



Am. Sub. H.B. 465

124th General Assembly

(As Passed by the House)

Reps. Willamowski, Manning, Sulzer, Hagan, Buehrer, Seitz, Schaffer, Calvert, Fessler, Setzer, Otterman, Hughes, Gilb, Roman, Grendell

BILL SUMMARY

- Provides that a person engages in a deceptive trade practice when, in the course of the person's business, vocation, or occupation, the person performs for or with the expectation of compensation, whether directly or indirectly received, a service for which a license, certificate, permit, or registration is required, including licenses, certificates, permits, or registrations required under specified laws, while not holding a current and valid license, certificate, permit, or registration.
- Modifies the Consumer Sales Practices Act by providing that a consumer may not rescind a transaction for a violation of that Act if the transaction in question is a real estate transaction involving the purchase and sale of land and a contract to construct a single-family dwelling unit, or a newly constructed single-family dwelling unit.

CONTENT AND OPERATION

Deceptive trade practices

The current Deceptive Trade Practices Law provides that a *person* engages in a deceptive trade practice when, in the course of the person's business, vocation, or occupation, the person does any of specifically listed acts.¹ The bill expands that Law to provide that a person engages in a deceptive trade practice when, in the course of the person's business, vocation, or occupation, the person performs

¹ "Person" means an individual, corporation, government, governmental subdivision or agency, business trust, estate, trust, partnership, unincorporated association, limited liability company, two or more of any of the foregoing having a joint or common interest, or any other legal or commercial entity (R.C. 4165.01(D)--not in the bill).

for or with the expectation of compensation, whether directly or indirectly received, a service for which a license, certificate, permit, or registration is required, including licenses, certificates, permits, or registrations required under certain laws specified below, while not holding a current and valid license, certificate, permit, or registration. These laws are the following: Dairies Law (R.C. Chapter 917.); Pesticides Law (R.C. Chapter 921.); Agricultural Commodity Handlers Law (R.C. Chapter 926.); Plants and Nursery Stock Law (R.C. Chapter 927.); Livestock Dealers Law (R.C. Chapter 943.); Small Loans Law (R.C. Chapter 1321.); Mortgage Brokers Law (R.C. Chapter 1322.); Asbestos Hazard Abatement Law (R.C. Chapter 3710.); Radon Law (R.C. Chapter 3723.); Lead Abatement and Testing Law (R.C. Chapter 3742.); Radiation Control Law (R.C. Chapter 3748.); Boxing, Discharging of Firearms, Dueling, and Ohio Athletic Commission Law (R.C. Chapter 3773.); Insurance Agents Licensing Law (R.C. Chapter 3905.); Public Insurance Adjusters Law (R.C. Chapter 3951.); Third-Party Administrators Law (R.C. Chapter 3959.); Accountants Law (R.C. Chapter 4701.); Architects Law (R.C. Chapter 4703.); Attorneys Law (R.C. Chapter 4705.); Auctioneers Law (R.C. Chapter 4707.); Barbers Law (R.C. Chapter 4709.); Debt Pooling Companies Law (R.C. Chapter 4710.); Ohio Credit Services Organizations Law (R.C. Chapter 4712.); Cosmetologists Law (R.C. Chapter 4713.); Dentists and Dental Hygienists Law (R.C. Chapter 4715.); Embalmers, Funeral Directors, and Crematory Facility Operators Law (R.C. Chapter 4717.); Telephone Solicitors Law (R.C. Chapter 4719.); Nurses Law (R.C. Chapter 4723.); Optometrists and Dispensing Opticians Law (R.C. Chapter 4725.); Pawnbrokers Law (R.C. Chapter 4727.); Precious Metals Dealers Law (R.C. Chapter 4728.); Pharmacists and Dangerous Drugs Law (R.C. Chapter 4729.); Physician Assistants Law (R.C. Chapter 4730.); Physicians and Limited Practitioners Law (R.C. Chapter 4731.); Psychologists and School Psychologists Law (R.C. Chapter 4732.); Professional Engineers and Professional Surveyors Law (R.C. Chapter 4733.); Chiropractors Law (R.C. Chapter 4734.); Real Estate Brokers Law (R.C. Chapter 4735.); Sanitarians Law (R.C. Chapter 4736.); Secondhand Dealers and Junk Yards Law (R.C. Chapter 4737.); Motor Vehicle Salvage Law (R.C. Chapter 4738.); Steam Engineers and Boiler Operators Law (R.C. Chapter 4739.); Construction Industry Examining Board Law (R.C. Chapter 4740.); Veterinarians Law (R.C. Chapter 4741.); Hearing Aid Dealers Law (R.C. Chapter 4747.); Private Investigators and Security Services Law (R.C. Chapter 4749.); Nursing Home Administrators Law (R.C. Chapter 4751.); Speech Pathologists and Audiologists Law (R.C. Chapter 4753.); Occupational Therapists and Physical Therapists Law (R.C. 4755.); Counselors and Social Workers Law (R.C. Chapter 4757.); Dietetics Law (R.C. Chapter 4759.); Anesthesiologist Assistants Law (R.C. Chapter 4760.); Respiratory Care Law (R.C. Chapter 4761.); Acupuncturists Law (R.C. Chapter 4762.); Real Estate Appraisers Law (R.C. Chapter 4763.); Emergency Medical Services Law (R.C. Chapter 4765.); Ambulance Licensing Board Law (R.C. Chapter 4766.); Athlete Agents Law (R.C.

Chapter 4771.); X-ray Machine Operators, Radiographers, Radiation Therapy Technologists, and Nuclear Medicine Technologists Law (R.C. Chapter 4773.); Motor Vehicle Collision Repair Operators Law (R.C. Chapter 4775.); Industrial Hygiene and Occupational Safety Law (R.C. Chapter 4777.); and Child Day Care Law (R.C. Chapter 5104.). (R.C. 4165.02(A)(14).)

Remedies

The following remedies for deceptive trade practices under current law apply to the new deceptive trade practice under the bill.

A person who is *likely to be damaged* by a person who commits a deceptive trade practice that is listed in R.C. 4165.02(A) may commence a civil action for injunctive relief against the other person, and the court of common pleas involved in that action may grant injunctive relief based on the principles of equity and on the terms that the court considers reasonable. Proof of monetary damage or loss of profits is not required in a civil action for injunctive relief. A person who is *injured* by a person who commits a deceptive trade practice that is listed in R.C. 4165.02(A) may commence a civil action to recover actual damages from the person who commits the deceptive trade practice.

The court may award reasonable attorney's fees to the prevailing party in either type of civil action authorized as described in the preceding paragraph. An award of attorney's fees may be assessed against a plaintiff if the court finds that the plaintiff knew the action to be groundless. An award of attorney's fees may be assessed against a defendant if the court finds that the defendant has willfully engaged in a trade practice listed in R.C. 4165.02(A) knowing it to be deceptive.

The civil relief as described above is in addition to civil or criminal remedies otherwise available against the same conduct under the common law or other sections of the Revised Code. (R.C. 4165.03--not in the bill.)

In order to prevail in a civil action that seeks injunctive relief or an award of damages and that is based on one or more deceptive trade practices listed in R.C. 4165.02(A), a complainant need not prove competition between the parties to the civil action. R.C. 4165.02 does not affect unfair trade practices that are otherwise actionable at common law or under other sections of the Revised Code. (R.C. 4165.02(B) and (C).)

Consumer sales practices

Background

The Consumer Sales Practices Act (CSPA) prohibits any *supplier* from committing an unfair or deceptive act or practice in connection with a *consumer*



transaction. (See **COMMENT 1.**) Such an unfair or deceptive act or practice by a supplier violates the CSPA whether it occurs before, during, or after the transaction. (R.C. 1345.02(A)--not in the bill.) The law lists the types of deceptive acts or practices without limiting the scope of the above prohibition. (See **COMMENT 2.**)

The CSPA also prohibits any supplier from committing an unconscionable act or practice in connection with a consumer transaction. Such an unconscionable act or practice by a supplier violates the CSPA whether it occurs before, during, or after the transaction. Certain circumstances must be taken into consideration in determining whether an act or practice is unconscionable. (R.C. 1345.03(A) and (B)--not in the bill.) (See **COMMENT 3.**)

Remedies

A consumer has a cause of action and is entitled to relief for a violation of the CSPA. Under existing law, if the violation was prohibited by R.C. 1345.02 or R.C. 1345.03, as described above and **COMMENT 2** and **3**, the consumer may, in an individual action, *rescind the transaction* or recover the consumer's damages. A consumer also may seek a declaratory judgment, an injunction, or other appropriate relief against an act or practice that violates the CSPA. (R.C. 1345.09(A) and (D).)

Operation of the bill

The bill provides an exception *only* to the remedy of rescission of the transaction under existing law. It provides that a consumer may not rescind a transaction if the transaction in question is a real estate transaction involving the purchase and sale of land and a contract to construct a single-family dwelling unit, or a newly constructed single-family dwelling unit (R.C. 1345.09(G)). The bill, in effect, retains the existing remedies of recovery of damages, declaratory judgment, injunction, or other appropriate relief under continuing law if the transaction is as described above. (See **COMMENT 4.**)

COMMENT

1. The CSPA defines the following terms, among others (R.C. 1345.01(A) and (C)--not in the bill):

"Consumer transaction" means a sale, lease, assignment, award by chance, or other transfer of an item of goods, a service, a franchise, or an intangible, to an individual for purposes that are primarily personal, family, or household, or solicitation to supply any of these things. "Consumer transaction" does not include transactions between persons, defined in the Public Utilities Commission

Law and the Taxation Law dealing with financial institutions, dealers in intangibles, and insurance companies, and their customers; transactions between certified public accountants or public accountants and their clients; transactions between attorneys, physicians, or dentists and their clients or patients; and transactions between veterinarians and their patients that pertain to medical treatment but not ancillary services.

"Supplier" means a seller, lessor, assignor, franchisor, or other person engaged in the business of effecting or soliciting consumer transactions, whether or not the person deals directly with the consumer.

2. The act or practice of a supplier in representing any of the following is deceptive (R.C. 1345.02(B)--not in the bill):

(1) That the subject of a consumer transaction has sponsorship, approval, performance characteristics, accessories, uses, or benefits that it does not have;

(2) That the subject of a consumer transaction is of a particular standard, quality, grade, style, prescription, or model, if it is not;

(3) That the subject of a consumer transaction is new, or unused, if it is not;

(4) That the subject of a consumer transaction is available to the consumer for a reason that does not exist;

(5) That the subject of a consumer transaction has been supplied in accordance with a previous representation, if it has not, except that the act of a supplier in furnishing similar merchandise of equal or greater value as a good faith substitute does not violate this section;

(6) That the subject of a consumer transaction will be supplied in greater quantity than the supplier intends;

(7) That replacement or repair is needed, if it is not;

(8) That a specific price advantage exists, if it does not;



(9) That the supplier has a sponsorship, approval, or affiliation that the supplier does not have;

(10) That a consumer transaction involves or does not involve a warranty, a disclaimer of warranties or other rights, remedies, or obligations if the representation is false.

R.C. 1345.02(D) prohibits any supplier from offering to a consumer or representing that a consumer will receive a rebate, discount, or other benefit as an inducement for entering into a consumer transaction in return for giving the supplier the names of prospective consumers, or otherwise helping the supplier to enter into other consumer transactions, if earning the benefit is contingent upon an event occurring after the consumer enters into the transaction.

3. In determining whether an act or practice is unconscionable, the following circumstances must be taken into consideration (R.C. 1345.03(B)--not in the bill):

(1) Whether the supplier has knowingly taken advantage of the inability of the consumer reasonably to protect his interests because of his physical or mental infirmities, ignorance, illiteracy, or inability to understand the language of an agreement;

(2) Whether the supplier knew at the time the consumer transaction was entered into that the price was substantially in excess of the price at which similar property or services were readily obtainable in similar consumer transactions by like consumers;

(3) Whether the supplier knew at the time the consumer transaction was entered into of the inability of the consumer to receive a substantial benefit from the subject of the consumer transaction;

(4) Whether the supplier knew at the time the consumer transaction was entered into that there was no reasonable probability of payment of the obligation in full by the consumer;

(5) Whether the supplier required the consumer to enter into a consumer transaction on terms the

supplier knew were substantially one-sided in favor of the supplier;

(6) Whether the supplier knowingly made a misleading statement of opinion on which the consumer was likely to rely to his detriment;

(7) Whether the supplier has, without justification, refused to make a refund in cash or by check for a returned item that was purchased with cash or by check, unless the supplier had conspicuously posted in the establishment at the time of the sale a sign stating the supplier's refund policy.

4. The Ohio CSPA is based on the Uniform Consumer Sales Practices Act. According to the Official Comment by the National Conference of Commissioners on Uniform State Laws regarding the definition of "consumer transaction" in the Uniform Act, land transactions are excluded from the Act on the assumption that they frequently are, and should be, regulated by specialized legislation. (Uniform Laws Annotated, Uniform Consumer Sales Practices Act (1970), Comment to § 2.)

In *Brown v. Liberty Clubs, Inc.* (1989), 45 Ohio St.3d 191, the Ohio Supreme Court recognized that the Consumer Sales Practices Act has no application in "pure" real estate transactions. However, it held that the Act is applicable to the personal property or services portion of a "mixed" transaction that involves both the transfer of personal property or services and the transfer of real estate. The Court found that a deceptive solicitation offering to transfer "gifts" to a consumer as an inducement to visit the real estate subdivision involved and the purchase of land in the subdivision were "so inextricably intertwined" that the Act must be applied "even though the major portion of the instant transaction was the sale of real estate." (*Brown, supra*, at p. 194.)

In the subsequent case of *Heritage Hills Ltd. v. Deacon* (1990), 49 Ohio St.3d 80, the Supreme Court declined to apply the CSPA to residential lease transactions, specifically rejecting the argument that a lease was a "service" within the meaning of the CSPA. The Court held that a lease is a conveyance of an interest in real estate and is not covered by the CSPA. The Court further noted that R.C. Chapter 5321. (Landlord-Tenant Act) would apply to residential rental agreements.

In *Kieber v. Spicer Construction Co.* (C.A. 2d Dist. 1993), 85 Ohio App.3d 391, the Court of Appeals for Greene County held that although the Consumer Sales Practices Act does not apply to isolated, "pure" real estate transactions

involving the purchase and sale of land and any pre-existing improvements, it applies to transactions that include a contract to construct a residence. The Court interpreted a residential contractor that builds a new house as a supplier of consumer-oriented services for purposes of the CSPA. The Court stated that although the Supreme Court implied in *Brown, supra*, that residential construction was not a "good" for purposes of the CSPA, the Court did not interpret *Brown* to stand for the proposition that residential contractors' *services* are not covered by the CSPA whenever purchases include land and construction but are covered, as other courts have held, when purchases include only construction. (*Keiber, supra*, at p. 393.)

The following unreported Court of Appeals decisions have relied on the *Keiber* ruling: *Lawson v. Mack* (C.A. 6th Dist. 1991) 1991 Ohio App. LEXIS 1752; *Fesman v. Berger* (C.A. 1st Dist. 1995), 1995 Ohio App. LEXIS 5327; *Byers v. Coppel* (C.A. 4th Dist. 2001), 2001 Ohio App. LEXIS 3846.

Pursuant to R.C. 1345.05(B), the Attorney General has adopted substantive rules to define with reasonable specificity acts or practices that violate R.C. 1345.02 and 1345.03. In the definitions of terms for purposes of those rules, "services" is defined to mean the performance of labor for the benefit of another and to include "the construction of a single-family dwelling unit by a supplier on the real property of a consumer." (OAC 109:4-3-01(C)(2).)

HISTORY

ACTION	DATE	JOURNAL ENTRY
Introduced	01-08-02	p. 1204
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