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Consumer Protection Via the Larceny by Trick Statute

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CONSUMER PROTECTION VIA THE LARCENY BY TRICK STATUTE

IN 1951, IN THE DECISION of *State v. Healy*,[1] the Ohio Supreme Court examined and interpreted the so-called larceny by trick statute.[2] The significance of that decision in terms of consumer protection for Ohio is immense, though as yet unfelt because of a disinclination on the part of public officials and the legal community to use criminal statutes for such a purpose.

The belief that criminal statutes are not the proper vehicle for carrying forward an effective plan for the protection of the consumer is widespread. A recent study of the direct selling industry stated with regard to fraudulent practices:

> Criminal convictions are difficult to obtain and are an ineffective way to regulate consumer fraud. Enforcement agencies do not have enough time and manpower to devote to criminal fraud cases; the time spent is less likely to result in conviction. If someone is convicted the penalty will probably be too small to act as a deterrent.[3]

The former Attorney General, now the senior senator from Ohio, the Hon. William B. Saxbe, conducted an in-depth study of the role of government in consumer protection and stated that:

> The criminal law is not an appropriate tool to achieve broad social policy goals. It necessitates proof of the impossible requirements of scienter, proof beyond a reasonable doubt, penalties and fines that may be deemed only a cost of doing business, and strict construction and application of statutes by judges and juries.[4]

A more recent statement from the Ohio Office of the Attorney General espoused a similar sentiment, saying:

> It has long been the contention of those active in consumer protection that criminal statutes have not been an effective weapon

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[1] State v. Healy, 156 Ohio St. 229, 102 N.E.2d 233 (1951).

[2] OHIO REV. CODE § 2907.21 (Supp. 1972), providing that:

> No person shall obtain possession of or title to, anything of value with the consent of the person from whom he obtained it, provided he induced such consent by a false or fraudulent representation, pretense, token, or writing.
>
> Whoever violates this section is guilty of larceny by trick, and, if the value of the service or thing so obtained or sought to be obtained is sixty dollars or more, shall be imprisoned not less than one nor more than seven years. If the value is less than sixty dollars, such person shall be fined not more than three hundred dollars or imprisoned not more than ninety days, or both.

[3] Project, *The Direct Selling Industry: An Empirical Study*, 16 U.C.L.A. L. REV. 883, 955 n. 308 (1969).

[4] Saxbe, *The Role of the Government in Consumer Protection: The Consumer Frauds and Crimes Section of the Ohio Attorney General*, 29 OHIO L. REV. 897, 908 (1968).

against deceptive and fraudulent selling practices. This view is supported by a letter survey of county prosecutors recently conducted by the Consumer Frauds and Crime Section.[5]

An examination of the history and scope of the larceny by trick statute, the broad language of decisions interpreting said statute, and pertinent legal, social, and economic factors shows this aversion to act on the part of public officials to be unwarranted.

For the most part, consumer protection in Ohio has been the work of such agencies as the Better Business Bureau, legal aid societies, the Chamber of Commerce, and private consumer organizations.[6] In Ohio, the only state agency concerned with the general area of consumer frauds and deception is the administratively created Consumer Frauds and Crimes Section of the Attorney General's office.[7] The main function of this agency is gathering information and educating the public and other public officials and not enforcing criminal statutes.[8] It was recently noted that "there is no active or well-financed network of consumer related organizations in Ohio."[9]

It is of course possible for the defrauded consumer to bring a civil action for fraud if there is an intentional misrepresentation by the vendor;[10] or if the misrepresentation is innocent or is the result of nondisclosure, the victim may institute an action for constructive fraud.[11] However, unless the loss to the consumer is substantial, the cost-benefit ratio of such civil actions makes them impractical.

It is the purpose of this comment to demonstrate that the means for practical and effective consumer protection in the area of consumer frauds does in fact exist in Ohio in the form of a criminal statute—the larceny by trick statute, and this means could be utilized by local prosecutors. Similar statutes exist in most states under the heading of larceny by trick or false pretenses. Depending on the language of the statutes of the other jurisdictions, many of the principles discussed herein in connection with the Ohio statute may be applicable to those statutes.

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[5] CONSUMER FRAUDS & CRIMES BULLETIN, June, 1971, at 1 [hereinafter cited as BULLETIN].

[6] OHIO LEGISLATIVE SERVICE COMMISSION, REPORT NO. 103, CONSUMER LAWS, PROGRAMS, AND ORGANIZATIONS 23 (1971) [hereinafter cited as REPORT NO. 103].

[7] *Id.* at 27.

[8] CONSUMER FRAUDS & CRIMES BULLETIN, July, 1963.

[9] REPORT NO. 103 at 23.

[10] Manning v. Len Immke Buick, 28 Ohio App.2d 203, 276 N.E.2d 253 (1971).

[11] Ruedy v. Toledo Factories Co., 61 Ohio App. 21, 23 N.E.2d 293 (1939).

HISTORY AND PURPOSE

Under the general larceny statute,[12] it was not larceny for a person to take and carry away the property of another if the owner of said property voluntarily delivered the property to the taker with the intent that the taker was to have not only possession of the property, but also title to the property. This was true even though fraud was practiced to induce the delivery of the property. The fraudulent taker is considered to have taken and carried away his own property, not the property of another.[13]

To deal with the fraudulent taker, a statute was passed designating actions of obtaining property by false pretenses to be criminal.[14] The false pretenses statute is concerned with fraudulent acts to obtain *possession* of another's property. This statute was supplemented by the larceny by trick statute[15] to make it a crime to obtain *possession of or title to* the property of another by a false or fraudulent representation.

The effectiveness of the false pretenses statute was severely limited by the Ohio Supreme Court in its decision in *Harris v. State*.[16] It construed the statute to apply only to a representation that related to a past or present fact or event and not to a promise relating to the future.[17]

The larceny by trick statute has not suffered from such a limitation. In 1949, the Court of Appeals of Ohio, Cuyahoga County, examined the statute in the case of *State v. Singleton*.[18] The court stated, "As is commonly known, many swindles are perpetrated by inducing the owner to part with the possession or title to his property by means of false or fraudulent representations as to future events of transactions. . . ."[19] The court then went on to say that it was apparent that the larceny by trick statute was passed to fill in the gaps of the larceny and the false pretenses statutes and to make it a criminal offense to perpetrate a swindle by such means.[20]

> Another important aspect of the *Singleton* decision held
> [A]ny representation, pretense, token or writing, made by the actor *in furtherance of a scheme or artifice to defraud* [emphasis added] is a fraudulent representation, pretense, token or writing, and may,

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[12] OHIO REV. CODE § 2907.20.
[13] Kellogg v. State, 26 Ohio St. 15 (1874).
[14] OHIO REV. CODE § 2911.01.
[15] OHIO REV. CODE § 2907.21 (Supp. 1972).
[16] Harris v. State, 125 Ohio St. 257, 181 N.E. 104 (1932).
[17] *Id.* at 259, 181 N.E. at 105.
[18] State v. Singleton, 85 Ohio App. 245, 87 N.E.2d 359 (1949).
[19] *Id.* at 256, 87 N.E.2d at 365.
[20] *Id.*

> depending on the specific character thereof, be both false and fraudulent. . . .[21]

These two elements, a scheme to defraud and fraudulent representations that may be promissory in nature and relate to future facts or events are important aspects for effecting consumer protection by section 2907.21.

SCOPE AND APPLICATION

That section 2907.21 is to have a broad scope was further delineated by the Ohio Supreme Court in *State v. Healy*.[22]

The defendant therein contended that his conviction by the trial court could not stand since the trial court did not instruct the jury as to specific intent being a requisite element of the crime. The Court of Appeals agreed with the defendant and set aside the defendant's conviction saying that the larceny by trick statute must be construed together with the general larceny statute. The Court of Appeals reasoned that since specific intent had been interpreted by the courts to be an element of the crime of larceny (even though not so stated in the General Code), then a similar interpretation should be given to the larceny by trick statute.[23]

The Supreme Court reversed, noting that the larceny by trick statute does not use the word "steal" but instead uses the word "obtain."[24] The court held that the word "obtain" "means just what it says, to get, to secure possession of. It is used in the ordinary sense and has no technical meaning beyond that."[25]

The court then stated:

> It seems clear that where a statute in defining an offense is silent on the question of intent and thereby indicates the purpose of the General Assembly to make proof of a specific intent unnecessary, proof of a general intent to do the proscribed act is sufficient. . . .[26]

In a direct statement as to the scope of the statute the court stated, "It is intended to be broader than the larceny statute . . . and to provide that the commission of the fraudulent acts, coupled with obtaining of *possession* or title to the property is sufficient to constitute an offense."[27] Later the court remarked that it ". . . was clearly designed and enacted for the purpose of protecting the innocent from ingenuous fraudulent

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[21] *Id.* at 257, 87 N.E.2d at 365.
[22] State v. Healy, 156 Ohio St. 229, 102 N.E.2d 233 (1951).
[23] *Id.* at 238, 102 N.E.2d at 238.
[24] *Id.*
[25] *Id.* at 239, 102 N.E.2d at 238.
[26] *Id.* at 239, 102 N.E.2d at 239.
[27] *Id.*

schemes, and that purpose should not be thwarted by an interpretation which would in effect nullify its very salutory provisions."[28]

In interpreting the larceny by trick statute, the Court of Appeals in *Singleton* noted that the fraudulent conduct proscribed by the statute was "similar to the fraudulent conduct proscribed by Section 215 of the United States Criminal Code (Section 338, Title 18, U.S. Code),"[29] (prohibiting mail fraud), and that:

> [I]t is obvious that the fraudulent conduct proscribed in each of such sections is of the same general character, and that the decisions applicable to the interpretation and construction of Section 215 of the United States Criminal Code are therefore applicable to the interpretation of and construction of Section 12447-1, General Code [now Section 29701.21, Ohio Revised Code].[30]

Thus, under such decisions it has been held that the crime consists in the making of those promises which the parties never intended to perform, or false representations which they never intended to make good,[31] and that when it is shown that a defendant knew he would not perform a promissory representation, a fraud has been established.[32] In commenting on how the intent may be established the Supreme Court held: "The relevant representations were promissory, and substantial fraud depended on the divergence between the promised performance and the promisor's belief that he could perform."[33] Thus a great divergence between promises and performance would be interpreted as intent to defraud, and if such promises were made to a number of people a scheme to defraud could be demonstrated.

The cases point to the conclusion that the essence of the crime is the making false or fraudulent representations that induce another to consent to part with possession of, or title to a thing of value. When possession of, or title to a thing of value is transferred, based upon the false or fraudulent representation, the offense is completed.

The value of the statute with respect to consumer protection is further revealed in decisions that have struck down, as not applicable, defenses which may prevail in a civil action based on fraud.

One typical deceptive trade practice is to make a number of representations to the prospective purchaser regarding quality, value, service, etc., and then have the customer sign a contract which excludes

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[28] *Id.* at 240, 102 N.E.2d at 239.
[29] 85 Ohio App. at 257, 87 N.E.2d at 365.
[30] *Id.* at 258, 87 N.E.2d at 366.
[31] Barnard v. United States, 16 F.2d 451 (9th Cir. 1926).
[32] Knickerbocker Merchandising Co. v. United States, 13 F.2d 544 (2nd Cir. 1926).
[33] *Id.* at 545.

mention of these representations and contains a provision merging prior oral representations into the subsequently executed written contract. The promisor would then be able to produce the contract if any disagreement arose as to the agreed bargain. In a civil action the defense is valid[34] but in criminal actions based on charges of false pretenses or larceny by trick, the courts have not accepted the common law concept of "merger" as a valid defense.

Thus, in the case of *People v. Frankfort*,[35] the defendants were charged with grand theft by obtaining money by false pretenses. The defendants asserted that the contracts insulated them from prosecution because they contained a merger clause and statements that no salesman was authorized to make any statements other than those in the contract and the defendants would not be held liable for any other representations. The defendants claimed that since each party had read and understood what he signed there could be no prosecution for false pretenses. The court denied the defense reasoning that, since the state is not a party to the contract it is not precluded by the contract language from prosecuting a crime committed by way of the contract.[36]

Similar reasoning was used as long ago as 1888 in a decision in the Supreme Court of Illinois in the case of *Jackson v. People*.[37] The defendant who had misrepresented the health and quality of a horse sold to one Hines, claimed he was absolved on the basis of a contract he signed with Hines that had a merger clause. The court held that the State was not precluded by the parol evidence rule from showing the true state of facts in a criminal action.[38]

In a more recent decision, the Supreme Court of Washington reached a similar result in *State v. Cooke*,[39] but based its decision on a somewhat different principle. There the court held that, "although 'a merger clause' may bar one from asserting false oral representations in an action on a written contract entered into at arm's length, it does not prevent the State from enforcing a statute enacted for the public's protection."[40]

Another defense that may be effective in civil suits for a deceptive sales practice is the claim that since the plaintiff received something of value and cannot prove it is worth less than the price paid, there can

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[34] McCartney v. Roberts, 2 O.L.A. 139 (Ohio App. 1923).
[35] People v. Frankfort, 114 Cal. App.2d 680, 251 P.2d 401 (1952).
[36] *Id.*
[37] Jackson v. People, 126 Ill. 139, 18 N.E. 286 (1888).
[38] *Id.*
[39] State v. Cooke, 59 Wash.2d 829, 371 P.2d 39 (1962).
[40] *Id.*

be no complaint at a later stage when the purchaser becomes dissatisfied with the product, since there was no actual loss.[41]

In ruling on such an assertion in the case of *People v. Ross*,[42] the Court of Appeals of California stated, "Nor does the 'actual loss,' as the defendant asserts, determine the existence of theft or the degree thereof. 'If the victim is induced to part with money or property in exchange for other property fraudulently misrepresented, the crime is committed.'. . ."[43]

Examination of Section 2907.21 and decisions interpreting it have thus established a number of factors that may make the statute useful as a basis for consumer protection. The statute applies to those making false representations that may be promissory in nature, may apply to representations of future events and transactions as well as to present or past facts, and may be shown by demonstrating a scheme to defraud by the promisor. The scheme itself may be shown by evidence of a wide divergence in what the promisor said he would do and what his intentions were, as demonstrated by his actions. The state is not required to show specific intent, only a general intent, and the statute is not to be so strictly construed as to deprive it of a useful purpose. In addition, the defense of a merger clause in the written contract that denies any other representations were made is not effective in a criminal action. Nor is the fact that the purchaser has suffered no net financial loss a valid defense since the essence of the crime is making false or fraudulent representations that induce another to transfer a thing of value and not the fact that the purchaser has suffered financial loss.

Under the broad interpretations of Section 2907.21 in the *Singleton* and *Healy* decisions, and by the decisions in other state and federal courts of similar statutes, the scope of the statute is broad enough to include a prohibition against the practice of making false or fraudulent statements during preliminary negotiations or advertisements that are made to induce a buyer to enter into a contract where such false representations are not included, and where the maker of said false representations knew they would not be included and, in fact, had no intention of carrying out said false representations when they were made.

Thus, if a vendor states that the car he is selling has only 20,000 miles, or states that the vendee has three days to cancel the deal, or terms the agreement "lay away," and the vendor makes these statements

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[41] Manning v. Len Immke Buick, 28 Ohio App.2d 203, 205, 276 N.E.2d 253, 255 (1971).

[42] People v. Ross, 25 Cal. App.3d 190, 100 Cal. Rptr. 703 (1972).

[43] *Id.* at 195, 100 Cal. Rptr. at 705.

knowing either they are not true or with no intention of carrying them out, but solely for the purpose of inducing the vendee to transfer to him a thing of value, then a "false or fraudulent representation pretense, token or writing"[44] would have been made as proscribed by section 2907.21. If by this scheme or artifice, the vendor does induce the vendee to transfer to the vendor a thing of value, the crime stated in section 2907.21 is completed.

The provisions of this statute could be applied to a number of deceptive practices that now plague the consumer. Magazine salesmen who purport to be offering "special rates" but in fact are not, car dealers who misrepresent used cars by turning back the odometer, stores that advertise low prices to be the result of a "close out" but actually are selling cheaper merchandise, or repairmen who misrepresent the condition and need for repairs of an appliance or automobile could all be prosecuted under this statute.

The penalties for violation of the statute are not to be regarded lightly. In any such transaction involving sixty dollars or more a felony is committed and the guilty party "shall be imprisoned not less than one nor more than seven years."[45] This can hardly be written off as an expense of doing business.

As was stated in a recent issue of Consumer Frauds and Crime Bulletin, "[T]he apparent lack of criminal prosecutions in the consumer frauds area cannot be attributed to the absence of an applicable statute."[46] From the standpoint of legal arguments, section 2907.21 appears to be an effective tool that could be utilized by local prosecutors to protect the consumer.

EXTRA-LEGAL CONSIDERATIONS

The first major hurdle to be overcome in instigating effective use of the criminal laws for protection of consumers against fraudulent practices is getting local and county prosecutors to recognize the scope of the problem and the availability of remedies.

The Consumer Frauds and Crimes Section of the Ohio Attorney General's Office, "... the agency which has the best opportunity to observe a broad range of fraudulent activities statewide, has estimated that Ohioans lose $300 million annually from this cause—about $125 for each family unit."[47] Not many types of criminal activity have such a

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[44] OHIO REV. CODE § 2907.21 (Supp. 1972).

[45] *Id.*

[46] BULLETIN at 2.

[47] OHIO LEGISLATIVE SERVICE COMMISSION, REPORT NO. 102, FRAUD, DECEPTION, AND OTHER ABUSES IN CONSUMER SALES AND SERVICE 1 (1971) [hereinafter cited as REPORT NO. 102].

widespread effect on the public. Yet, in a 1970 survey of local public and private organizations dealing with consumer protection in Ohio,[48] the forty-five (out of the eighty-nine) county prosecutors' offices that responded averaged only 11.6 man-hours per week per agency spent on consumer problems.[49] The fact that sixty-eight per cent of these county prosecutors felt their staffs were of adequate size to deal with consumer problems[50] is some evidence of a lack of recognition of the need for action on the part of those who enforce the criminal statutes. It would appear that the situation has not significantly changed since the survey. In a November, 1972, article on the Consumer Affairs Division of the Summit County Prosecutor's Office[51] it was stated that the division was "one of the first on the local level and is believed to be one of the few [offices] using the unique method of applying long-standing State criminal laws on larceny by trick and fraud against unscrupulous businessmen."[52]

In another survey of county prosecutors in Ohio,[53] two reasons often given for lack of enforcement in this area were the need for investigative personnel and the overwhelming press of other criminal matters.[54] It would seem however, that the need for investigative personnel could often be satisfied by using part-time and voluntary workers. Students and retirees are good potential sources of willing and capable workers to search records, conduct interviews, and to receive and check out complaints.

The magnitude of the problem has been previously indicated,[55] and this factor should be carefully weighed by local officials in deciding how to allocate their time and resources. Although cost-benefit ratios displayed by programs now in existence vary according to location, "the more modest estimates of direct benefits to consumers far exceed the administrative costs involved."[56]

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48 OHIO LEGISLATIVE SERVICE COMMISSION, REPORT NO. 101, CONSUMER PROBLEMS AND PROTECTION (1971).

49 *Id.* at 1, 407 organizations were surveyed with 72% responding.

50 *Id.* at 3.

51 Akron Beacon Journal, Nov. 26, 1972, at 1, col. 1.

52 *Id.* at A15.

53 BULLETIN at 2.

54 *Id.*

55 *See* REPORT NO. 102.

56 THE COUNCIL OF STATE GOVERNMENTS, CONSUMER PROTECTION IN THE STATES (1970).

CONCLUSION

The need for protection of the consumer against deceptive and fraudulent practices cannot be doubted.[57] Indeed, since the first state program for consumer protection was established in New York in 1951, most of the states have enacted some kind of consumer legislation or are studying the consumer problem.[58] The emphasis has been on administrative agencies and procedures for civil action whereby the victimized consumer may obtain some restitution. While there is no doubt that such procedures are needed, their effectiveness has often not lived up to the expectations of the proponents of such measures.[59] The reason for this failure stems not only from a widespread aversion on the part of the public to getting involved in legal actions, but also arises from the fact that the individual consumer's loss is often of such a relatively minor value that legal action is not warranted.[60]

There is another approach to the problem of protecting the consumer—the use of criminal penalties. Enforcement of criminal statutes against those who prey on the unwary by false or fraudulent schemes has a number of advantages as compared to the use of civil actions.

First, the enforcement of criminal sanctions is a state action, thus alleviating the consumer's dread of instigating and becoming involved in the legal process. As previously noted, state action also has advantages in relation to legal ramifications, especially in the area of contracts.

Secondly, the state is able to pursue those who make large profits by short-changing many people out of small amounts. In other words the cost of legal actions would be borne by the victimizer rather than the victim.

Thirdly, the notoriety of criminal proceedings and harsh penalties for convictions can bring unscrupulous dealings to a halt much more quickly than civil suits that are often just figured as a cost of doing business.

The Ohio larceny by trick statute has been chosen as an example of how existing criminal statutes may be utilized to effectuate consumer protection. The statute has only recently been applied to the area of consumer protection, but the potential for increased use is considerable.

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[57] Knauer, *A Need Fulfilled,* 1 LOY. CONSUMER PROTECTION J. 3 (1972).

[58] THE COUNCIL OF STATE GOVERNMENTS, CONSUMER PROTECTION IN THE STATES, 23 (1970).

[59] *See* REPORT No. 102 at 1.

[60] Note, *New York City's Alternative to the Consumer Class Action: The Government as Robin Hood,* 9 HARV. J. LEGIS. 301, 302 (1971-72).