

# CONSUMER PROTECTION IN OHIO AGAINST FALSE ADVERTISING AND DECEPTIVE PRACTICES

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## PRE-EXISTING OHIO AND FEDERAL PUBLIC LAW

### *False Advertising and Misbranding of Food, Drugs and Cosmetics*

Before the passage of Am. Sub. House Bill No. 39, which became effective September 25, 1969, Ohio regulated the advertising and labeling of food, drugs and cosmetics. The Ohio statutes prohibit false advertising with respect to such items.<sup>1</sup> Apparently the intent of the actor is not at issue because the focus of the legislation is on effect. An advertisement is false "if it is false or misleading in any particular."<sup>2</sup> An item is misbranded if the labeling is "false or misleading."<sup>3</sup> Provision is made for misdemeanor penalties if violations are found. In misbranding cases the director of agriculture or the board of pharmacy may place an embargo on the offensive items and may petition in court for an order of condemnation.<sup>4</sup> The court, if it finds a case of misleading labeling, may order the respondent to correct the misbranding if possible; otherwise the item is destroyed. In less severe cases the director of agriculture or the board of pharmacy may simply give written notice to the offender, with an opportunity to correct the violation.<sup>5</sup> These sections of the code appear to be little used because no annotations were noted thereunder. In 1969, despite its statutory authority, the department of agriculture did not initiate any criminal prosecutions and only about fifty embargo actions were initiated.<sup>6</sup> Departmental enforcement consisted for the most part of sending out letters of warning to offenders.<sup>7</sup> In cases involving deceptive advertising by meat retailers, the department was particularly ineffectual. On complaint by a customer or because of departmental initiative, offenders are warned by letter, but a department spokesman admitted that the illegal activities are often resumed after a few months cessation. The dearth of criminal prosecutions

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<sup>1</sup> OHIO REV. CODE ANN. § 3715.52(e) (Page 1954). The Ohio Statutes also prohibit falsely advertising "anything of value" offered for "use, purchase, or sale." OHIO REV. CODE ANN. § 2911.41 (Page 1954). Enforcement of this section, however, is left to local prosecutors, rather than an administrative agency. OHIO REV. CODE ANN. § 2911.42. With the workload occasioned by such cases as *Gideon v. Wainwright*, 372 U.S. 335 (1963), local prosecutors will be less inclined to prosecute under the general false advertising statute than the agencies are inclined to do under the more specific statutes. *Infra*, notes 6 and 7.

<sup>2</sup> OHIO REV. CODE ANN. § 3715.68(A) (Page 1954).

<sup>3</sup> OHIO REV. CODE ANN. §§ 3715.60, 3715.64, 3715.67 (Page 1954).

<sup>4</sup> OHIO REV. CODE ANN. § 3715.55 (Page 1954).

<sup>5</sup> OHIO REV. CODE ANN. § 3715.57 (Page 1954).

<sup>6</sup> Telephone conversation with the department on July 15, 1970.

<sup>7</sup> About 150 letters of warning were sent to offenders.

was attributed to the unwillingness of private citizens to initiate and follow through on criminal actions.

### *Criminal Fraud*

The crime of false pretenses is knowingly and designedly obtaining the property of another by means of untrue representations of fact with intent to defraud.<sup>8</sup> The crime requires that the defendant have knowledge of the falsity of his representation.<sup>9</sup> However, the real flaws in the offense lie in the requirement that there be an untrue representation of fact. A statement of opinion is not a statement of fact and therefore not indictable, unless expressed as a fact.<sup>10</sup> Although a promise made with no intent to perform it is a statement of fact, *i.e.*, the speaker's state of mind, the courts have virtually unanimously held that a false promise is not the proper subject of indictment.<sup>11</sup> Such conduct may form the basis for a private action in tort or on the contract,<sup>12</sup> but does not constitute a crime. These holes in the law render it particularly useless in false advertising cases where much of what is said falls under the heading of opinion, puffing or "trade talk" and yet may constitute the basis for sales of goods made as a result of deceptive advertising. In addition, there is real hesitancy by prosecutors to indict business men who are regarded as the pillars of the community, even though rogues may abound in their midst.<sup>13</sup>

### *Existing FTC Jurisdiction and Powers*

The Federal Trade Commission was created in 1914 and from the first, in addition to prohibiting trade restraint, it has seen fit to interdict false advertising.<sup>14</sup> In the Wheeler-Lea Act in 1938 Congress made unlawful misrepresentations concerning food, drugs, and cosmetics and as a result gave the FTC authority to prohibit them generally as "unfair or deceptive acts or practices."<sup>15</sup> The FTC's jurisdiction is over acts and practices or methods of competition *in* commerce.<sup>16</sup> However, the FTC has asserted jurisdiction over acts that are essentially intrastate in character although interstate in impact.<sup>17</sup> Further, the FTC has asserted jurisdiction over advertising solely on the basis that it is carried in media crossing the state

<sup>8</sup> PERKINS, CRIMINAL LAW 297 (2d ed. 1969).

<sup>9</sup> OHIO REV. CODE ANN. § 2911.01 (Page 1954).

<sup>10</sup> Williams v. State, 77 Ohio St. 468, 83 N.E. 802 (1908).

<sup>11</sup> Perkins, *supra* note 8, at 304. Dillingham v. State, 5 Ohio St. 280, 283 (1855).

<sup>12</sup> Burgdorfer v. Thielemann, 153 Ore. 354, 55 P.2d 1122 (1936).

<sup>13</sup> C. KATZ, THE LAW AND THE LOW INCOME CONSUMER 33-34 (1968).

<sup>14</sup> Circle Cilk Co., 1 F.T.C. 13 (1916).

<sup>15</sup> 52 Stat. 114 (1938), 15 U.S.C. § 52 (1964); 52 Stat. 111 (1938), 15 U.S.C. § 45 (1964).

<sup>16</sup> FTC v. Bunte Bros., 312 U.S. 349 (1941). Proposed legislation would expand the FTC's jurisdiction to include acts which "affect commerce." S. 3201, 91st Cong., 2d Sess. § 101 (1970).

<sup>17</sup> *E.g.*, Bankers Sec. Corp. v. FTC, 297 F.2d 403 (3d Cir. 1961).

lines.<sup>18</sup> The FTC is empowered to identify violations and to issue cease-and-desist orders.<sup>19</sup> The Justice Department is charged with prosecuting violations of the cease-and-desist orders.<sup>20</sup> The focus of the FTC in its attacks on false advertising is on the impact of the advertising and *not* on the asserter's fault whether intentional or negligent.<sup>21</sup> And, unlike strict liability in tort, FTC false representation law does not require a showing of harm to its victims. Further, it appears not to give a private remedy to those injured by false advertising.<sup>22</sup> The FTC has a responsibility to protect "that vast multitude which includes the ignorant, the unthinking and the credulous."<sup>23</sup> That is to say the FTC will weigh the effect of the statement against the lowest common denominator of the audience it seeks to protect, which is composed of "dolts" if compared to the mythical "reasonable man" of tort law.

When you—or we—are deciding whether a trade practice is likely to mislead the public, I think it important to bear in mind that the objective is to protect the whole public, not just the high school or college graduates, or people with an I.Q. of 100 or above, or the "average" man, whoever he is. The extent of this problem is not inconsiderable, because probably 20% of the population has an I.Q. below 90, and 1/3 of adults read at not better than seventh grade level. I am not saying that we should insist on advertising being moronic; but I am saying that in deciding whether violation of a deceptive practice statute has occurred, we should consider the degree of understanding of the consumer audience to whom the advertising or selling method is addressed.<sup>24</sup>

The FTC has been criticized for its complex and time-consuming procedures which lead to weak enforcement.<sup>25</sup> Some of the wealthier advertisers deliberately take advantage of FTC procedures and lengthy court battles to continue profitable sales of misrepresented products for as long as possible.<sup>26</sup> The FTC's ineffectiveness has been attributed to its lack of power to imprison, fine, or assess or award damages. At most it can issue a cease-and-desist order which can be appealed to the courts within sixty days after issuance.<sup>27</sup> On the other hand, the mere threat of an FTC in-

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<sup>18</sup> *Shafe v. FTC*, 256 F.2d 661 (6th Cir. 1958).

<sup>19</sup> 15 U.S.C. § 45(b) (1964).

<sup>20</sup> 15 U.S.C. § 45(1) (1964).

<sup>21</sup> *FTC v. Algoma Lumber Co.*, 291 U.S. 67 (1934).

<sup>22</sup> *Cf. G. ALEXANDER, HONESTY AND COMPETITION* 9, n.59 (1967).

<sup>23</sup> *Charles of the Ritz Distributors Corp. v. FTC*, 143 F.2d 676, 679 (2d Cir. 1944).

<sup>24</sup> Address by Gale P. Gotschall, Assistant General Counsel for Federal-State Cooperation, Federal Trade Commission, "Why FTC Seeks Aid of the Attorneys General in Combating Consumer Deception and Unfair Competition," before the Western Conference of National Association of Attorneys General, Santa Fe, N.M., Sept. 2, 1966, pp. 7-8.

<sup>25</sup> KATZ, *supra*, note 13 at 51.

<sup>26</sup> *Id.*

<sup>27</sup> *FTC, Here is Your Federal Trade Commission* 4 (1964).

vestigation with its resulting bad publicity is enough deterrence for many honest businessmen.<sup>28</sup>

The U.S. Post Office Department discourages would-be hucksters and constitutes a definite deterrent to sharp operators. A postal fraud statute provides criminal penalties for using the mail to defraud.<sup>29</sup> An administrative statute empowers the Postmaster General to stop incoming mail from reaching the fraudulent operator.<sup>30</sup> The Post Office Department has an official policy that it has no authority to recover money or property or to take any action to adjust an unsatisfactory transaction.<sup>31</sup> However, some inspectors will begin processing complaints of mail fraud even if only a civil question is involved, and will try to resolve the matter by letter or telephone. If the inspector concludes intent to defraud is present, his findings will be submitted to a United States Attorney who decides whether to prosecute.<sup>32</sup>

The criminal fraud statute requires proof of a scheme to defraud and the use of the mails for execution of the scheme.<sup>33</sup> There is no requirement that anyone actually be defrauded or even a likelihood of fraud.<sup>34</sup> And, unlike the civil law of fraud, fraud can be found in "puffing" or "trader's talk."<sup>35</sup> For these and other reasons, a conviction was obtained in ninety-nine percent of the cases tried in fiscal 1964.<sup>36</sup>

#### ANALYSIS OF AM. SUB. H.B. NO. 39

##### *Passing Off*

Am. Sub. H.B. No. 39 adopts the Uniform Deceptive Trade Practices Act in Ohio almost verbatim, although with some important omissions. The heart of the statute consists of prohibited acts described in the legislation as "deceptive trade practices." These trade practices involve roughly either misleading trade identification or deceptive advertising. The first deceptive trade practice is passing off goods or services as those of another.<sup>37</sup> "Passing off" is simply "a convenient name for the doctrine that no one should be allowed to sell his goods as those of another."<sup>38</sup> Use of

<sup>28</sup> OGLVY, CONFESSIONS OF AN ADVERTISING MAN 93 (1963).

<sup>29</sup> 18 U.S.C. § 1341 (1964).

<sup>30</sup> 74 Stat. 654 (1960), 39 U.S.C. § 4005 (1964). 15 U.S.C. § 52 (1964) provides that no false advertisement may be disseminated through use of the mails.

<sup>31</sup> U.S. Post Office Dept., *How the Postal Inspection Service Protects You Against Mail Fraud* (1964).

<sup>32</sup> KATZ, *supra*, note 13, at 47.

<sup>33</sup> *Pereira v. United States*, 347 U.S. 1, 8 (1954).

<sup>34</sup> *E.g.*, *Hermansen v. United States*, 230 F.2d 173-74 (5th Cir.), *cert. denied*, 351 U.S. 924 (1956).

<sup>35</sup> *United States v. Whitmore*, 97 F. Supp. 733, 736 (S.D. Cal. 1951).

<sup>36</sup> KATZ, *supra* note 13, at 47.

<sup>37</sup> OHIO REV. CODE ANN. § 4165.02(A) (Page 1965).

<sup>38</sup> *Vogue Co. v. Thompson-Hudson Co.*, 300 F. 509, 512 (6th Cir. 1924). It is also illegal

a name or letter, or of a mark which is the same as that used by an established business constitutes passing off. Implicit in the right to relief of the injured competitor is the idea that he has acquired by his efforts a right in a name or other symbol which the courts will protect.<sup>39</sup> The other interest the courts are protecting is the public interest in the circulation of merchandise which will stand on its own merits without resort to deception or confusion with other products as a means of sale.<sup>40</sup> The term "passing off" is also used to describe covert substitution of a different brand of goods for the one requested by a customer.<sup>41</sup> Passing off is established as a tort at common law.<sup>42</sup> Although not highly enthusiastic, the FTC will occasionally intervene in these cases.<sup>43</sup>

### *Confusion As to Source, etc.*

It is a deceptive trade practice to cause a "likelihood of confusion or misunderstanding as to the source, sponsorship, approval, or certification of goods or services."<sup>44</sup> This section from the Uniform Deceptive Trade Practices Act forbids trade symbol infringement and reflects the trend of authority.<sup>45</sup> The following examples illustrate the breadth of potentially actionable confusion under the Uniform Act:

likelihood of confusion as to source exists where consumers may erroneously believe that the wellknown 'Yale' lock company manufactures a defendant's 'Yale' flashlights; likelihood of confusion as to sponsorship exists where consumer may erroneously believe that *Seventeen* magazine sponsors a defendant's 'Seventeen' girdles; likelihood of confusion as to approval exists where consumers may erroneously believe that *Consumer Reports* has approved a defendant's air-conditioner as a 'Best Buy;' and likelihood of confusion as to certification exists where consumers may erroneously believe that Underwriters' Laboratories has authorized use of its seal of approval on a defendant's toaster.<sup>46</sup>

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to cause a likelihood of confusion by use of misleading trade names. OHIO REV. CODE ANN. § 4165.02(c) (Page 1965). *E.g.*, The Drake Medicine Co. and Drake v. Glessner, 68 Ohio St. 337, 67 N.E. 722 (1903) ("Dr. Drake's German Croup Remedy" versus "Dr. Drake's Famous German Croup Remedy.")

<sup>39</sup> In *Lloyd Bros. v. William S. Merrill Chem. Co.*, 25 W. L. Bull. 319 (Super. Ct. 1891) the court protected plaintiffs' trade-mark in the word "Asepsin" by granting an injunction prohibiting defendant from using the name.

<sup>40</sup> *French Bros. Dairy Co. v. John Giacini*, 12 Ohio C.C.R. (n.s.) 134 *aff'd*, 84 Ohio St. 483 (1911); *Cloverleaf Restaurants Inc. v. Lenihan*, 79 Ohio App. 493, 72 N.E.2d 761 (1946).

<sup>41</sup> *E.g.*, *Block Light Co. v. Tapphorn*, 2 Ohio N.P. (n.s.) 553 (C.P. Hamilton 1904).

<sup>42</sup> *Safe-Cabinet Co. v. Globe Wernicke Co.*, 3 Ohio App. 24, 144 N.E. 711 (1924) *mod* and *aff'd*, 92 Ohio St. 532, 112 N.E. 478 (1915). OHIO REV. CODE § 2913.07 makes it a crime to willfully counterfeit a trade-mark with intent to use it for passing off purposes.

<sup>43</sup> ALEXANDER, *supra* note 22, at 159-61.

<sup>44</sup> OHIO REV. CODE ANN. § 4165.02(B) (Page 1965).

<sup>45</sup> *E.g.*, *Triangle Pub., Inc. v. Rohrlisch*, 167 F.2d 969 (2d Cir. 1948); See RESTATEMENT (SECOND); TORTS § 717 and comments (Tent. Draft No. 8, 1963).

<sup>46</sup> Dole, *Merchant and Consumer Protection: The Uniform Deceptive Trade Practices Act*, 76 YALE L.J. 485, 487 n. 15 (1967).

It is also a deceptive trade practice to use misleading descriptive representations and designations of geographic origin.<sup>47</sup> Section 43(a) of the Lanham Trademark Act contains an analogous provision.<sup>48</sup> The FTC will prohibit the false use of a name of geographic origin when the geographic location has become associated with favorable product characteristics.<sup>49</sup> The FTC follows private trademark law in the theory that geographic names are not subject to exclusive appropriation by the first user but remain available for the common use of others so located.<sup>50</sup> However, there is an exception when a geographic name has acquired secondary meaning as the source indicator of a single producer's products.<sup>51</sup>

### *False Advertising*

It is a deceptive trade practice to falsely represent sponsorship, "characteristics, ingredients, uses, benefits, or quantities."<sup>52</sup> This conduct includes false representations that a person is the representative, successor, associate, or affiliate of another.<sup>53</sup> It also includes false statements that goods were designed, approved, or sponsored by another.<sup>54</sup>

It is a deceptive trade practice to fail to reveal the prior use of goods.<sup>55</sup> This conduct was declared illegal at common law.<sup>56</sup> The FTC will prohibit such conduct or may affirmatively order a promoter to fully reveal characteristics of the product marketed.<sup>57</sup> It is also illegal to misrepresent the quality, grade or model of goods.<sup>58</sup> This conduct was also illegal under both common and federal law.<sup>59</sup>

<sup>47</sup> OHIO REV. CODE ANN. § 4165.02(D) (Page 1965).

<sup>48</sup> § 43(a) 60 Stat. 441 (1946), 15 U.S.C. § 1125(a) (1958).

<sup>49</sup> *Waltham Precision Instrument Co. v. FTC*, 327 F.2d 427 (7th Cir.), *cert. denied*, 377 U.S. 992 (1964) (use of Swiss movements).

<sup>50</sup> 3 CALLMAN, UNFAIR COMPETITION AND TRADEMARKS 1121 n. 80 (2d ed. 1950).

<sup>51</sup> *Id.* at 1225 n. 81. *See also*, *Cincinnati Vici Shoe Co. v. Cincinnati Shoe Co.*, 9 Ohio Dec. 579, 583 (Super. Ct. 1899): "It is true that geographical or generic names cannot be the subject of a trade-mark; but it is not true that a person using such words in unfair competition so that the public, by the use of such words, are led to suppose that they are buying the goods of one person when in fact they are buying the goods of another, may not be restrained from so using such words."

<sup>52</sup> OHIO REV. CODE ANN. § 4165.02(E) (Page 1954).

<sup>53</sup> *E.g.*, *Alaska Sales and Service, Inc. v. Rutledge*, 128 F. Supp. 1 (D. Alaska 1955) (false representation of automobile dealership franchise). In *Lipman v. Martin*, 5 Ohio N.P. 120 (Super Ct. 1898) the defendant had modeled his store, which was next to plaintiff's, so as to look like part of plaintiff's establishment. The court enjoined the defendant from representing his business, in any manner, as the business of the plaintiff, and from giving his store the appearance of being part of plaintiff's.

<sup>54</sup> Uniform Deceptive Trade Practices Act, Section 2(a)(5), Comment.

<sup>55</sup> OHIO REV. CODE ANN. § 4165.02(F) (Page 1965).

<sup>56</sup> *E.g.*, *Champion Spark Plug Co. v. Sanders*, 331 U.S. 125 (1947) (alternative holding)—(requiring disclosure that spark plugs were repaired).

<sup>57</sup> *E.g.*, *Mohawk Refining Corp. v. F.T.C.*, 263 F.2d 818 (3d Cir.), *cert. denied*, 361 U.S. 814 (1959), order modified, *CCH Trade Reg. Rep.* ¶ 17,710 (FTC 1966) (greater disclosure in advertising and representing that oil is re-refined).

<sup>58</sup> OHIO REV. CODE ANN. § 4165.02(G) (Page 1965).

<sup>59</sup> *E.g.*, *Burlington Mills Corp. v. Roy Fabrics, Inc.*, 91 F. Supp. 39 (S.D. N.Y.), *aff'd per*

Professor Dole has concluded that decisions under analogous § 43(a) of the federal Lanham Trademark Act suggest that a person who invokes these false advertising provisions will have to show that the defendant's advertisement is a false representation of "fact."<sup>60</sup> He goes on to point out that the "shrewd use of exaggeration, innuendo, ambiguity and half-truth is more efficacious from the advertiser's standpoint than factual assertions,"<sup>61</sup> but that the Uniform Act should not be so "literally and woodenly" interpreted.<sup>62</sup> I agree. In *Vulcan Metals Co. v. Simmons Mfg. Co.*<sup>63</sup>, Judge Learned Hand discounted as non-actionable misrepresentations about a vacuum cleaner to the effect that

it was absolutely perfect in even the smallest detail . . . ; that it was so simple a child of six could use it; that it worked completely and thoroughly; that it was . . . long-lived, easily operated, and effective; that it was the only sanitary portable cleaner on the market . . . ; and that perfect satisfaction would result from its use, if properly adjusted.<sup>64</sup>

These statements artfully blend ambiguities and generalities with the assertion that the product is long lasting, relate to its quality, and should be actionable under the Uniform Act.<sup>65</sup>

### *Trade Disparagement*

It is a deceptive trade practice to disparage the "goods, services, or business of another by false representation of fact."<sup>66</sup> Every beginning law student is familiar with this practice as a common law tort because

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*curiam*, 182 F.2d 1020 (2d Cir. 1950) (semble) (forbidding sale of second grade materials as first grade); *FTC v. Algoma Lumber Co.*, 291 U.S. 67 (1934).

<sup>60</sup> Dole, *supra* note 46, at 489.

<sup>61</sup> Quoting from HANDLER, *CASES ON TRADE REGULATION* 982 (3d ed. 1960).

<sup>62</sup> Dole, *supra* note 46, at 489.

<sup>63</sup> 248 F. 853 (2d Cir. 1918).

<sup>64</sup> *Id.* at 855.

<sup>65</sup> § 2(a)(7), OHIO REV. CODE ANN. § 4165.02(G) (Page 1965). *Baxter v. Ford Motor Co.*, 168 Wash. 456, 12 P.2d 409 (1932) held actionable a statement that a windshield would not shatter under the hardest impact as a representation of quality, where it shattered and caused injury. The statement is clearly one of fact. The Deceptive Trade Practices Act, however, requires only a "likelihood of confusion" in certain cases of misleading trade identification in Sections 2(a)(2) and (3), OHIO REV. CODE §§ 4165.02(B) and (C), and confers standing to invoke its provisions on any person "likely to be damaged" in section 3(a), OHIO REV. CODE § 4165.03 (Page 1965). If in fact advertising statements are untrue even though they are "mere puffing" or dealer's talk, or are difficult to identify as statements of fact, as in *Vulcan Metals*, one is prompted to inquire as to why the advertiser finds it necessary to resort to them. In such marginal cases as *Vulcan Metals*, the court ought not to be as hesitant to grant injunctive relief as it is to award damages. However, OHIO REV. CODE § 2911.42 which authorizes a prosecuting attorney to bring suit to enjoin false or fraudulent advertising practices has been interpreted not to apply to puffing or dealer's talk. *State v. Schaengold*, 13 Ohio L. Rep. 130, 133 (Cincinnati Mun. Ct. 1915): "Puffing seems to have at all times been considered legitimate and ethical, and defendant cites recent advertisements of local merchants offering . . . \$15.00 suits for \$8.90, etc., but there is a vast distinction between exaggerating the value or comparative quality and efficiency of an article and that of falsely misrepresenting such article."

<sup>66</sup> OHIO REV. CODE ANN. § 4165.02(H) (Page 1965).

of familiarity with the ancient English case wherein a brewer complained of an assertion by a competitor that he would give a peck of malt to his mare, and "she should pisse as good beare as Dickes doth Brew."<sup>67</sup> Disparagement by competitors was enjoined at common law.<sup>68</sup>

### "Bait and Switch" Advertising

The Ohio statute makes it a deceptive practice for a seller to utilize "bait advertising," a practice by which a seller seeks to attract customers by advertising at low prices products which he does not intend to sell in more than nominal amounts.<sup>69</sup> When the customer shows up at the store, the seller discourages purchasing the "bait," and tries to "switch" the customer to a higher priced item. This is accomplished by disparaging the bait or by exhausting what was a miniscule stock to begin with.<sup>70</sup> Particularly timely are bait advertising schemes of meat retailers who sell bulk quantities of hanging beef by baiting customers with promises of low priced steaks. When the customer appears he is told the advertised beef, which is commercial or low grade, is undesirable, and is switched to a much higher priced grade.

"Bait Advertising" has been held enjoined at common law by the manufacturer of the bait,<sup>71</sup> and Ohio authorized by statute local prosecutors to seek such relief.<sup>72</sup> The FTC takes the position that it is improper to assert the availability of a product which is not available for sale or which is available only in a form that is unacceptable to most customers.<sup>73</sup> Loss-leader selling wherein the seller tries to boost general sales by selling a leading item at or below cost is acceptable, however. This is true unless the seller tampers with the bait so that its performance is discouraging, disguises unpopular features or makes independent deceptive representations to disparage the announced product.<sup>74</sup>

<sup>67</sup> *Dickes v. Fenne*, 1 March 93, 1 Rolle Abr. 58, W. Jones 444 (K.B. 1639).

<sup>68</sup> *E.g.*, *Maytag Co. v. Meadows Mfg. Co.*, 35 F.2d 403 (7th Cir. 1929), *cert. den.*, 281 U.S. 737 (1930). *Cf.* *Hagmeier v. Hulshizer*, 11 Ohio N.P. (n.s.) 507 (C.P. Licking 1910) held sufficient against a general demurrer allegations in a petition that defendant circularized material disparaging plaintiff's flour. The court characterized the alleged conduct as libelous, but Prosser points out that if the statement reflects only upon the quality of what plaintiff has to sell, rather than on plaintiff personally, it is not defamatory; proof of special damage is essential to the cause of action and falsehood is not presumed, while in defamation truth is always a matter of defense, and damage need not be proved if the publication is actionable "per se." PROSSER, *CASES AND MATERIALS* 1105, n.1 (4th ed. 1967).

<sup>69</sup> OHIO REV. CODE ANN. § 4165.02(I), (K) (Page 1965).

<sup>70</sup> Uniform Deceptive Trade Practices Act, Section 2(a)(9-10), Comment.

<sup>71</sup> *Electrolux Corp. v. Val-Worth, Inc.*, 6 N.Y.2d 556, 161 N.E.2d 197, 190 N.Y.S. 2d 977 (1959).

<sup>72</sup> OHIO REV. CODE ANN. § 2911.41 (Page Supp. 1969), OHIO REV. CODE ANN. § 2911.42. The statute has had little use and does not apply to good faith broadcasters or publishers through whom most of the bait and switch tactics are perpetrated on the public. Additionally, "intent, design or purpose" is required as part of the bait and switch scheme.

<sup>73</sup> *Earl A. Scheib, Inc.*, 63 F.T.C. 1049 (1963).

<sup>74</sup> ALEXANDER, *supra* note 22, at 197.



*"Fire" Sales*

It is a deceptive trade practice to advertise spurious "fire" and "liquidation" sales as well as to make misrepresentations as to fictitious price cuts.<sup>76</sup> The FTC will interdict false claims as to price cuts. For example, in *Sidney J. Kreiss, Inc.*,<sup>76</sup> two FTC Commissioners were persuaded that an advertised sales price was illegitimate even though there were only two sales per year which never lasted more than four weeks each. However, 95 percent of the sales items were sold during these sales.

The FTC gives the following as an example of fraudulent price claims:

John Doe is a retailer of Brand X fountain pens, which cost him \$5 each. His usual markup is 50 percent over cost; that is, his regular retail price is \$7.50. In order subsequently to offer an unusual "bargain," Doe begins offering Brand X at \$10 per pen. He realizes that he will be able to sell no, or very few, pens at this inflated price. But he doesn't care, for he maintains that price for only a few days. Then he "cuts" the price to its usual level—\$7.50—and advertises: "Terrific Bargain: X Pens, Were \$10, Now Only \$7.50!" This is obviously a false claim. The advertised "bargain" is not genuine.<sup>77</sup>

Other examples of deceptive price advertising include use of a fictitious "former" price, advertising a "cut" from a manufacturer's list price when in fact the list price is seldom if ever followed, and advertising a retail price as a "wholesale" price.<sup>78</sup>

## REMEDIES UNDER AM. SUB. H.B. 39

If a deceptive trade practice is found the Ohio statute authorizes a person who is "likely to be damaged" to obtain an injunction against continuation of the conduct.<sup>79</sup> This remedy, drawn from common law equity principles, constitutes the working section of the Uniform Deceptive Practices Act. The specific statutory authorization of suit in the Uniform Act was particularly necessary for a competitor because there was an early rash of decisions that the competitor as such had no standing to sue for deceptive trade practices.<sup>80</sup> Sometimes cases were dismissed because the unfair trade practice of the competitor was characterized as a public nuisance.<sup>81</sup> The Ohio statute dispenses with a requirement that monetary damages be

<sup>76</sup> OHIO REV. CODE ANN. § 4165.02(J) (Page 1965). In *Straum v. State*, 15 Ohio App. 32 (1921) the court held that where there was a reduction in terms of payment for new Victrolas the defendant's advertising of "special reductions" was not false advertising within the meaning of OHIO REV. CODE ANN. § 2911.41 (Page 1954).

<sup>77</sup> 56 F.T.C. 1421 (1960) (The Commission split 3-2).

<sup>78</sup> ALEXANDER, *supra* note 22 at 253-54, Appendix J.

<sup>79</sup> *Id.*

<sup>80</sup> OHIO REV. CODE ANN. § 4165.03 (Page 1965).

<sup>81</sup> 4 CALLMAN, UNFAIR COMPETITION, TRADEMARKS AND MONOPOLIES § 87.1(a)(1) (3d ed. 1970).

<sup>81</sup> *Moon v. Clark*, 192 Ga. 47, 14 S.E.2d 481 (1941).

proven.<sup>82</sup> In cases where the court finds that the defendant willfully engaged in the conduct, attorneys' fees may be awarded to the plaintiff. If the court finds the action was groundless it may award attorneys' fees to the defendant.<sup>83</sup> In either case the award of attorneys' fees is subject to judicial discretion. Like the FTC, the statute focuses primarily on the impact of the defendant's conduct, and not on the actor's intent. By conferring standing on a person "likely to be damaged" by a deceptive trade practice, the legislature has caused the statute to reach unintentional as well as intentional conduct.<sup>84</sup> The statute limits the primary relief to an injunction and does not at all concern itself with damages because of the difficulty of proving damages among other reasons.<sup>85</sup>

It should not be assumed that the Ohio statute will be an adequate tool for policing sellers' practices if use of the legislation is limited to injured competitors. Consumer welfare groups may be the best answer for keeping unscrupulous merchants in line. The Uniform Deceptive Trade Practices Act originated as an effort to reform the law of business torts, not consumer torts. However, at first blush the Act would seem to confer standing on a consumer as "a person likely to be damaged." Such individual consumers then could bring a consumer class action, which has been promoted as an effective tool under the Uniform Act.<sup>86</sup> Poverty lawyers have used the "representative suit" or class action to secure civil rights in the area of school desegregation,<sup>87</sup> legislative reapportionment,<sup>88</sup> and to change welfare eligibility rules.<sup>89</sup> A class action promotes more careful judicial administration, allows consumers with small claims to meet jurisdictional amounts and puts economic, psychological and procedural pressure on a defendant.<sup>90</sup> Individual standing provides the foundation for consumer

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<sup>82</sup> OHIO REV. CODE ANN. § 4165.03 (Page 1965).

<sup>83</sup> *Id.*

<sup>84</sup> Dole, *supra* note 46, at 495. Section 3(a) of the Uniform Deceptive Trade Practices Act eliminates the requirement of proof of "intent to deceive." The Ohio version does not specifically eliminate such requirement. However, since it does confer standing on "a person likely to be damaged," and requires proof that defendant "willfully engaged in the trade practice knowing it to be deceptive" to assess attorneys' fees against a defendant, the better interpretation would not require proof of intent for an injunction except in bait and switch cases under OHIO REV. CODE § 4165.02(I) and (K), which specifically require intent.

<sup>85</sup> 2 NIMS, UNFAIR COMPETITION & TRADEMARKS 1390 (4th ed. 1947).

<sup>86</sup> Dole, *Consumer Class Actions Under the Uniform Deceptive Trade Practices Act*, 1968 DUKE L.J. 1101. Individual Consumer standing seems also to be sanctioned by the language in the statute that "A complainant need not prove competition between the parties." OHIO REV. CODE ANN. § 4165.02 (Page 1965).

<sup>87</sup> *E.g.*, *Brown v. Board of Education*, 347 U.S. 483 (1954).

<sup>88</sup> *E.g.*, *Baker v. Carr*, 369 U.S. 186 (1962).

<sup>89</sup> *E.g.*, *King v. Smith*, 392 U.S. 309 (1968).

<sup>90</sup> Dole, *supra* note 86, at 1102-03. Ohio allows the claims of the class to be aggregated in determining the jurisdiction of the court. Rule 23(F), Ohio Rules of Civil Procedure. *But see Snyder v. Harris*, 394 U.S. 332 (1969), holding that aggregation of the claims of class members under the 1966 Revision of Federal Rule 23 in order to establish the \$10,000 jurisdictional amount will not be permitted unless it would have been permitted under the old Rule 23, which permitted aggregation only in true or hybrid class actions where named and unnamed persons

class actions. Professor Dole has raised the issue of the individual plaintiff consumer's standing:

Only a person 'likely to be damaged' can sue for injunctive relief under the Act; yet why should a consumer who knows that a merchant is engaging in trickery need an injunction to protect himself in the future? On the other hand, how can consumers who are likely to be damaged in the future because they do not know about the trickery ever realize that they have standing to sue? Indeed, will not their discovery of the trickery, which will alert them to the possibility of suit under the Uniform Act, ipso facto destroy their standing by removing any likelihood of future injury?<sup>91</sup>

Professor Dole answers the individual standing question by suggesting that an allegation be made that the plaintiff desires to continue to do business with the merchant, the deception will be difficult to detect and there is a probability of its repetition.<sup>92</sup> Such an allegation should not be difficult to make in cases where there are no satisfactory alternative sources of supply in the neighborhood.<sup>93</sup>

Ohio's version of the 1966 Revision of Federal Rule 23 authorizes class suits if four general conditions are met: (1) the class is so numerous that joinder of all members is impracticable; (2) there are questions of law or fact common to the class; (3) the claims of the representative consumers are typical of claims of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.<sup>94</sup> *Robnet v. Miller*,

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are either necessary or indispensable to the cause of action, or the suit is prosecuted by persons who are interested in a common fund or property. Consumers who seek damages by a class action do not fall into either category; rather, theirs is a spurious class action because their rights are several, they are interested in a common question of law or fact and seek common relief. Damage class actions are "spurious" in nature for, under the 1938 Federal Rule 23, they are joinder devices and not true class actions which traditionally have a res judicata impact upon unnamed parties. In one of the consolidated cases in *Snyder v. Harris*, an aggrieved out-of-city consumer of a gas company alleged damaged to himself of \$7.81 resulting from illegal billing and collection of a city franchise tax, and sought to aggregate claims of approximately 18,000 other out-of-city customers. See Starrs, *The Consumer Class Action—Part II: Considerations of Procedure*, 49 BOSTON U.L. REV. 407, 419-24, 463-67, 492-94 (1969). The proposed Consumer Protection Act of 1970 would allow class actions on behalf of consumers victimized by unfair consumer practices, provide for a broad range of remedies, confer jurisdiction over unfair consumer practices on the federal courts and thereby eliminate the need to aggregate damages. S. 3201, 91st Cong., 2d Sess. §§ 204-06 (1970).

<sup>91</sup> Dole, *supra* note 86, at 1112.

<sup>92</sup> *Id.* at 1113.

<sup>93</sup> Often true in the cities. See D. CAPLOVITZ, *THE POOR PAY MORE*, chs. 4 & 5 (1967).

<sup>94</sup> Rule 23(A), Ohio Rules of Civil Procedure, effective July 1, 1970. In addition to the four general requirements imposed by Rule 23(A), a plaintiff must satisfy the conditions of either 23(B)(1), (2) or (3). Rule 23(B)(1) authorizes a class action where individual litigation by a member of the class creates a risk of inconsistent adjudications establishing incompatible standards for a party opponent, or individual adjudications would be dispositive of the interests of other non-party class members or impair or impede their ability to protect their interests. "Examples of this situation might include a taxpayer's suit to invalidate municipal action or a shareholder's individual claim to declare a dividend." J. MCCORMACK, *OHIO CIVIL RULES PRACTICE* 84 (1970) [hereinafter cited as MCCORMACK]. Rule 23(B)(2) authorizes a class action whenever "the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole. . . ." "This section is primarily designed for

decided before the enactment of Rule 23, encourages consumer class actions.<sup>95</sup> Plaintiff purchasers of food freezers alleged they were promised by individual defendants that in return for plaintiffs' obligating themselves to buy the freezers, two defendants would supply plaintiffs' normal food requirements for two years at one-half price. After notes and contracts were signed, the notes were discounted to a loan company and no further cut-rate food was supplied. Plaintiffs sought cancellation of the contracts, surrender of cognovit notes, damages and injunctive relief. The appellate court reversed a trial judge's dissolution of a temporary restraining order. To the assertion by the defense that certain members of the class might want to keep their freezers and thereby stand on the contract, the court responded that since the class included defrauded customers, it would be difficult to conceive of one who would elect to stand on the contract.<sup>96</sup> The Deceptive Trade Practices Act itself further encourages such class actions by defining "person" as two or more legal entities having joint or com-

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civil rights cases although other cases may fall within the section. Actions for damages are excluded in [sic] this section." MCCORMACK 84. A consumer class action seeking injunctive relief falls within this section. "[A]n action looking to . . . declaratory relief could be brought by a numerous class of purchasers . . . against a seller alleged to have undertaken to sell to that class at prices higher than those set for other purchasers . . . when the applicable law forbids such a pricing differential." 39 F.R.D. 69, 102 (1966) (Advisory Committee's Note, to new Rule 23(B)(2)). Rule 23(B)(3) authorizes a class suit whenever "the court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy." "This section would permit mass torts to be prosecuted in a class suit if found to be the best vehicle for the adjudication of the controversy. An example of a typical case brought under this section is the security fraud case where individual investors are in a poor position to seek redress [damages?] individually." MCCORMACK 84. Where the action is characterized as a (B)(3) action there is a requirement that class members be notified; and such members may elect to be excluded from the class. Ohio R. Civ. P. 23(C)(2). The judgment in an action maintained as a class action binds all members of the class in a (B)(1) or (B)(2) action, and all except excluded members in a (B)(3) action. Because of the difficulty of giving notice and the probability that a judgment in a (B)(3) action will not bind non-party class members where no notice is given them, characterization as a (B)(1), (B)(2) or (B)(3) action is important. MCCORMACK 84-85.

<sup>95</sup> 105 Ohio App. 536, 152 N.E.2d 763 (1957). *Contra*, *Davies v. Gas & Elec. Co.*, 151 Ohio St. 417, 86 N.E.2d 603 (1949). Plaintiff gas consumer sued for damages and injunctive relief based on fraud by dilution of the gas supplied; the court held that since there were 700,000 consumers scattered throughout Ohio the class action would not stand because the right to redress depended on different local rate schedules, etc. However, this objection was based on the conclusion there was no community of interest of persons comprising the "class" with a right to recovery based on the same essential facts. This analysis isn't valid where plaintiffs seek injunctive relief against the deceptive practices alleged in the petition, which is the authorized remedy under the Deceptive Practices Act. Indeed, proof of monetary damages is obviated by the terms of the Act. OHIO REV. CODE ANN. § 4165.03 (Page 1965). The court's declaration in *Davies* that individual claims could not be aggregated to meet the jurisdictional amount is superseded by Rule 23(F), *supra* note 90.

<sup>96</sup> 105 Ohio App. 536, 545, 152 N.E.2d 763, 766-67 (1957). Such a suggestion was accepted in *Davies v. Gas & Elec. Co.*, *supra* note 95, the court reasoning that some persons might not wish to sue for tort damages, others might choose breach of contract rather than fraud as the proper remedy; and still others might choose to sue for restitution. The fear expressed by the court in *Davies* is met by the requirement that where an action is characterized as a Rule 23(B)(3) action, as a *Davies*-type claim for damages undoubtedly would be, non-party class members must be notified of the pendency of the action, and may elect to be excluded, with the result that those not notified aren't bound by the judgment. *Supra*, note 94.

mon interest.<sup>97</sup> However, it is not at all certain that courts will react favorably to such cases.<sup>98</sup> For example, what are the criteria by which it is decided that the representative parties will fairly and adequately protect the interests of the class?<sup>99</sup>

#### PROPOSALS FOR LEGISLATIVE CONSIDERATION

It is an old saw that the laws of a people can be no better than the mechanism for their enforcement. The FTC is in a potentially powerful position to move against "deceptive practices" including advertising under § 5 of the Federal Trade Commission Act. In a nine month period beginning in December, 1969, it produced three notable opinions in the consumer field.<sup>100</sup> The FTC has, however, been under heavy attack lately from its detractors who condemn it as an agency low in competence and *esprit de corps*, and lacking in any sense of priorities as to how to devote its efforts. "Nader's Raiders" spent a summer studying the FTC and their criticisms are published in book form. The American Bar Association reached the same conclusion as the raiders.<sup>101</sup> Specifically the ABA pointed to the failure of the FTC to plan and the crippling delay in its procedures as its two greatest drawbacks.<sup>102</sup>

Ohio has a Consumer Fraud Bureau attached to the Attorney General's office, as have a number of other states, but such bureaus have also been criticized for their ineffectiveness. The Ohio office sends a news letter to public agencies—

But such Bureaus turn out to be a mixed blessing. Unscrupulous companies soon learn that the most that might happen to them . . . is that their license might be suspended. To my knowledge, no fraudulent business-

<sup>97</sup> OHIO REV. CODE ANN. § 4165.01(E) (Page 1965).

<sup>98</sup> *Hall v. Coburn Corporation of America*, 26 N.Y.2d 396, 259 N.E.2d 720 (1970). The Consumer Protection Act of 1970 requires notice to be given to the FTC of an unfair consumer practice, and bars consumer action if the FTC or the Attorney General files an action. S. 3201, 91st Cong., 2d. Sess. §§ 206(b)(1) and (3)(1970).

<sup>99</sup> *Eisen v. Carlisle & Jacquelin*, 391 F.2d 555 (2d Cir. 1968), (you need "qualified, experienced and . . . able" counsel); The court in *Davies v. Gas & Elec. Co.*, *supra* note 95, seemed adversely impressed by the size of the class—700,000. That shouldn't be a consideration where equitable relief is sought. In such cases, the community of interest is more apparent than when damages are sought.

<sup>100</sup> *In re All-State Industries of North Carolina, Inc.*, FTC, 1969. CCH Trade Reg. Serv. 18,740 (respondent home improvement contractors' failure to disclose ability to assign negotiable instrument free of personal defenses is an unfair trade practice); Leon A. Tashoff, FTC, 1968. CCH Trade Reg. Serv. 18,606 (example of bait and switch advertising with respect to sale of eyeglasses, failure to disclose finance charges and in some instances cash prices, all characterized as unfair and deceptive practices); *In re Household Sewing Machine Co., Inc.*, FTC, 1969. CCH Trade Reg. Rep. ¶ 18,882 (example of bait and switch sales of sewing machines and misrepresentation of year of machines, all characterized as unfair methods of competition in the advertising and sale of sewing machines).

<sup>101</sup> *Report of the ABA Commission to Study the Federal Trade Commission*. (1969) 34-35. The Raiders' book is E. COX, R. FELLRATH & J. SCHULZ, *THE CONSUMER AND THE FEDERAL TRADE COMMISSION* (1969).

<sup>102</sup> *Id.*

man has yet to be prosecuted and sent to jail by the Attorney General's office [of New York]. Furthermore, the Attorney General's Consumer Fraud Bureau turns out to be a major factor in why New York no longer has consumer representation on the state level. Consumer affairs are, to use a term of the ghetto, the "turf" of the Attorney General and he does not want any competition. And so the consumers of New York are not organized and they are not represented, and legislative reforms proceed at a snail's pace, if at all.<sup>103</sup>

Specific authorization of a class suit under Ohio's version of the Uniform Deceptive Trade Practices Act would undoubtedly be a positive step in the direction of reform. Such a provision would encourage private enforcement of what is concededly a public problem, but one that could best be dealt with by the private and public sector combined. I also think Ohio should enact the catch-all provision of the Uniform Act which allows enjoining "any other conduct which similarly creates a likelihood of confusion or of misunderstanding."<sup>104</sup> This provision allows the statute to be interpreted by that process of judicial inclusion which allows for necessary flexibility in the law to meet the ingenuity of the American businessman and his legal counselor, who will undoubtedly see those gaps which the legislature could not anticipate.

In the public sector, the Ohio Legislature might want to consider statutory authority for the Attorney General or any law enforcement official, including city or county prosecutor, to petition a court for injunctive relief involving deceptive trade practices. A few states have authorized such actions.<sup>105</sup> Such legislation might give to the law enforcement official the authority to petition the court to restore to any person, money or property acquired by such illegal trade practices, and thus obviate the need for private actions. New York has adopted a procedure whereby the mere threat of an injunction may be sufficient to halt the activities without the need for formal action. The Attorney General may promise not to seek an injunction against any company if it files "an assurance of discontinuance of any act or practice" considered illegal under the act.<sup>106</sup> It may also be stipulated that the alleged violator make "voluntary payment" of the state's "cost of investigation" in an amount up to 2,000 dollars.<sup>107</sup> Noncompli-

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<sup>103</sup> Caplovitz, *The Problems of the Poor Consumer: A Sociologist's Viewpoint*, in *Ohio State Legal Services Association Course on Law and Poverty: The Consumer* (1968), p. 1.05.

<sup>104</sup> Uniform Deceptive Trade Practices Act, § 2(12).

<sup>105</sup> ILL. ANN. STAT. ch. 121-1/2, § 267 (Smith-Hurd Supp. 1970); § 325.907(3) N.J. STAT. ANN. § 56:8-8 (1964); see MINN. STAT. ANN. (Supp. 1970); N.D. CENT. CODE § 51-15-07 (Supp. 1969). OHIO REV. CODE ANN. § 2911.42 authorizes Prosecuting Attorneys to seek injunctive relief of fraudulent advertising, but it probably isn't as broad as the Deceptive Trade Practices Act because of the requirement of "Scienter." *Rosenblatt v. Cleveland*, 20 Ohio L. Abs. 106 (Ct. App. 1935). To eliminate ambiguity in the Ohio version of the Act, a requirement of proof of "intent to deceive" should be negated. *Supra*, note 84.

<sup>106</sup> N.Y. EXEC. LAW § 63(15). See also WASH. REV. CODE ANN. § 19:86:100 (Supp. 1970).

<sup>107</sup> N.Y. EXEC. LAW § 63(15). A total of \$22,812.00 was collected by the state treasury

ance by a company with its assurance could then constitute prima facie evidence in any civil action or proceeding instituted by the Attorney General.<sup>108</sup>

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under this statute according to the 1964 annual Report of the New York State Bureau of Consumer Frauds & Protection on file in Biddle Law Library, University of Pennsylvania. KATZ, *supra* note 13, 35, n. 256.

<sup>108</sup>N.Y. Exec. Law § 63(15).