he complied with the court order.

Lotteries

State v. Reader's Digest Association, Inc., 81 Wash.2d 259, 501 P.2d 290 (1972) involved the mailing of "Sweepstakes" information into the state and an action by the Attorney General for a declaratory judgment that the scheme constituted a lottery and unfair trade practice in violation of the Consumer Protection Act. The Washington State Constitution, Art. 2, § 24 declares: "The legislature shall never authorize any lottery ...." The court noted that the necessary elements of a lottery are prize, chance and consideration. Reader's Digest admitted its scheme involved prize and chance but denied consideration was present.

The court indicated that under Washington law consideraton sufficient to support a contract is enough. Citing State ex rel. Schillberg v. Safeway Stores, 75 Wash.2d 339, 450 P.2d 949 (1969), the court stated: "Consideration for a lottery may be both gain and detriment or one without the other." (p. 298.) Here, the court found similar consideration:

> Thus, in both "bonus bingo" and the Sweepstakes the thing sought by the promoter from the participant was the latter's attention directed to the former's advertisements. This constitutes a detriment to the participant. The corresponding increase in sales that results from the success in attracting the attention of the participants constitutes the benefit to the promoter. (p. 297-298.)

The scheme met the definition of lottery and consequently was a violation of state law, RCW 9.59.010. Thus, the court reasoned since the scheme was illegal and against public policy it was per se an unfair trade practice, citing decisions under section 5 of the FTC as support for this proposition.

B. Procedural Questions

The reported litigation which has arisen under state unfair and deceptive trade practices acts has typically involved substantive and constitutional challenges. The recent enactment of many of these laws has, as would be expected, resulted in an initial testing of the substantive provisions of the acts rather than a raising of procedural issues. However, a number of reported cases have centered on procedural questions, some of which are likely to arise in other states. This section highlights procedural issues raised under state unfair and deceptive trade practices acts.

Procedure: Judge or Jury Issue: Unfair Practices

North Carolina

Hardy v. Toler, 228 N.C. 303, 218 S.E.2d 342 (1975). Plaintiff purchased a used car with a turned-back odometer and falsely represented to be a never-wrecked, one-owner vehicle still under the manufacturer's warranty. He brought an action against the seller for treble damages under North Carolina's unfair and deceptive trade practices statute. The facts alleged by plaintiff were stipulated at a jury trial.

The principal question before the North Carolina Supreme Court here was "whether the determination that certain acts or practices constitute unfair or deceptive acts or practices, in violation of [N.C.] G.S. § 75-11, is to be made by the judge or jury." This issue was fully presented to the court by means of an amicus curiae brief filed by the Attorney General's office, which argued that the issue was one to be decided by the judge.

The court, noting that the issue presented was one of first impression, cited as persuasive the decisions of other state courts and of the federal courts interpreting the Federal Trade Commission Act whose language the North Carolina statute closely parallels. The court concluded that "The traditional function of the jury has been a fact-finding one but the determination as to liability under those facts should be found by the court as a matter of law." Having denied that the issue was a legal one, the court further held that the stipulated facts constituted unfair or deceptive trade practices as a matter of law. The North Carolina law then provided for an automatic trebling of the jury's award of $600 actual damages.

The importance of this decision to other states lies in the characterization which the court has given to the ultimate legal issue to be decided in unfair or deceptive trade practices actions, whether a violation has legally occurred. Since the issue is readily reviewable by appellate courts it allows the state supreme court to construe this issue, as cases are presented to it. Consequently, if this decision is followed in other jurisdictions, the development of appellate case law on the basic underlying substantive issue may be enhanced. The case also is an encouraging sign as to the effectiveness which the Attorney General amicus appearances can have in private actions under state unfair and deceptive trade practices actions.

Texas

State v. Credit Bureau of Laredo, Inc., 530 S.W.2d 288 (Tex. 1975). The Supreme Court of Texas has determined that an action for civil penalties

for violation of a court order enjoining certain unfair or deceptive trade practices is one which entitles the defendant to a jury trial. However, the court also held that the state, upon trial of the issue, need not prove that a "knowing" violation of the court's order has occurred, but merely that the injunction was, in fact, violated.

In discussing the jury trial issue, the court first held that this was an action for civil penalties and not an action for contempt which would not entitle the defendant to a jury trial right. The court then found that both Article I, Section 15, the Bill of Rights Jury Article of the Texas Constitution guaranteed the right to jury trial in a action for civil penalties. Common law and federal authority involving civil penalty enforcement under the Federal Trade Commission Act were cited in support of this position. In concluding the court held that Credit Bureau of Laredo was entitled to a jury trial not only to determine whether a violation of the injunction had occurred, but also to determine the amount of civil penalties which should be assessed in case a violation was found.

Class Action Questions

California

Breidenbach v. East Bay Dodge, Inc., No. 1, Civil 36339 (Cal. Ct. App., March 18, 1976). This action was a private class action for declaratory and injunctive relief to enjoin automobile dealers from claiming deficiencies on repossessed automobiles that are resold at wholesale, rather than a retail basis. The trial court dismissed the complaint as to one of the defendant dealers on the ground that named plaintiffs had no standing to sue since none had purchased an automobile that was later repossessed by that dealer.

The California Court of Appeal held that plaintiffs, as members of the general public, have standing under California Civil Code Section 3369 to seek an injunction banning unlawful or unfair business practices such as those alleged in the complaint. The court also ruled that albeit Commercial Code Section 9504 appears to authorize the conduct complained of, the statute does not immunize defendant from the charge that the business practices alleged are unfair and therefore enjoinable under section 3369.

Iowa

Iowa v. Union Asphalt & Roadoils, Inc., 281 F.Supp. 391 (S.D. Iowa, 1968), aff'd 408 F.2d 1171 (8th Cir. 1969), aff'd 409 F.2d 1239 (8th Cir. 1969), was a civil antitrust action on behalf of the state and its political subdivision for alleged violations of the Sherman and Clayton Antitrust Acts. A motion to dismiss the class action aspects of the lawsuit for claimed failure to meet the requirements of Federal Rule of Civil Procedure 23 and because the Attorney General did not have the authority to represent political subdivisions of the State of Iowa was made.

It was alleged that the representative parties' claims, the relief sought, and defenses to the claims of the representative parties were not typical of the other members of the class. The court held that the disparate facts would not preclude a class action since the circumstances merely

demonstrated the possible desirability of establishing subclasses as the facts developed. The alleged conspiracy to fix prices in violation of antitrust laws was the overriding consideration of each claim.

Secondly, the court addressed the allegation that the Attorney General did not have the authority under Iowa law to represent the political subdivisions. The court stated that his authority was not decisive as he was representing the class by acting primarily in furtherance of his clients' own claims which would consequently accrue to the benefit of other class members. The court found the overriding considerations of commonality noted above would prevent each representative party from acting solely in their own interest pursuant to alleged dissimilar factors in each claim. Thus, the representative parties would fairly and adequately protect the members of the class as required by FRCP 23(a)(4).

State ex rel. Turner v. Younker Brothers, Inc., 210 N.W.2d 550 (Iowa 1973), was an action brought by the state on relationship to the Attorney General and to the Attorney General in his individual capacity, seeking damages, injunctive relief and a declaratory judgment for an alleged violation of the Iowa usury law.

The action was brought as a class action on behalf of the state and all customers and patrons similarly affected by the alleged illegal imposition of interest. The complaint was amended to add the Attorney General in his individual capacity and to seek the imposition of a constructive trust on the funds allegedly taken usuriously from customers. The trial court struck all allegations concerning the class action.

Iowa Rule of Civil Procedure 42 read substantially the same as did 23(a) FRCP between 1933 and 1966 when the latter rule was revised. It was alleged that this was either a "spurious" or "hybrid" type of action. "Spurious" class actions involve separate causes of action with no right to a common fund or property. "Hybrid" class actions involve individual causes of action and a right to a common fund or property.

The court reviewed the Iowa law which did not allow "usurious interest" to be recovered once paid and determined that consequently no "specific property" upon which a constructive trust could be imposed existed. Therefore, a "hybrid class action" was inappropriate. The court, without discussion, also found the basis for a "spurious" class action did not exist.

New Jersey

Olive v. Graceland Sales Corp., 61 N.J. 182, 293 A.2d 658 (1972), was originally a private action against a company selling grave sites and the Attorney General because of his official responsibilities with respect to cemetaries. The Attorney General cross complained against Graceland and the plaintiffs attempted to bring the action on behalf of all persons who had been victimized by the alleged misrepresentations.

The plaintiffs' action alleged fraudulent misrepresentations in the sale of burial plots, legal infirmities in written contracts and fraudulent imposition on buyers in entry of default judgments against them. They

sought rescission of contracts and relief for all persons victimized. The Attorney General cross-complained alleging violation of the Consumer Fraud Act and asked injunctive relief on behalf of the named individuals. The court found no intention in the Consumer Fraud Act to vest sole power in the Attorney General's office to act in the area of consumer fraud.

The court also found that a 1971 amendment to the Consumer Fraud Act which authorized private actions did not bar a class action by a private litigant for violations of that act or for wrongs actionable in absence of the statute. However, if the Attorney General were to sue for a class, there might be no need for a private class action if the suit were on behalf of the same class and sought a remedy which would deal adequately with the consumer grievance. In this instance, it appeared to the court that the parties represented and relief sought were not so coextensive and the private class action was allowed.

Kugler v. Koscot Interplanetary, Inc., 120 N.J. Super. 216, 293 A.2d 682 (1972), involved an action by the Attorney General for injunction, an accounting, restitution of monies paid, civil penalties and revocation of Koscot's certificate of authority to transact business in New Jersey in addition to other remedies. The defendants alleged that the Attorney General was not entitled to bring this consumer class action because there were no common elements of law and fact for each class member and because notice of the action was not given in accordance with R.4:32-2(b).

The court, citing Kugler v. Romain, 110 N.J. Super. 470, 266 A.2d 144 (1971), stated that the purchasers of distributorships were an ascertainable class with a sufficient community of interest to justify the action by the Attorney General. The objection that notice under the general class action must be given to class members was answered by saying there was no direction requiring such notice by the Attorney General. The action brought by the Attorney General is in the "nature of a class action." However, the court found no necessity of the Attorney General complying with the early notice requirement when notice would be given to the class members upon entry of judgment in the case.

Riley v. New Rapids Carpet Center, 61 N.J. 218, 294 A.2d 7 (1972) was a private consumer class action suit predicated on alleged bait-and-switch sales tactics in contravention of the Consumer Fraud Act. On pretrial applications, the trial court granted judgment in favor of one defendant and dismissed the class action aspects of the suit allowing only named plaintiffs to proceed with the suit. The court found that the lower court had dismissed the class action because of diverse specifications of fraudulent behavior at a premature stage in the proceedings. In the court's view, a plaintiff should be permitted to seek relevant data from defendants where business practices appear to be sharp or slick in order to determine the appropriateness of maintaining the action on behalf of a class. Here the court found the dismissal of the class action inappropriate at such an early stage.

Kentucky

In Re Glenn W. Turner Enterprises Litigation, 521 F.2d 775 (3rd Cir. 1975). The Third Circuit Court of Appeals has reversed a pretrial order of

the Federal District Court, Western District of Pennsylvania, which had restrained all class members and parties acting through or on their behalf from instituting or continuing any actions in any state or federal court based on the activities of Glen W. Turner, unless the parties filed a notice of exclusion from the federal class action litigation.

The Kentucky Attorney General's office had obtained a judgment against Turner and his related companies prohibiting their deceptive trade practices and awarding nearly $500,000 to be distributed by the Attorney General's office to defrauded investors in Turner's enterprises. The district court's restraining order had prohibited attempts to collect on this judgment. The Attorney General's office maintained that it was not authorized to represent defrauded Kentucy citizens in the federal consolidated class actions. Consequently, he could not exclude Kentucky federal class members from the litigation and thereby avoid the district court's restraining orders.

The court of appeals construed the district court's order in light of the Federal Anti-Injunction Act 28 U.S.C. § 2283 (1970). The statute provides that "[a] court of the United States may not grant an injunction to stay proceedings in a State court, except as expressly authorized by Act of Congress, or where necessary in aid of jurisdiction, or to protect or effectuate its judgments." The final exception was easily dismissed because the district court had issued no orders which needed to be protected or effectuated by means of the injunction. The "jurisdictional" exception was also dismissed because the restraining order wasn't "necessary in aid of" the district court's jurisdiction. The court noted that the possible inability of the defendants to satisfy a subsequent federal judgment if Kentucky was allowed to pursue its claim against Turner did not support the entry of the restraining order. Finally, the court of appeals dismissed the district court's reliance on Federal Rule of Civil Procedure 23 as being an "Act of Congress" which authorized an otherwise prohibited injunction under 28 U.S.C. § 2283.

Service of Process

Arizona

People ex rel. Nelson v. Superior Court, Cty. of Navaho, 20 Ariz. App. 591, 514 P.2d 1042 (1973), involves three impound orders issued by the state to protect evidence needed in lawsuits filed under the Consumer Fraud Act. The orders were served by a member of the Attorney General's staff rather than a deputy sheriff or other person empowered to effect service by the Rules of Civil Procedure, 16 ARS, on persons other than the owner defendants.

The impounding of evidence occurred pursuant to the following statute:

> 44-1524. Powers of the attorney general ... 4. Pursuant to an order of the superior court, impound any record, book, document, account, paper, or sample of merchandise material to such practice and retain the same in his possession until the completion of all proceedings undertaken under this article or in the courts.

The court found this section creates a substantive right of impoundment for the protection of the buying public, service of which is not governed by the rules of civil procedure. Also, service upon the personnel in charge of the place of business at the time of impoundment was sufficient, it being unnecessary to serve the owner-defendant personally.

New York

LaBelle Creole v. Attorney General, 10 N.Y.2d 192 219 N.Y.S.2d 1, 176 N.E.2d 705, (1961), construing N.Y. EXEC. LAWS Sec. 63, sub'd 12., involved a subpoena issued to determine whether the plaintiff corporation was committing fraudulent acts within the state. The plaintiff was a Panamanian corporation, in the business of placing orders for liquor by residents of New York traveling abroad, and delivering the liquor duty free. The subpoena was served upon the plaintiff's president in New York City and required the giving of testimony and the production of books and records in an inquiry by the Attorney General into whether persistently fraudulent acts were being committed.

The court held that the plaintiff was subject to service of process although it was a foreign corporation. The court reasoned that where the purpose of the proceeding is the protection of the state's citizens from potentially dangerous consequences, less evidence of the corporation's doing business in the state is required that might otherwise be required. A foreign corporation's immunity from suit in New York on the ground that it is not doing business there, did not give it immunity from investigation by the Attorney General to determine whether it was violating the laws of the state.

Criminal Penalties

Iowa

Lenertz v. Municipal Court of the City of Davenport, 219 N.W.2d 513 (1974), was a decision of the Iowa Supreme Court construing subsection 2b of the Iowa Consumer Fraud Act, § 713.24, Code of Iowa. The Attorney General's office had argued that although criminal penalties were not found in the Consumer Fraud Act, a violation of subsection 2b could be punished criminally by means of a general misdemeanor statute which applied whenever a prohibited act was not otherwise penalized by statute, § 687.6, Code of Iowa.

The supreme court was faced with a violation of subsection 2b which prohibits referral selling. Subsection 2b voids all contracts induced by referral selling and, in the view of the court, this constituted a penalty in the terms of § 687.6. Therefore, the general misdemeanor statute did not apply. This decision does not reach the effect of violations on the general prohibitory clause, subsection 2a.

Contempt - Subpoenas

Kansas

State v. McPherson, 208 Kan. 511, 493 P.2d 228 (1972), construing KAN. STAT. ANN. Secs. 50-610, et seq. The Kansas Supreme Court held that an

assurance of discontinuance filed under KAN. STAT. ANN., Sec. 50-610 is not a court order, and violation of such an assurance is therefore not punishable as contempt. Admission of violations of the assurance, the terms of which are not contained in a court order, do not constitute admissions of violation of any order or injunction. The judgment of the district court convicting the appellant magazine subscription seller of contempt was reversed.

New Jersey

Application of the Attorney General of New Jersey, 116 N.J. Super. 143, 281 A.2d 284 (1971), construing N.J. STAT. ANN. Sec. 56: 83, 3-4. This case involved an action brought to hold the defendant in contempt for failure to obey a subpoena issued under the Consumer Fraud Act. The defendant alleged that the subpoena was invalid since it required immediate turnover of documents. The court held that whereas a "forthwith" subpoena as originally issued was invalid, oral modification obviated dangers in requiring immediate turnover of the documents. Refusal to honor the subpoena was a contemptible offense.

New York

In the Matter of Hartsdale Canine Cemetary, Inc., v. Lefkowitz, 37 App. Div.2d 548, affirmed, 29 N.Y.2d 702 (1971), construing N.Y. EXEC. LAW Sec. 63, sub'd 12. This was an action by petitioner to quash a subpoena duces tecum, issued by the Attorney General. The state served the subpoena during the course of an investigation of defendant's animal cemetary and its use of a perpetual maintenance trust fund. The court held that under the facts of this case, the Attorney General had properly exercised his discretion in conducting the investigation. No abuse having occurred, the defendant was ordered to comply with the subpoena.

Discovery

New York

People by Lefkowitz v. Volkswagen of America, Inc., 342 N.Y.S.2d 749, 41 App. Div.2d 827 (1973), involved discovery pursuant to an action filed by the Attorney General seeking an injunction against alleged deceptive acts by Volkswagen, Inc., restitution and a civil penalty for false advertising.

Pretrial disclosure by the Attorney General of individual names and addresses of persons allegedly suffering injury was sought. The court denied discovery because as the suit was brought in the name of the state, individual names were not relevant. The names were as readily available from Volkswagen's own records and the names were fairly characterized as the Attorney General's work product in preparation for trial.

Investigative Demand

Kentucky

Commonwealth ex rel. Hancock v. Pineur, 533 S.W.2d 527 (Ky. 1976). The Kentucky Supreme Court has upheld the right of the Division of Consumer

Protection to issue an "Investigative Demand" without reciting on its face the reason or grounds for issuing it. KRS § 367.240 authorizes the Attorney General to execute such a demand, but defendant argued that in order for there to be judicial review of the demand, a showing of reasonable grounds for issuance had to be on its face.

The court quoted extensively from United States v. Morton Salt Co., 338 U.S. 632 (1975), in holding that "'law-enforcing agencies have a legitimate right to satisfy themselves that corporate behavior is consistent with the law and the public interest.'" Judicial review does not depend on an on-the-face showing of reasonable grounds, said the court. "[A]s in any other case in which a plaintiff has been or is about to be injured in his person or property, once he makes a prima facie showing of facts entitling him to relief the defendant agency has the onus of coming forward with a showing of reasonable justification, else it runs the risk of an adverse judgment."

Injunction

Florida

Health Care Services, Florida, Inc. v. Shevin, 311 So.2d 761 (Fla. App. 1975). The trial court temprorarily enjoined the defendants from operating their weight reducing business in Dade and Broward Counties, or in any other county in Florida, until they obtained the proper county occupational licenses. However, Florida's District Court of Appeal held that the provision of the injunction pertaining to territorial limits was too broad and was amended to run within the limits of the jurisdiction in which the action was brought.

North Carolina

State ex rel. Robert Morgan v. Dare To Be Great, Inc., et al., 15 N.C. App. 275, 189 S.E.2d 802 (1972), construing N.C. GEN. STATE. Secs. 75-11, 14-291.2, 25A-37. This was an action by the State of North Carolina for a preliminary injunction against certain illegal activities including participation in a pyramid or chain sales scheme. Defendant claimed the court should not consider evidence by affidavit and that the state was not entitled to injunctive relief, as private individuals had a remedy and the state had not shown irreparable injury. The court held that affidavits may be considered by the court when considering issuance of a preliminary injunction. Also, even though individual remedies may exist, the state may obtain injunctive relief against the continuation of pyramid of chain sales schemes.

Washington

State v. Ralph Williams Northwest Chrysler Plymouth, Inc., 82 Wash.2d 265, 510 P.2d 233 (1973). This case involved a car dealer who was engaged in many allegedly unfair and deceptive trade practices which were sought to be enjoined by the Attorney General's office. The dealer ceased selling cars in the State of Washington on December 30, 1970 after this action was brought. The defendant claimed the injunction sought was moot. Although the defendant claimed to be an "inactive, defunct corporation," the court found certain signs of corporate life in the defendant and other defendants were yet in existence.

The state claimed the cessation of business was not voluntary and consequently the mootness question, when an injunction was sought, must be decided favorably to the defendant only where the allegedly wrongful behavior could not reasonably be expected to recur. A heavier burden is placed on the party urging mootness of an injunction where, as here, business practices are ceased subsequent to the institution of suit. Also, the court found restitutionary issues which required adjudication and therefore, the suit had not been mooted by cessation of the violative behavior.

Pennsylvania

Commonwealth v. Roman Homes, Inc. and Frank Arenella, Sr., No. 3 (Court of Common Pleas, Luzerne County, filed March 24, 1975). A decision has been handed down in the above matter in which a preliminary injunction was ordered against certain building contractor abuses.

The court noted that the action was being brought under the Unfair Trade Practices and Consumer Protection Act, a legislative enactment which provides a remedy to the state exclusive of any remedy the alleged injured homeowners might have. Consequently, the defendants' contention that the plaintiffs had an adequate remedy at law was dismissed. The second contention of the defendants was that no irreparable harm had been established. The court reviewed the facts which established delayed completion dates and poor workmanship in home construction and determined that these failures constituted violations of the consumer protection law. Under Pennsylvania case law if a defendants' conduct is unlawful it is tantamount to being injurious to the public and for one to continue such conduct constitutes irreparable harm. Finally, the court found that the individual defendant, the corporate president, was the moving force behind the corporation and liable for the fraudulent acts of the corporation.

Exhaustion of Administrative Remedies

Massachusetts

Gordon v. Hardware Mutual Casualty Company, 361 Mass. 582, 281 N.E.2d 573 (1972). This involved a private class action against an automobile insurance company for increasing the cost of insurance in violation of, among other statutes, the Consumer Protection Act. G.L. c. 93A. A demurrer was granted by the supreme court on the ground that the plaintiff had failed to exhaust the available administrative remedies within the Insurance Commission.

To the plaintiff's objection that the administrative remedies could not provide the relief available under the Consumer Protection Act (minimum damages, multiple damages, attorneys fees and costs) the court responded: "The question is not whether the alternative (administrative) remedy is in all respects as prompt and as broad, but whether it is inadequate." (281 N.E.2d at 576.) The court found this action to be one involving rate regulation, and consequently the insurance commission administrative remedies must be exhausted before the court would entertain jurisdiction over the matter.

Res Judicata

New Jersey

Kugler v. Banner Pontiac, Buick, Opel, Inc., 120 N.J. Super. 572, 295 A.2d 385 (1972), involved a challenge to the Attorney General's action under the Consumer Fraud Act on the basis that it was precluded by an earlier criminal acquittal on a disorderly persons charge arising out of the same operative facts.

The court noted that the standard of proof necessary to prove the disorderly persons charge was higher than that necessary to prove violation of the Consumer Fraud Act. Additionally, to hold that the Attorney General, as a prosecutor in criminal matters and as a plaintiff in a civil matter, or as attorney for the division of the Executive Branch, such as the Department of Environmental Protection or the Division of Motor Vehicles, is the "identical party" for purposes of collateral estoppel would emasculate much remedial legislation. The court held that the Attorney General was not barred from bringing suit under the Consumer Protection Act on either collateral estoppel or res judicata grounds despite the existence of a prior criminal acquittal of a charge arising from the same factual allegations.

Jurisdiction

New Jersey

Kugler v. Romain, 110 N.J. Super. 470, 266 A.2d 144 (1971), construing N.J.S.A. 12A:2-302, 56:8-2, 8, 13, 14. The court, reviewing a series of challenges to the Attorney General's suit under the New Jersey Consumer Protection Act, held as follows:

a. The section of the Consumer Protection Act empowering the Attorney General to hold hearings and to assess penalties against persons practicing fraudulent and deceptive sales practices provides an alternative proceeding and does not deprive the court of jurisdiction to assess a penalty for violation of the Act.

b. The unconscionability of a contract or a clause therein within the Uniform Commercial Code provision authorizing courts to refuse to enforce unconscionable contracts or clauses is not a matter of private concern only, and may be asserted by the Attorney General in an action under the Consumer Protection Act.

New Hampshire

State v. Kay, 350 A.2d 336 (N.H. 1975). The sole issue which the district court transferred to the New Hampshire Supreme Court without ruling was whether to grant the defendant's motion to dismiss the state's complaint. The complaint charged that the defendant violated the misdemeanor statute regulating business practices for consumer protection. The defendant allegedly falsified his name as a representative of a Florida resort association and represented that an $18 fee for a vacation certificate was refundable, even though such certificates specified the fee was nonrefundable.

In denying the defendant's motion to dismiss which charged "The complaint, on its face fails to state a criminal offense," the court ruled that the district court could assume jurisdiction over conduct constituting a misdemeanor within the consumer protection statute. Accordingly, it remanded the case to the district court.

FOOTNOTES

1. 16 AM. JUR. 2d Sec. 137, p. 336, and footnote 17 thereunder indicate that this is a presumption which is applied in every jurisdiction.

2. See People v. Gym of America, Inc., 493 P.2d 660 (Col. 1972), State ex rel. Turner v. Koscot Interplanetary, Inc., 191 N.W. 2d 624 (Iowa 1971), Kugler v. Market Development Corp., 306 A.2d 489 (N.J. 1973), State by Lefkowitz v. I.T.M., Inc., 275 N.Y.S. 2d 303 (1966).

3. Kugler v. Market Development Corp., supra.

4. State by Lefkowitz v. I.T.M., Inc., supra.

5. See Holiday Magic, Inc. v. Warren, 357 F. Supp. 20, (E.D. Wisconsin, 1973) in which a wide variety of civil rights claims were argued unsuccessfully to the district court.

6. People v. Gym of America, Inc., supra, People v. Witzerman, 29 Cal. App. 3d 169, 105 Cal. Rptr. 284, (1972), Imperial Inventors International v. People ex rel William Scott, USDC (Northern District, Illinois) #73 C 2244, State ex rel. Turner v. Koscot, supra; State v. Koscot Interplanetary, 212 Kan. 660, 512 P.2d 416 (1973), Kugler v. Market Development Corp., supra; State v. Ralph Williams; State v. Reader's Digest Ass'n., 81 Wash.2d 259, 501 P.2d 259, (1972), H.M. Distributors v. Dept. of Agriculture, 55 Wisc.2d 261, 198 N.W.2d 598 (1972), Holiday Magic v. Warren, supra; Carpets by the Carload v. Warren, 368 F. Supp. 1075, (E.D. Wisconsin, 1973).

7. 16 AM. JUR. 2d Sec. 552 p. 951, footnote 20 and cases cited thereunder.

8. Committee of State Officials on Suggested State Legislation, Council of State Governments, 1970 SUGGESTED STATE LEGISLATION, 141 (1970).

9. Legislative Bill 327, 1974, amending 87-301 et seq. STATUTES OF NEBRASKA.

10. A similar argument as to the effect of civil penalties provisions has been made unsuccessfully in State v. Ralph Williams N.W. Chrylser Plymouth, Inc., 510 P.2d 233, (1973). The Washington Supreme Court stated at page 242, "The existence of (civil) penalties in an act, however, does not make the act quasi-criminal in nature. The legislature has wide discretion in the choice of remedies to promote compliance with a law, and providing for fines in a civil proceeding does not convert the proceeding to a criminal or penal one.... Therefore, construction of RCW 19.86 is not governed by the strict rules pertaining to penal structures." See also, People v. Witzerman, 29 Cal. App. 3d 169, 105 Cal. Rptr. 284 (1972).

11. Repealed effective Jan. 1, 1974 and replaced by the Kansas Consumer Protection Act, KSA Sec. 50-623 et seq.

12. Speech of Attorney General Warren B. Rudman to National Conference of State, County and City Consumer Office Administrators, June 19, 1974, Washington, D.C. For a discussion of the relative merits of civil and criminal sanctions, see Committee on the Office of Attorney General, THE USE OF CIVIL REMEDIES IN ORGANIZED CRIME CONTROL, (December, 1975).

13. Lenertz v. Municipal Court of the City of Davenport. Iowa Supreme Court (June 1974), a case in which the Iowa Consumer Protection Division tested its theory that violations of the Iowa Consumer Fraud Act could be prosecuted criminally via the provisions of a general misdemeanor section of the Code. The Supreme Court of Iowa decided that Sec. 713.24 (2)(b), Code of Iowa, since it voided all contracts induced by referral selling techniques, contained its own penalty and consequently the general misdemeanor statute did not come into play.

14. E.g., Kugler v. Market Development Corp., 306 A.2d 489 (1973); and, Holiday Magic, Inc. v. Warren, 357 F. Supp. 20 (E.D. Wisconsin 1973).

15. 73 AM. JUR. 2d Sec. 296, p. 455, Footnote 47 and cases cited thereunder.

16. The relevant portions of the rules adopted include:

Ag 122.01 Unfair Trade Practice. The promotional use of a chain distributor scheme in connection with the solicitation of business investments from members of the public is an unfair trade practice under section 100.20, Wis. Stats. When so used the scheme serves as a lure to improvident and uneconomical investment. Many small investors lack commercial expertise and anticipate unrealistic profits through use of the chance to further perpetuate a chain of distributors, without regard to actual market conditions affecting further distribution and sale of the property purchased by them or its market acceptance by final users or consumers. Substantial economic losses to participating distributors have occurred and will inevitably occur by reason of their reliance on perpetuation of the chain distributor scheme as a source of profit.

Ag 122.02 Definitions. "(1) 'Chain distributor scheme' is a sales device whereby a person, upon a condition that he make an investment, is granted a license or right to recruit for profit one or more additional persons who also are granted such license or right upon condition of making an investment and may further perpetuate the chain of persons who are granted such license or right upon such condition.... A limitation as to the number of persons who may participate, or the presence of additional conditions affecting eligibility for the above license or right to recruit or the receipt of profits therefrom, does not change the identity of the scheme as a chain distributor scheme."

Ag 122.02(2) further states: "... and includes, without limitation, franchises, business opportunities and services. It does not include real estate, securities registered under Chapter 551, Wisc. Stats., or sales demonstration equipment and materials furnished at cost for use in making sales and not for resale."

Ag 122.03 Prohibition. No person shall promote, offer or grant participation in a chain distributor scheme.

17. For example, see State ex rel. Turner v. Koscot Interplanetary, Inc., 191 N.W.2d 624 at 629, where it is stated: "And as we have consistently held, the legislature may be its own lexicographer."

18. Miller v. Board of Public Works, 195 Cal. 477, 234 P. 281 (1925).

19. Fourteenth Amendment to the Constitution of the United States.

20. Hanson v. Denckla, 357 U.S. 235 (1958); and, Garren v. Rollis, 85 Idaho 86, 375 P.2d 994 (1962).

21. International Shoe Corp. v. Washington, 326 U.S. 310 (1945).

22. Milliken v. Meyer, 311 U.S. 457, 463 (1940).

23. Deutsch v. Aderhold, 80 F.2d 677 (5th Cir. 1935).

24. See also, Imperial Investors International v. People ex rel. William Scott, U.S. District Court, Northern District of Illinois, Eastern Division, No. 73 C 2244, where the issue was raised but dismissed without discussion.

25. 47 Am. Jur. 2d § 31, footnote 12.

26. Dyke v. Taylor Implement Mfg. Co., 391 U.S. 216 (1968).

27. Valentine v. Chrestensen, (1942) 316 U.S. 52, 54, 62 S.Ct. 920 but see, Va. State Board of Pharmacy v. Citizens Consumer Council, Inc., et al., ____U.S.____ (1976) (advertising of prescription drug prices is not wholly outside the protection of the first amendment).

28. Imperial Investors, supra, footnote 24.

29. Art. VI, § 2, U.S. Constitution, the "supremacy clause" is the basis for resolution of such alleged inconsistent laws."

30. Art. I § 8 [3] U.S. Constitution.

31. See Reader's Digest Assn. v. States, 501 P.2d 290 (1972) where a lottery under state law was considered an unfair trade practice when not so considered by the F.T.C.

32. § 110.04 WISC. STATS. (1935).

33. 16 AM. JUR. 2d § 258 p. 507.

34. Chapter 72-28, Laws of Florida, 1972 and Section 83.69, Florida Statutes (1973).

35. 83.271 Mobile home parks, eviction, grounds, proceedings:

(1) A mobile home park owner or operator may not evict a mobile home dweller other than for the following reasons:

(a) Non-payment of rent

(b) Violation of some federal, state or local ordinance which may be deemed detrimental to the safety and welfare of other dwellers in the mobile home park.

(c) Violation of any rule or regulation established by the park-owner or operator, provided the mobile home owner received written notice of said violation at least thirty days prior to the date he is required to vacate. A copy of all rules and regulations shall be delivered by the park owner or operator to the mobile home owners prior to his signing the lease or entering into a rental agreement. A copy of the rules and regulations also shall be posted in the recreation hall, if any, or some other conspicious place in the park.

(2) Cumulative eviction proceedings may be established in a written lease agreement between the park owner or operator and a mobile home dweller in addition to those established by law.

(3) This section shall not preclude summary eviction proceedings, and if the park operator or owner does not have one of the above grounds available, the park tenant may raise the same by affirmative defense.

36. The new ground for eviction reads:

(d) "Change in use of land comprising the mobile home park or a portion thereof on which a mobile home to be evicted is located from mobile home rentals to some other use, provided all tenants effected are given at least ninety days' notice, or longer if provided for in a valid lease, of the projected change of use and of their need to secure other accommodations."

37. In Frye v. Taylor, 263 So.2d 835 (Fla. App. 1972), a private action on a note executed to obtain a loan in order to enable the defendant to purchase a directorship in Koscot Interplanetary. The court found such a purchase to be participation in a lottery (F.S.A. 849.091) and also the purchase of a security (F.S.A. 517.01 et seq.). The former is a violation of law, so the obligation incurred was void. The latter, absent compliance with registration requirements, was similarly voidable and the purchaser was entitled to recover monies already paid to the seller.

38. See Committee on the Office of Attorney General, STATE PROGRAMS FOR CONSUMER PROTECTION, (1973), pp. 42-43; and J.C. Penney Company v. Parrish Company, 339 F. Supp. 726 (D. Idaho 1972).

39. Of interest in this area is also Hockley v. Hargitt, 82 Wash. 2d 337, 510 P.2d 1123 (1973), where it was held that RCW 19.86.090 limits recovery of damages for a private party to "actual damages" but allows a private party to enjoin future violations of the Consumer Protection Act.

40. This result was changed by enactment of the 1973 Kansas Consumer Protection Act, see § 50-624 (3) K.S.A.

41. The case of Sound Storm Enterprises, Inc. v. Keefe, 209 N.W.2d 560 (Iowa 1973) at p. 569, distinguishes American Benevolent Ass'n. and must be read together with that decision to determine the current status of Iowa law as to imposing contempt on corporate officers for violation of an injunction by the corporation or its agents and employees. Generally, see 17 AM. JUR. 2d Contempt, § 12.

TABLE OF CASES

TABLE OF CASES

Grayned v. City of Rockford, 408 U.S. 104 (1972), p. 2.
Griswold v. Connecticut, 381 U.S. 479 (1965), p. 36.
Hanson v. Denckla, 357 U.S. 235 at 253 (1958), p. 14.
Hardy v. Toler, 228 N.C. 303, 218 S.E.2d 342 (1975), p. 61.
Hav-A-Tampa Cigar Co. v. Johnson, 149 Fla. 148, 5 So.2d 433 (1941), p. 38.
Health Care Services, Florida, Inc. v. Shevin, 311 So.2d 761 (Fla. App. 1975), p. 68.
Hearing Aid Association of Kentucky v. Bullock, ____ F. Supp. ____ (E.D. Ky. 1976), p. 51.
H.M. Distributors of Milwaukee, Inc. v. Department of Agriculture, 55 Wis. 2d 261, 198 N.W.2d 598 (1972), pp. 7, 8, 24, 35, 43.
Holiday Magic, Inc. v. Warren, 357 F. Supp. 20 (E.D.Wis. 1973) pp. 7, 20, 23, 26.
Holiday Magic, Inc. v. Warren, 357 F. Supp. 20 (E.D.Wis. 1973), vacated, 497 F.2d 687 (7th Cir. 1974), pp. 12, 29, 36.
Holiday Magic, Inc. v. Warren, 497 F.2d 687 (7th Cir. 1974), pp. 7, 20, 23, 26.
Home Building & Loan Association v. Blaisdell, 290 U.S. 398 (1934), p. 12.
Household Finance Corp. v. Mowdy, 13 Ill. App. 822, 300 N.E.2d 863 (1973), p. 56.
Hunter v. Haun, 210 Kan. 11, 499 P.2d 1087 (1972), p. 48.
In Re Brandywine Volkswagen, Ltd., 306 A.2d 24 (Del. Super. Ct. 1963), pp. 45, 54.
In Re Glenn W. Turner Enterprises Litigation, 521 F.2d 775 (3rd Cir. 1975), p. 64.
In the Matter of Hartsdale Canine Cemetary, Inc. v. Lefkowitz, 37 App. Div. 2d 548, aff'd, 29 N.Y.2d 702 (1971), p. 67.
International Shoe Co. v. Washington, 326 U.S. 310 (1945), p. 17.
Iowa v. Union Asphalt & Roadoils, Inc., 281 F. Supp. 391 (S.D. Iowa, 1968), aff'd 408 F.2d 1171 (8th Cir. 1969), aff'd 409 F.2d 1239 (8th Cir. 1969), p. 62.
Iowa v. Willex Products & Murphy, (Polk County District Court, 1975), p. 55.
Joseph A. Kaplan & Sons, Inc. v. FTC, 347 F.2d 785 (D.C. Cir. 1965), p. 35.
Joseph v. Norman's Health Club, Inc., et al., 532 F.2d 86 (8th Cir. 1976), p. 58.
Koscot Interplanetary, Inc. v. King, 452 S.W.2d 531 (Tex. Civ. App. 1970), p. 39.
Kugler v. Banner Pontiac, Buick, Opel, Inc., 120 N.J. Super. 572, 295 A.2d 385 (1972), pp. 21, 70.
Kugler v. Haitian Tours, Inc., 120 N.J. Super. 260, 293 A.2d 706 (1972), p. 59.
Kugler v. Koscot Interplanetary, Inc., 120 N.J. Super. 216, 293 A.2d 682 (1972), pp. 41, 64.
Kugler v. Market Development Corp., 124 N.J. Super. 314, 306 A.2d 489 (1973), pp. 5, 14, 22, 24, 59.
Kugler v. Romain, 110 N.J. Super. 470, 266 A.2d 144 (1971), pp. 55, 64, 70.
LaBelle Creole v. Attorney General, 10 N.Y.2d 192 219 N.Y.S.2d 1, 176 N.E.2d 705, (1961), p. 66.
Ledisco Financial Services, Inc. v. Viracola, 533 S.W.2d 951 (Tex. Civ. App. 1976), p. 58.
Ledwith v. Fennell, No. 76-0-148 (D. Neb. April 13, 1976), p. 52.
Lefkowitz v. Compact Association, Inc., 22 App. Div.2d 129 affirmed, 17 N.Y.2d 758 (1966), p. 56.
Lenertz v. Municipal Court of the City of Davenport, 219 N.W.2d 513 (1974), p. 66.

Mahood v. Bessemer Prop., Inc., 18 So.2d 775 (Fla. 1944), p. 38.
McGee v. International Life Insurance Co., 355 U.S. 220 (1957), p. 17.
Mourning v. Family Publications Service, Inc., 411 U.S. 356 (1973), p. 2.
Murphy v. Erwin-Wasey, Inc., 460 F.2d 661 (1st Cir. 1972), p. 16.
National Bellas Hess, Inc. v. Department of Revenue, 386 U.S. 753 (1967), p. 17.
New York v. J. S. Garlick Parkside Memorial Chapels, Inc., 23 N.Y.2d 754, 244 N.E.2d 467, 296 N.Y.S.2d 952 (1968), p. 59.
NLRB v. Jones & Laughlin, 301 U.S. 1 (1937), p. 21.
Olive v. Graceland Sales Corp., 61 N.J. 182, 293 A.2d 658 (1972), p. 63.
Palm Beach Mobile Homes, Inc. v. Strong, 300 So.2d 881 (Fla. 1974), pp. 37, 38.
Parker v. Fennell, No. CV 76-1-75 (D. Neb., April 16, 1976), p. 52.
People v. Abbott Maintenance Corp. and Installment Dept., Inc., 11 App. Div.2d 136, 201 N.Y.S.2d 895, aff'd, 9 N.Y.2d 810, 215 N.Y.S.2d, 761 175 N.E.2d 341 (1961), p. 55.
People v. Superior Court of Los Angeles (Jayhill), 107 Cal. Rptr. 192, 507 P.2d 1400 (1973), p. 43.
People v. Superior Court of Los Angeles (Kaufman), 115 Cal. Rptr. 813, 525 P.2d 716 (1974), p.30.
People v. Witzerman, 29 Cal. App.3d 169, 105 Cal. Rptr. 284 (1972), pp. 4, 20, 22.
People by Lefkowitz v. Volkswagen of America, Inc., 342 N.Y.S.2d 749, 41 App. Div.2d 827 (1973), p. 67.
People ex rel. Dunbar v. Gym of America, Inc., 177 Colo. 97, 493 P.2d 660 (1972), pp. 2, 4, 11, 19, 34, 44.
People ex rel. Kelley v. Koscot Interplanetary, Inc., 37 Mich. App. 447, 195 N.W.2d 43 (1972), p. 41.
People ex rel. Mosk v. National Research Company of California, 201 Cal. App.2d 765, 20 Cal. Rptr. 516 (1961), p. 4.
People ex rel. Nelson v. Superior Court, Cty. of Navaho, 20 Ariz. App. 591, 514 P.2d 1042 (1973), p. 65.
Pittsburgh Press Co. v. Pittsburgh Commission on Human Relations, 413 U.S. 376 (1973), p. 24.
R.E.I. Industries, Inc. v. State, 477 S.W.2d 956 (Tex. Civ. App. 1972), p. 59.
Rice v. Snarlin, 131 Ill. App.2d 434, 266 N.E.2d 183 (1970), p. 47.
Riley v. New Rapids Carpet Center, 61 N.J. 218, 294 A.2d 7 (1972), pp. 44, 64.
Ritholz v. Ammon, 240 Wis. 578, 4 N.W.2d 173 (1972), p. 25, 28, 34.
Sauerman v. Stan Moore Motors, Inc., 203 N.W.2d 191 (Iowa 1972), p. 48.
Schaffer v. Granite Hotel, Inc., 110 N.J. Super. 1, 264 A.2d 240 (1970), p. 14.
Scott v. Western International Surplus Sales, Inc., 267 Ore. 512, 517 P.2d 661 (1974), p. 48.
Securities & Exchange Commission v. Koscot Interplanetary, Inc., 497 F.2d 473, (5th Cir. 1974), p. 40.
Sears, Roebuck & Co. v. Federal Trade Commission, 258 F.307 (7th Cir. 1919), p. 5.
Sellinger v. Freeway Mobile Home Sales, 110 Ariz. 537, 521 P.2d 1119 (1974), P.47.
Skinner v. Oklahoma, 316 U.S. 535 (1942), p. 20.
State v. AAMCO Automatic Transmission, 293 Minn. 342, 199 N.W.2d 444 (1972), pp. 44, 45.
State v. Advance Marketing Consultants, Inc., 66 Wis.2d 706, 255 N.W.2d 887 (1975), p. 18.

END

7 additional