

7-1-1976

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Christopher B. Swartley

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### Recommended Citation

Christopher B. Swartley, *Recent Consumer Protection Developments in Montana*, 37 Mont. L. Rev. (1976).  
Available at: <https://scholarship.law.umt.edu/mlr/vol37/iss2/3>

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## RECENT CONSUMER PROTECTION DEVELOPMENTS IN MONTANA

Christopher B. Swartley

### I. INTRODUCTION

The consumer protection movement has been receiving increased attention recently from the federal government. Few Montanans are aware that many of the federal developments in consumer law vitally affect this state's citizens, and that in addition, Montana has made steady progress on its own in the consumer law area. This note will discuss these advances by means of an overview of key provisions of the Federal Trade Commission Act (recently amended)<sup>1</sup> and court interpretations of them, and their relationship to the Montana Consumer Protection Act<sup>2</sup> and administrative action pursuant to it. Lawyers who are concerned with consumer problems should also be aware that there have been other recent developments which are relevant to Montana but beyond the limited scope of this work.<sup>3</sup>

### II. THE FEDERAL TRADE COMMISSION ACT

#### A. *Historical Background*

The FTC was created in 1914 as a result of enforcement difficulties under the Sherman Antitrust Act,<sup>4</sup> and the enunciation of uncertain standards by the Supreme Court in regard to monopolization.<sup>5</sup> Section 5 of the original FTC Act<sup>6</sup> empowered the Commission to prevent "unfair methods of competition in commerce" by cease and desist orders. However, it was not until passage of the Wheeler-Lea Amendment<sup>7</sup> to the FTC Act that consumers received substan-

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1. 15 U.S.C. §§ 41 *et seq.* (1970), *as amended*, (Supp. IV, 1974) [hereinafter referred to as the FTC Act].

2. REVISED CODES OF MONTANA (1947) [hereinafter referred to as R.C.M. 1947], §§ 85-401 *et seq.* [hereinafter referred to as the Montana Act].

3. See, for example, the Consumer Product Safety Act of 1972, 15 U.S.C. §§ 2051 *et seq.* (Supp. IV, 1974); the Moss-Magnuson Warranty Act, 15 U.S.C. §§ 2301 *et seq.* (Supp. IV, 1974); and Montana's Consumer Reporting Agencies Act, R.C.M. 1947, §§ 18-501 *et seq.*, enacted in 1975. The creation of a federal Consumer Protection Agency (or Agency for Consumer Advocacy) continues to draw Congressional attention, but House-Senate agreement and passage of a bill are elusive. A discussion of the history of this legislation can be found in Leighton, *The Consumer Advocacy Agency Proposal . . . Again*, 27 ADMIN. L. REV. 149 (1975).

4. 15 U.S.C. §§ 1 *et seq.* (1970).

5. See historical discussion in MacIntyre and Volhard, *The FTC and Incipient Unfairness*, 41 GEO. WASH. L. REV. 407, 409-411 (1973).

6. FTC Act § 5, ch. 311, § 5, 38 Stat. 719 (1914), *as amended* 15 U.S.C. § 45 (Supp. IV, 1974) [hereinafter referred to as § 5].

7. Act of Mar. 21, 1938, ch. 49, § 3, 52 Stat. 111 (1938).

tial benefit from the Commission. Prior to 1938, experimental consumer fraud prosecutions had been severely hampered by reviewing courts' strict construction of the term "unfair methods of competition" to require not only proof of injury to the consumer, but also proof of injury to competition among businesses.<sup>8</sup> The 1938 Amendment clarified the FTC's function by adding to § 5 the declaration that "unfair or deceptive acts or practices in commerce" were unlawful.<sup>9</sup>

The Wheeler-Lea Amendments represented a shift in emphasis, from the control of deceptive . . . practices as an incident of anti-trust regulation to the avowed purpose of protecting the consumer from fraud.<sup>10</sup>

The FTC is now recognized as possessing dual powers: first, ". . . to define and proscribe an unfair competitive practice, even though the practice does not infringe either the letter or the spirit of the antitrust laws. . . ;" and second, ". . . to proscribe practices as unfair or deceptive in their effect upon consumers regardless of their nature or quality as competitive practices or their effect on competition."<sup>11</sup> Pursuant to this latter function, the FTC has created an extensive federal jurisprudence to give meaning to the post-1938 § 5, thus establishing a substantial body of federal consumer protection law. In addition to the hundreds of reported decisions generally defining "unfair or deceptive" there are "trade regulation rules" officially promulgated and directed to specific problem situations between consumers and industry.<sup>12</sup>

### B. The FTC Consumer Law

The methods by which the FTC chooses to exercise its powers and the outcome of such actions have dual relevance to Montana consumers. First is the direct effect that a Trade Regulation Rule or successful FTC prosecution has on purveyors within its jurisdiction "in or affecting commerce."<sup>13</sup> Most gasoline refiners and dis-

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8. Lovett, *State Deceptive Trade Practice Legislation*, 46 TUL. L. REV. 724, 728-9 (1972).

9. Act of Mar. 21, 1938, ch. 49, § 3, 52 Stat. 111 (1938).

10. *Holloway v. Bristol-Myers Corp.*, 485 F.2d 986, 994, citing H.R. Rep. No. 1613, 75th Cong., 1st Sess. at 3 (1937): ". . . this amendment makes the consumer, who may be injured by an unfair trade practice, of equal concern, before the law, with the merchant or manufacturer injured. . . ."

11. *FTC v. Sperry & Hutchinson Co.*, 405 U.S. 233, 239 (1972).

12. 16 CFR §§ 400 *et seq.*, dealing with topics as diverse as sleeping bag content, cigarette package warnings, and posting of octane ratings.

13. P.L. 93-637, § 201 (Jan. 4, 1975) amending 15 U.S.C. § 45(2)(1). The amendment changed the words "in commerce" to "in or affecting commerce" throughout the entire FTC Act.

tributors who sell automotive gas "in commerce", for example, are bound by the octane posting requirement of 16 CFR § 422;<sup>14</sup> failure to comply could result in a cease and desist action<sup>15</sup> or a civil action by the Commission for consumer relief.<sup>16</sup> Secondly, Montana's consumer statute gives great weight to federal action under § 5 by making FTC and court interpretations of it part of our substantive law.<sup>17</sup> It is therefore essential that prosecuting attorneys and consumer advocates be aware of some of the major developments under the FTC Act.

### 1. *The Decision Whether to Prosecute or Make Rules*

Even before the Wheeler-Lea Amendment of 1938, the federal courts had rejected common law limitations to the FTC's prosecution power:

The commissioners. . . are to exercise their common sense, as informed by their knowledge of the general idea of unfair trade at common law, and stop all those trade practices that have a capacity or a tendency to injure competitors directly or through deception of purchasers, quite irrespective of whether the specific practices in question have yet been denounced in common law cases.<sup>18</sup>

The open-ended nature of the original § 5 and the breadth added by the 1938 Amendment indicated an intent to allow for a constantly expanding body of law.

Thus, legislative and judicial authorities alike convince us that the [FTC] does not arrogate excessive power to itself if, in measuring

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14. The Rule makes it an unfair method of competition and an unfair or deceptive act or practice to fail to disclose minimum octane of gasoline dispensed in commerce. This Rule is especially noteworthy because of the treatment it received in *National Petroleum Refiners Association v. FTC*, 482 F.2d 672 (D.C. Cir. 1973), cert. denied 415 U.S. 951 (1974). J. Skelly Wright confirmed the power claimed by the FTC to promulgate substantive rules of illegality in business conduct ("Trade Regulation Rules"), in advance of specific adjudications, under 15 U.S.C. § 46(g) (1970).

15. 15 U.S.C. § 45(b) (Supp. IV, 1974).

16. 15 U.S.C. §§ 57b(a) and (b) (Supp. IV, 1974).

17. R.C.M. 1947, § 85-403 states:

(1) It is the intent of the legislature that in construing section 2 [85-402: Unfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce are unlawful]. . . due consideration and weight shall be given to the interpretations of the federal trade commission and the federal courts relating to section 5(a)(1) of the [FTC Act]; and

(2) The [Department of Business Regulation] may make rules and regulations interpreting the provisions of section 2. . . of this act. Such rules and regulations shall not be inconsistent with the rules, regulations and decisions of the federal trade commission and the federal courts in interpreting. . . section 5(a)(1) of the [FTC Act].

18. *Sears, Roebuck & Co. v. FTC*, 258 F. 307, 311 (7th Cir. 1919). For a treatment of the common law of unfair competition see 1 H. NIMS, *UNFAIR COMPETITION AND TRADEMARKS*, ch. 1 (4th ed. 1947).

a practice against the elusive, but congressionally mandated standard of fairness, it, like a court of equity, considers public values beyond simply those enshrined in the letter or encompassed in the spirit of the antitrust laws.<sup>19</sup>

What standards will the FTC use to capture this elusive concept? At least an indication can be gleaned from past administrative action:

The Commission has described the factors it considers in determining whether a practice that is neither in violation of the antitrust laws nor deceptive is nonetheless unfair:

"(1) whether the practice, without necessarily having been previously considered unlawful, offends public policy as it has been established by statutes, the common law, or otherwise—whether, in other words, it is within at least the penumbra of some common law, statutory, or other established concept of unfairness; (2) whether it is immoral, unethical, oppressive, or unscrupulous; (3) whether it causes substantial injury to consumers (or competitors or other businessmen)."<sup>20</sup>

This statement may be as elusive as the concept of unfairness; perhaps for that reason it was quoted but not followed in a recent case, where a new and broader balancing test was set forth:

An unfairness analysis will take into account many basic economic facts and considerations, and will permit a broad focus in the examination of marketing practices. Unfairness is potentially a dynamic analytical tool capable of a progressive, evolving application which can keep pace with a rapidly changing economy. Thus as consumers products and marketing practices change in number, complexity, variety, and function, standard of fairness to the consumer may also change.<sup>21</sup>

Perhaps the flexibility of such "tests" is valuable in allowing the FTC elbowroom under § 5. Some commentators maintain, however, that the uncertainty of such standards makes them unworkable and retard development by administrators and courts.<sup>22</sup> As an additional guideline, a proposed standard has been suggested which is based upon a combination of § 5 itself and the two tests set out above:

19. *FTC v. Sperry & Hutchinson Co.*, *supra* note 11 at 244 (footnote omitted).

20. *Id.* at n.5, citing *Statement of Basis and Purpose of Trade Regulation Rule 408, Unfair or Deceptive Advertising and Labeling of Cigarettes in Relation to the Health Hazards of Smoking*, 29 Fed. Reg. 8355 (1964).

21. *Pfizer Inc.*, 81 FTC 23, 61 (1972)(footnote omitted).

22. Erxleben, *The FTC's Kaleidoscopic Unfairness Statute: Section 5*, 10 GONZAGA L. REV. 333, 342 (1975). The author is the Seattle Regional Director of the FTC; the views he expressed are his own.

- (1) the conduct causes substantial injury or the threat of substantial injury to consumers.
- (2) the conduct offends a communal standard of fair dealing evidenced, directly or indirectly, by an established concept of public policy or values.
- (3) the conduct results in net social or economic disutility. In an unfairness analysis the need for any one of these factors is, of course, influenced by the degree of presence of the other two. Where one is clearly present, and the business justification is relatively small, the practice is likely to be proscribed.<sup>23</sup>

## 2. *The Choice of How to Proceed—Court Guidelines to § 5 Prosecutions*

Several fundamental rules have been enunciated by the federal courts as guidelines for all FTC prosecutions. Additional rules have been laid out for the many different fact situations that occur. A basic familiarity with these principles is necessary to understand the power of the FTC.

The most important principle involved in establishing a § 5 cause of action is "that a finding of 'tendency and capacity to mislead' is sufficient and that actual deception need not be shown."<sup>24</sup> Thus it is not necessary for the Commission to produce consumers to testify to deception, nor are consumers needed to testify to the meaning they perceived in a representation.<sup>25</sup> Furthermore, both intent<sup>26</sup> and good faith<sup>27</sup> are irrelevant. To prove a case of deception, the FTC must show by substantial evidence:

1. That the product or service is not as effective as claimed and as understood by the hypothetical consumer,
2. That the product's performance is different from the claim, or
3. That the claim cannot be verified.<sup>28</sup>

It is logical to assume that rules similar to those applied in cases involving deception would be applicable to those involving unfairness in another manifestation. As a practical matter, it appears that

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23. *Id.* at 342-3. (footnotes omitted). These criteria are offered strictly for the reader's analytical use and as an indication of the direction the FTC may take in the future. They may also be helpful to prosecuting attorneys for the purpose of evaluating a potential case.

24. *Vacu-matic Carburetor Co. v. FTC*, 157 F.2d 711, 713 (7th Cir.), *cert. denied*, 331 U.S. 806 (1946).

25. *Charles of the Ritz Distributors Corp. v. FTC*, 143 F.2d 676, 680 (2d Cir. 1944). A capacity to deceive can be inferred solely from exhibits without additional proof. *Portwood v. FTC*, 418 F.2d 419, 422 (10th Cir. 1969).

26. *FTC v. Algonia Lumber Co.*, 291 U.S. 67 (1934).

27. *Koch v. FTC*, 206 F.2d 311 (6th Cir. 1953).

28. Gellhorn, *Proof of Consumer Deception Before the Federal Trade Commission*, 17 KAN. L. REV. 559, 563 (1969).

most FTC allegations incorporate the two concepts without distinction.<sup>29</sup>

To whom must a practice be unfair or deceptive under § 5? The standard of the "reasonable consumer" has been definitively rejected:

[The FTC Act] was not "made for the protection of experts, but for the public—that vast multitude which includes the ignorant, the unthinking and the credulous" . . . ; and the "fact that a false statement may be obviously false to those who are trained and experienced does not change its character, nor take away its power to deceive others less experienced" . . . the Commission may insist upon the most literal truthfulness . . .<sup>30</sup>

Another fundamental principle is that consumer protection should be preventative, reaching a suspected wrong before it becomes too widespread or well-developed. Although it lacks preliminary injunctive powers and thus cannot actually prevent actions until after trial and administrative appeals,<sup>31</sup> the Commission has the power to act on an alleged § 5 violation in its "incipiency":

[T]he Commission should have the power to restrain an unfair act before it [becomes] a method or practice, if, in its discretion, such restraint be in the public interest. A single act may have multiple effects and may be far reaching. . . In fact, one of the objects of the FTC Act was to prevent potential injury by stopping unfair methods of competition in their incipiency.<sup>32</sup>

The following are rules of limited application which indicate the reach of the FTC, and which may be helpful as sources in similar fact situations:

- Once deception occurs, it is no defense that the consumer is familiarized with the true facts before entering an agreement.<sup>33</sup>
- It is no defense that no damage has occurred to consumers, since the FTC Act provides a preventive rather than a compensatory remedy.<sup>34</sup>
- Nor is it a defense that the act or practice complained of is a common one in a particular industry or trade.<sup>35</sup>
- A corporation will be held responsible for its employees' acts in

29. See, e.g., *National Petroleum Refiners Assoc. v. FTC*, *supra* note 14 at 674, n.1; *Portwood v. FTC*, *supra* note 25 at 420.

30. *Charles of the Ritz Distributing Co. v. FTC*, *supra* note 25 at 679-680 (footnotes omitted).

31. *Gellhorn*, *supra* note 28 at 560. The courts are in essence the enforcement arm of the FTC.

32. *Guziak v. FTC*, 361 F.2d 700, 703 (8th Cir. 1966) (citations omitted).

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

34. *Id.* at 873; *Ford Motor Co. v. FTC*, 120 F.2d 175, 182 (6th Cir.) *cert. denied*, 314 U.S. 668 (1941).

35. *Ford Motor Co. v. FTC*, *supra* note 34 at 182.

violation of § 5 even in the face of precautionary measures against such illegality.<sup>36</sup> Similarly, a defense based on common law employee/independent contractor differentiations carries no weight.<sup>37</sup>—Cessation of illegal practices, and by inference cessation of business, will not automatically mean cessation of FTC prosecution.<sup>38</sup>—“Puffing”, an “expression of opinion not made as a representation of fact,” is not illegal; but goods may not be assigned benefits or virtues they do not possess.<sup>39</sup>

As this partial list of rules demonstrates, the FTC has been given wide latitude by the courts in achieving its consumer protection goals. Attorneys involved in either a federal or state action pursuant to a § 5 type statute should be aware that this hands-off attitude exists and that prosecutors possess great discretion which can result in a marked advantage for them in litigation.

### III. THE MONTANA UNFAIR TRADE PRACTICES AND CONSUMER PROTECTION ACT OF 1973

In 1973 Montana joined the large group of states<sup>40</sup> that reacted to widespread dissatisfaction with the consumer's position by passage of remedial legislation. The Montana Consumer Protection Act<sup>41</sup> is very similar to statutes enacted in at least seven states which stem from recommendations of the Committee on Suggested State Legislation of the Council of State Governments.<sup>42</sup> It is unquestionable that the various aspects of consumer law will become the subject of expanded controversy and litigation in the future. Although Montana's Act has not yet been tested in the State's highest court, there is authority from the FTC and to a limited degree from state courts<sup>43</sup> to support reasonable inferences about the status of busi-

36. *Farke, Austin & Lipscomb, Inc. v. FTC*, 142 F.2d 437, 441 (2d Cir.), *cert. denied*, 323 U.S. 753 (1944); *see FTC v. Standard Education Society*, 86 F.2d 692, 697 (2d Cir. 1936).

37. *Goodman v. FTC*, 244 F.2d 584, 591-593 (9th Cir. 1957).

38. *Id.*; *see Perma-Maid Co., Inc. v. FTC*, 121 F.2d 282, 284 (6th Cir. 1941).

39. *Gulf Oil Corp. v. FTC*, 150 F.2d 106, 109 (5th Cir. 1945). Note that “the testimony of witnesses drawn from the general public of the impressions made upon their minds upon reading the advertisements was admissible.” *Id.* at 108. However, no sampling of public opinion is required, since a finding of deception can be made on the basis of a visual examination of exhibits. *Double Eagle Lubricant, Inc. v. FTC*, 360 F.2d 268, 270 (10th Cir. 1966); *Portwood v. FTC*, *supra* note 25.

40. 36 states had enacted some form of consumer protection statute prohibiting deceptive acts or practices by March 1, 1972. Lovett, *supra* note 8 at 724.

41. R.C.M. 1947, §§ 85-401 *et seq.* [hereinafter referred to as the Act].

42. Hawaii, Maine, Massachusetts, N. Carolina, Vermont, and Washington. Lovett, *supra* note 8 at 731-732. “Although . . . characterized as a ‘little FTC Act’ because of support from that agency, this labeling is really quite misleading. The UTPCPA is actually much broader and more effective in its remedial provisions. . .” *Id.* at 730. This is especially true in Montana, as will be demonstrated below.

43. There is a definite dearth of state case-law authority in the consumer area. Washington stands out as an exception because of the maturity of its enforcement program (now

ness, consumers, and the state under the Act. Montana attorneys should prepare themselves by at least gaining familiarity with the existing legislation.

### A. Unlawful Conduct

The Montana equivalent to § 5 of the FTC Act states that “[U]nfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce are unlawful.”<sup>44</sup> As previously noted, the following section, § 85-403, expresses the clear intent that FTC and federal court interpretations of § 5 be given “due consideration and weight” in the construction of § 85-402.<sup>45</sup> To some as yet undetermined extent, therefore, the rules set out previously are part of Montana’s law of consumer protection. Until court action defining that extent occurs, one can only speculate as to which rules apply, and how they apply.

The discretionary rule-making power given to the Department of Business Regulation<sup>46</sup> is more definite. Its rules and regulations can “not be inconsistent” with FTC and court interpretations of § 5.<sup>47</sup> The Department is thus limited, albeit negatively, where the federal government has acted.<sup>48</sup> Since the issues faced by state bureaucrats will very rarely be similar to the ones faced at the national level because of the different interests the two agencies were created to regulate, this limitation is in essence no limit at all.<sup>49</sup>

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in existence nearly 15 years), and of course as a function of adequate budgeting and efficient management. See generally Lovett, *supra* note 8 at 736; Comment, *Toward Effective Consumer Law Enforcement: The Capacity to Deceive Test Applied to Private Actions*, 10 GONZAGA L. REV. 457, 458 (1975). It is suggested that this nationwide lack of authority is the result of several factors, including reluctance and fear of officials and private persons to pursue judicial remedies, lack of adequate funds for such pursuit, bureaucratic red tape, and questionable ordering of priorities. The same problems seem to plague the FTC.

44. R.C.M. 1947, § 85-402.

45. The text is set out *supra* at note 17. The “trade regulation rules” noted *supra* at note 12 were given substantive effect and thus made applicable at least to some extent, in Montana by the *National Petroleum Refiners Assoc.* case, *supra* note 14. As of Jan. 4, 1975, FTC rulemaking must follow new guidelines laid down by Congress, although previously promulgated rules retain their validity. 15 U.S.C. § 57a (Supp. IV, 1974).

46. This department was created by R.C.M. 1947, § 82A-401 in 1971 [hereinafter referred to as the department]. It is actually the Consumer Affairs Division of that department which is responsible for implementing the Act.

47. R.C.M. 1947, § 85-403(2).

48. Note that national advertising (essentially, run in 5 or more states) is exempt from the Act. R.C.M. 1947, §§ 85-404(3), 85-401(5).

49. The Consumer Affairs Division of the department has thus far chosen to act only in two areas: 1) the definition of some of the acts and practices it considers to be “unfair or deceptive and therefore unlawful. . .” Montana Administrative Code § 8-2.4(1)-S400 [hereinafter referred to as MAC] (the list is too lengthy to reproduce here but offers some excellent guidelines as to advertising, false representation, “bait and switch”, etc.); 2) re-

The state Act does not apply to "actions or transactions permitted under law administered by the Montana public service commission", or to acts of merchants, publishers, newspapers, periodicals, radio, television, or ad agencies when they act without knowledge of the illegal character of the ads displayed and have no direct financial interest in the product or service advertised.<sup>50</sup> The former exemption is justified by the high standard of care and close scrutiny given to permissible utility action by the PSC; the latter by the logic and practicality of a policy which confines sanctions to those merchants who are actually responsible for alleged illegality.<sup>51</sup>

An act utilizing language very similar to Montana's withstood challenge on due process grounds in the Washington supreme court.<sup>52</sup> The court held that because of the guidance offered by the abundance of federal trade law interpreting § 5 of the FTC Act, the words used have a well-settled meaning and are not unconstitutionally vague. Furthermore, Washington courts will engage in the same "gradual process of judicial inclusion and exclusion,"<sup>53</sup> that the federal courts have utilized in the past.<sup>54</sup>

There is no question that it was the Montana legislature's intent in the 1973 Act that federal interpretations supply the foundation for defining "unfair methods of competition and unfair or deceptive acts or practices," and that our courts would build on this foundation, as Washington's have. This grant of power to shape a unique state consumer jurisprudence perhaps explains the breadth noted above in the words "due consideration and weight" and "not . . . inconsistent" of § 85-403; only with wide latitude can the courts and local administrators adequately meet special consumer problems.

### B. Enforcement Procedures

Procedural aspects of the law will probably be the biggest problem in fleshing out a Montana definition of unlawful conduct. The differences between state and federal enforcement mechanisms presents the most obvious problem. At the federal level, there is an expert agency empowered and budgeted to make final adjudicatory-

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quirements and definitions in the area of motor vehicle repairs and sales (probably Montana's leading area of consumer business friction). MAC §§ 8-2.4(2)-S410 *et seq.* The CAD exercises additional functions under other statutory authority. *See, e.g.,* R.C.M. 1947, § 18-520, § 75-9206.

50. R.C.M. 1947, § 85-404(1) and (2).

51. Lovett, *supra* note 8 at 734.

52. *State v. Reader's Digest Association*, 81 Wash.2d 259, 501 P.2d 290 (1972).

53. *Id.* at 301.

54. Reed, *Consumer Protection in Washington: An Overview*, 10 GONZAGA L. REV. 391, 395 (1975).

type determinations of illegality. The FTC only acts when it has reason to believe illegality has occurred or when "it shall appear . . . that a proceeding . . . would be to the interest of the public. . . ."<sup>55</sup> The person complained of has the right to appear and show cause why a cease and desist order should not issue<sup>56</sup> and also has the right to judicial review in the circuit courts of appeal.<sup>57</sup> Violation of an FTC cease and desist order can result in civil penalties of up to \$10,000 per violation.<sup>58</sup>

As in the FTC Act, the Montana Department of Business Regulation may bring an action when it has reason to believe illegality has occurred or when the proceeding would be in the public interest.<sup>59</sup> The similarity of the federal law ends here. Instead of an administrative show cause hearing and judicial review, Montana's Act provides for an injunctive action to be brought in the name of the state in district court.<sup>60</sup> The court may issue temporary or permanent injunctions to restrain and prevent violations;<sup>61</sup> it may fashion a judgment to restore persons harmed to their former status;<sup>62</sup> and it may revoke licenses or certificates authorizing persons to do business in the state if such action would restore to an injured party money or property lost as a result of the injury.<sup>63</sup>

Because of these broad remedial powers, including the ability to put a person out of business, a court may be reluctant to find a defendant guilty without substantial proof. How is a Montana district court to do the same job that it takes hundreds of people, thousands of dollars, and often several years to perform in the FTC?

55. 15 U.S.C. 45(b) (Supp. IV, 1974).

56. 15 U.S.C. 45(b) (Supp. IV, 1974).

57. 15 U.S.C. 45(c) (Supp. IV, 1974).

58. 15 U.S.C. 45(e) (Supp. IV, 1974). There is a special proceeding for recovery of these fines. 15 U.S.C. 95(m) (Supp. IV, 1974).

59. R.C.M. 1947, § 85-405. Note that the department may also act if it has reason to believe that a person is "about to knowingly use" an illegal practice. In this sense the Montana Act is broader than the FTC Act in giving the department power to restrain *future* acts done with knowledge of their illegality. However, until Montana establishes what is unfair or deceptive and makes these guidelines known, there would appear to be a full defense to prosecution for future acts in lack of knowledge. The section may have limited use for repeat offenders. If the department wants to restrain future action, its best bet would be to rely on the language at note 32, *supra*, and attack at the first sign of overt action on the basis of the "incipiency" standards.

60. R.C.M. 1947, § 85-405. Note that either the department or the county attorney may institute and prosecute these actions. If the county attorney chooses to do so, he must notify and report to the department. R.C.M. 1947, § 85-416.

61. R.C.M. 1947, § 85-405.

62. R.C.M. 1947, § 85-406. In this capacity the court may use the services of a receiver. R.C.M. 1947, § 85-407 specifies the receivers' rights and duties. The court apparently cannot order dissolution, suspension or forfeiture of corporate franchise until an injunction is violated. R.C.M. 1947, § 85-415.

63. R.C.M. 1947, § 85-406.

One court has held under a similar statute that the procedure is simply to let the jury decide the facts and have the court determine as a matter of law whether an act is unfair or deceptive.<sup>64</sup> Attorneys will have to aid the court in its determination of the law and in the correct application of the federal rules.

The Washington supreme court has stated that:

When appropriate we will consider the pertinent federal court interpretations of § 5 of the FTC Act. But in each case the question of what constitutes an "unfair method of competition" or an "unfair or deceptive act or practice" . . . is for us, rather than the federal courts, to determine . . . [W]e may consider all relevant federal precedent. . . .<sup>65</sup>

The Washington court made its own law in holding that "an act which is illegal and against public policy is *per se* unfair within the meaning of [the Washington code section identical to R.C.M. 1947, § 86-402]."<sup>66</sup> Because of the vagueness limitations of procedural due process, however, a court must be wary of completely abandoning federal law in favor of a new and different state jurisprudence.<sup>67</sup>

At a minimum, it should be clear from prior discussion that the prosecution's burden of proof does not include the necessity of showing intent or the common law elements of fraud. A "capacity to deceive" test should be adopted. Unless the court feels it would be helpful, consumer testimony should not be required. The consumer standard is not what a "reasonable man" would do under similar circumstances but rather whether an act could deceive the ignorant, credulous, or unthinking. "Incipient unfairness" should be within the court's power to control. Other rules noted earlier in this comment should be considered by the court in fact situations similar to those in which those rules were promulgated.<sup>68</sup> In unique fact situations the court should be free to analogize to FTC action; finally, if no valid analogy can be made, the court should take into account the determinations made by the Department and its own traditional notions of equity and fair play.

### C. Other Remedies

As a complement to the district court's injunctive power under § 85-405, the Montana Act provides that on petition of the Depart-

64. Hardy v. Toler, 288 N.C. 303, 218 S.E.2d 342, 346-7 (1975).

65. State v. Reader's Digest Association, *supra* note 52 at 301.

66. *Id.* at 301-302. See also 10 GONZAGA L. REV. 529 (1975) for a development of this rule.

67. See generally *Id.* at 300-301; State v. Ralph Williams Northwest Chrysler Plymouth, Inc., 82 Wash.2d 265, 510 P.2d 233, 242 (1973).

68. See Reed, *supra* note 54 at 397-400.

ment violators of an injunction can be assessed a civil penalty of up to \$10,000 per violation.<sup>69</sup> If the court finds that a violation was committed by one who "knew or should have known that his conduct was a violation", the Department may recover an additional \$500 per violation on behalf of the state.<sup>70</sup> Also, the court in its discretion may fine violators not more than \$2000, imprison them for not more than one year, or do both, but only if the illegal act constituted a "fraudulent course of conduct."<sup>71</sup> Finally, on petition of the Department, the court may order dissolution, suspension, or forfeiture of the corporate franchise of any violator of an injunction.<sup>72</sup>

The Department of Business Regulation has two less formal tools with which to shape business compliance in the face of consumer grievances. First, it may accept assurance of voluntary compliance after its determination of illegality, and thus prevent or discontinue action it considers violative of the Act without the necessity of proving anything to anyone.<sup>73</sup> Such an assurance must be in writing and be filed with the district court. It must be approved by the court; it does not operate as an admission. Secondly, the Department has broad investigative powers, including the "civil investigative demand"<sup>74</sup> developed by the U.S. Department of Justice for antitrust use,<sup>75</sup> and traditional subpoena and investigatory hearing powers.<sup>76</sup> Thus, the Department may obtain access to documents, records, samples, and witnesses without first filing a complaint in court. Although authority is not explicit in the statute, it appears that county attorneys may also utilize these discovery devices.<sup>77</sup> Enforcement is by means of a judicial hearing, which can

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69. R.C.M. 1947, § 85-414(1).

70. R.C.M. 1947, § 85-414(2),(4).

71. R.C.M. 1947, § 85-414(3). The addition of "fraudulent course of conduct" is unexplained and undefined. One can only speculate as to its inclusion in this section.

72. R.C.M. 1947, § 85-415. There is a difference between this power and that noted *supra* note 62. The latter is solely to restore injured parties to their former status; the former is penal.

73. R.C.M. 1947, § 85-409. Because of the low cost of this procedure and its favorable reception by businessmen at the federal level, this remedy is especially valuable. *See* discussion, Lovett, *supra* note 8 at 741-742. For Washington's use of the CID, *see* Reed, *supra* note 54 at 406-407; Comment, *Washington's Civil Investigative Demand*, 10 GONZAGA L. REV. 651 (1975).

74. R.C.M. 1947, § 85-410(1).

75. Lovett, *supra* note 8 at 737.

76. R.C.M. 1947, § 85-411. This section also affirms department power to make substantive rules and regulations granted under R.C.M. 1947, § 85-403(2).

77. R.C.M. 1947, § 85-416 provides that "the county attorney may *institute and prosecute actions* in the same manner as provided for the department (emphasis added)." This language raises questions of legislative intent which R.C.M. 1947, § 85-417 may help to clarify. The latter provides that county attorneys in first and second class counties may designate a full-time investigator. By logical extension, an investigator should have available

result in either an injunction against advertisement or sale of any merchandise, vacation or suspension of corporate charter, revocation or suspension of authority or a license to do business in Montana furthering the alleged violation, or other relief as may be required.<sup>78</sup> Disobedience of a court order carries a mandatory contempt citation.<sup>79</sup> Procedural safeguards built into these statutes to protect businessmen from unwarranted harassment include the right to extend the time of, or modify or set aside an investigative demand by petition to the district court,<sup>80</sup> the right to freedom from self-incrimination, and protections from information disclosures by the Department.<sup>81</sup>

#### D. Private Remedies

Montana has what very well may be the broadest private remedy provision of any consumer protection statute in the nation.<sup>82</sup> The Montana statute allows any person, including corporations, partnerships, and other legal entities,<sup>83</sup> to bring an individual (but not a class) action if that person:

[P]urchases or leases goods or services primarily for personal, family or household purposes and thereby suffers any ascertainable loss of money or property, real or personal, as a result of the use or employment by another person of a method, act or practice declared unlawful [by the Act]. . .<sup>84</sup>

A recovery of \$200 or actual damages, whichever is *greater*, may be supplemented in the court's discretion by the ability to award up to three times actual damages and other equitable relief,<sup>85</sup> as well as reasonable attorney fees for the prevailing party.<sup>86</sup> Injunctions, judgments, or orders made by a court in a department action to restrain illegal conduct "shall be prima facie evidence in an action brought under . . . [this section] . . . that the respondent used or

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the investigative tools of the department. The same logic does not apply to the "assurance of voluntary compliance" of R.C.M. 1947, § 85-409, but that power too should be extended to counties.

78. R.C.M. 1947, §§ 85-413(1),(2) and (3).

79. R.C.M. 1947, § 85-413(3).

80. R.C.M. 1947, § 85-410(2).

81. R.C.M. 1947, § 85-411.

82. R.C.M. 1947, § 85-408.

83. R.C.M. 1947, § 85-401(1).

84. R.C.M. 1947, § 85-408(1).

85. R.C.M. 1947, § 85-408(1). What is includable in actual damages is an open question. See Reed, *supra* note 54 at 401.

86. R.C.M. 1947, § 89-408(3). The court's power to award attorney fees to the defending party may have the effect of keeping otherwise meritorious claims out of court at least until some case law is established for private actions, but the section may also offer balance to the statute which is still quite favorable to consumers.

employed a method, act or practice declared unlawful. . .<sup>87</sup> This remedy is clearly a broad and powerful one for consumers. It carries forward basic policy:

The proper objective of social policy with such remedial devices should be to encourage assertion of legitimate consumer rights without encouraging unwarranted harassment of honest businessmen acting in good faith. From this standpoint, a reliable provision of attorney's fees and costs of suit for successful consumer plaintiffs will almost certainly be the most important factor in enabling consumer actions, with the lack of compensation to unsuccessful litigants serving as a needed discipline against unwarranted claims. Punitive damages, at least up to a certain level of recovery, serve the valuable function for consumers of offsetting risks of litigation or problems of proof in determining proper damages. . .<sup>88</sup>

Montana's statute does fall short, however, in its making attorney fees discretionary, since "consumers and their counsel should be assured of something more than a chance of actual damages . . . [t]he consumer must be assured that he can actually recover reasonable attorney's fees and the costs of his suit. . ."<sup>89</sup> Perhaps this deficiency will be offset by judicial liberality in damage awards, particularly in light of the judges' double discretionary power to order treble damages and attorney fees.

One final problem in the Montana private remedy provision is the burden of proof. The plaintiff must show injury of some sort in money or property; he must show that such injury was proximately caused by defendant's action; and he must show that this action was one declared unlawful by the Act. The first two elements are traditional and should pose no new difficulties. The proof of unlawful conduct (in the absence of the prima facie evidence of a Department action) raises serious questions with no known answers. Is the burden of proof the same as that placed on the Department in its action? Are the FTC tests to be applied here? Plaintiffs can argue that because of the absence of any different command, and because of the "prima facie evidence" provision tying public and private actions together, the answer to both questions should be yes. Defendants can argue that the common law fraud test should apply since the standard rules of procedure are specifically applicable and any change would cause a dangerous imbalance in favor of consumers, who are already offered the protection by the Department. Plain-

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87. R.C.M. 1947, § 89-408(4). This section should cut both ways, protecting a respondent who prevailed in a department action.

88. Lovett, *supra* note 8 at 744-745.

89. *Id.*

tiffs' argument appears to carry the most weight and follows the legislative intent of the Act, but only a court decision can answer these questions. As yet, utilization of this private remedy provision has been negligible if not non-existent. Washington has seen a similar lack of interest in its private remedy statute.<sup>90</sup> The non-use may be attributable to the high costs of such an action in Washington,<sup>91</sup> but such an explanation should carry less weight in this state because of the types of recovery permitted by our provision. It is more likely that a general lack of knowledge of this statute on the part of Montana consumers and their attorneys is responsible for its rare utilization.

#### IV. CONCLUSION

Montana has had one of the nation's best consumer protection acts for nearly three years now, but so far court action pursuant to it has been rare, leaving consumers uncertain as to what rules the Act may create or change. Washington's experience shows that in time, and given proper resources, a consumer jurisprudence will be created. As case law begins to develop, use of the Act should expand at a far greater pace than now. Montanans should be aware of this trend and should recognize the developments as they occur so that consumer protection will become a reality rather than a lifeless statute.

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90. RCWA § 19.86.090 (1961) (as amended in 1970).

91. Comment, *supra* note 43 at 457.

