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EDITORIAL COMMENT

CONSUMER DISPUTE RESOLUTION IN MISSOURI: MISSOURI'S NEED FOR A "TRUE" CONSUMER OMBUDSMAN

I. INTRODUCTION

Although the people of Missouri now have an outlet to which they can complain about services rendered by the private business sector, this has not always been the case. Before 1967, the citizens of Missouri relied upon the principle of *caveat emptor*, let the buyer beware, to regulate the market place. Since 1967, Missouri moved rapidly ahead in the field of consumer protection but somehow has managed to leave the average consumer naked in the cold world of commercial enterprise.

In order to better protect and inform its citizens the state of Missouri established a consumer protection division within the offices of the Missouri Attorney General.¹ Although this Public Protection Division receives complaints from individual consumers, the Attorney General is prohibited from representing these consumers on an individual basis. As a result, the typical consumer is left with a frustrating choice between an ineffective statutory remedy on one hand and making a futile complaint to the Attorney General on the other. This choice becomes even more distasteful when considering the current slumping economy and business' heightened desire to maximize profits at the consumer's expense.

The Missouri consumer needs help, but it is readily apparent that this help will not come from the business sector, or for that matter, from the courts. The key to protecting Missouri consumers lies within the confines of a viable dispute resolution device. Experimentation in dispute resolution seems to be the fad of the nineties with every jurisdiction dipping their hands into the ADR grab-bag and pulling out a range of devices from forced ADR to voluntary mediation conferences. Should the Missouri consumers, who had to wait fifty years for the legislature to catch-up with other states in enacting a consumer protection statute,

1. The author worked for the Missouri Attorney General's Consumer Protection Division and as a result his source for much of the information in this article is derived from first-hand knowledge and experience.

be asked to wait again before an effective dispute resolution mechanism is put in place?

I think the answer to this question is obviously—No. So were do we look for the cure to consumers' ills? I believe that the answer is lurking within the Attorney General's office. The purpose of the Consumer Protection Unit is to receive and investigate consumer complaints dealing with the private business sector. The Attorney General's handling of complaints is very similar to that of an Ombudsman. The word ombudsman was originally a Swedish word meaning a representative or agent of the people or a group of people.² My suggestion is that we transplant the complaint handling functions currently executed by the Consumer Protection Unit from the constraints of the Attorney General into an independent consumer dispute office—the Consumer Ombudsman.

The purpose of this Article is to explore the practicality of such a "modest proposal." In determining whether Missouri really needs a consumer ombudsman, the first order of business must be to comprehend how consumer protection developed in Missouri. Once established, this framework sheds lights upon how complaints are processed and what remedies are available to Missouri consumers. Only after we know the extent of the typical consumer's helplessness can we start to appreciate the need for an alternative dispute resolution device in Missouri. Finally, this article concludes by proposing a viable solution to Missouri's consumer crisis—the Consumer Ombudsman.

II. THE DEVELOPMENT OF CONSUMER PROTECTION IN MISSOURI

A. Consumerism

Consumerism is the promotion and protection of the consumer's rights and interests.³ In fact, the term "consumer" embraces practically everyone. Yet, the ability of consumers to pursue their legal rights falls short of the power implied by their numbers.⁴ Such irony led President Kennedy to observe that:

Consumers, by definition, includes us all. They are the largest economic group in the economy, affecting and affected by almost every public and private economic decision. Two-thirds of all spending in the economy is by consumers. But they are the only important group in the economy who are not effectively organized, whose views are often not heard . . .⁵

2. D. ROWAT, *THE OMBUDSMAN PLAN* 3 (1985).

3. B. MURRAY, *CONSUMERISM: THE ETERNAL TRIANGLE* xi (1973).

4. Bernstine, *Prosecutorial Discretion in Consumer Protection Divisions of Selected State Attorney General Offices*, 20 *How. L.J.* 247, 249 (1977).

5. 108 *CONG. REC.* 4167, 4263 (1962) (message from President Kennedy to Congress concerning strength of programs to protect consumer interests).

The essence of consumerism is found in the maxim *caveat venditor*, let the seller beware. This maxim replaced the traditional maxim of *caveat emptor*, let the buyer beware.⁶ The emphasis upon the concept of *caveat venditor* evolved out of the disagreement between business and government over the issue of consumer sovereignty.

The concept of consumer sovereignty dictates that the rational consumer decides the success or failure of business through her dollar vote in the market place.⁷ The disagreement centers upon whether the concept is operational. Government claims that it must be involved in the marketplace in order to protect the consumer's rights, whereas business argues that the concept of consumer sovereignty already is operational and sufficient for consumer protection.⁸ Business claims that the rational consumer does not need to be protected by the government, because she will be protected through the operation of a "free market." Thus ensues the classic battle between proponents of *laissez faire*, represented by business, and the proponents of government intervention that wish to remove fraud, collusion, and monopolies from the marketplace.

The emergence and growth of governmental intervention "springs partly from a realization that the market economy cannot by itself prevent economic oppression and misallocation of resources in the modern world."⁹ Laissez-faire "market pressures are effective only where products and services are simple and do not change rapidly, firms are numerous and well known, and information flows freely among consumers so that mistakes of some can guide the purchases of others."¹⁰ Since the early part of the twentieth century, "these pre-conditions can no longer be taken for granted, if they ever could be."¹¹ As a result, government has dominated the laissez-faire market debate and has deeply entrenched itself in the realm of consumer protection.

Beginning in the late nineteenth century, government changed its focus to the protection of consumers. In 1890, Congress enacted the Sherman Antitrust Act¹² which was the original federal legislation in the antitrust field. The Sherman Act prohibited contracts, combinations and conspiracies in restraint of trade.¹³ The Act also forbade monopolization and attempts to monopolize any part of interstate commerce.¹⁴ By passing antitrust legislation, the government ensured that the consumer's right to choose was protected by maintaining free and open competition.

6. B. MURRAY, *supra* note 3, at xi.

7. *Id.*

8. *Id.*

9. L. NADER, *NO ACCESS TO LAW* 69 (1980).

10. *Id.* at 70.

11. *Id.*

12. Sherman Antitrust Act, ch. 647, 26 Stat. 209 (1890) (current version codified at 15 U.S.C. §§ 1-7 (1977)).

13. *Id.* § 1, 26 Stat. at 209.

14. *Id.* § 2.

In 1906, Congress passed the Food, Drug, and Cosmetic Act¹⁵ to protect the consumer against adulterated and unsafe products in the food and drug industries. But by 1914, this emphasis upon product safety soon shifted back to a focus on unfair competition with the passage of the Federal Trade Commission Act (FTCA).¹⁶ This shift was brought about by the progressive movement of the early twentieth century.¹⁷

Prior to the early part of the twentieth century, consumers in the marketplace had to fend for themselves. At that time mass production was still new and there was virtually no consumer credit.¹⁸ The only consumer law was that of *caveat emptor*. The creation of the Federal Trade Commission (FTC) through the FTCA was the first effective assault upon the citadel of *caveat emptor*. Due to the rapidly expanding economy and the failure of the Sherman Antitrust Act, Congress created the FTC to provide a federal agency experienced in business matters that could regulate unfair business activities.¹⁹

Although the Federal Trade Commission Act of 1914 introduced the idea of consumer protection on the federal level, it was not until 1938 with the Wheeler-Lee Act²⁰ that the federal government truly became interested in consumer protection. The Wheeler-Lee Act changed the FTCA by declaring unfair and deceptive acts and practices unlawful.²¹ This Act made the FTC responsible not only for policing, regulating, and enforcing the provisions of the act with respect to false and misleading advertising, but also for protecting the consumer against unfair competitive acts.²²

B. Missouri Merchandising Practices Act

Until 1967, Missouri followed the outdated concept of *caveat emptor*. This concept manifested itself in Missouri case law by providing to those victimized of consumer fraud only one remedy—an action for common law-fraud. Under Missouri law, in order to prove common-law fraud the consumer had to prove the following elements:

1. A representation;
2. Its falsity;
3. Its materiality;
4. The speaker's knowledge of its falsity or ignorance of the truth;

15. Federal Food and Drugs Act, ch. 3915, §1, 34 Stat. 768 (1906) (current version codified at 21 U.S.C. §§ 1-15 (1938)).

16. 15 U.S.C. §§ 41-58 (1914).

17. B. MURRAY, *supra* note 3, at xi.

18. *Id.*

19. Moore, *The Consumer and The FTCA*, 23 ST. LOUIS B. J. 38, 38 (1976).

20. Ch. 49, 52 Stat. 111 (1938) (this act amended the Federal Trade Commission Act of 1914).

21. Moore & Friedman, *General Merchandising Practices Law*, in MISSOURI CONSUMER LAW AND PRACTICE 8-3 (1988).

22. B. MURRAY, *supra* note 3, at xi.

5. The speaker's intent that it should be acted upon by the hearer in the manner reasonably contemplated;
6. The hearer's ignorance of its falsity;
7. Reliance on its truth;
8. The right to rely thereon; and
9. Consequent and proximate injury.²³

This overwhelming burden took its toll in discouraging wrongfully victimized consumers from bringing suit against deceptive businesses.

Throughout the twentieth century, the marketplace became increasingly impersonal and the consumer could no longer trust the merchants with whom she dealt. This impersonal nature is illustrated by the fact that "[p]arties that buy and sell are often strangers to each other; production is centralized; and large organizations control information, condition the terms of purchase, and shape perceptions through advertising."²⁴ Additionally, the concept of *caveat emptor* eroded and relief under the principle of common-law fraud became impractical. At least three factors contributed to the erosion of the common-law fraud principle: industrialization, the increasing complexity of modern society, and widespread advertising.²⁵ As a result of these changes in the early 1900's and the increasing need for consumer protection legislation, the Missouri legislature enacted the Merchandising Practices Act in 1967.²⁶

The purpose of this law was to get around the technical difficulties and rigidity of proving common-law fraud by making unfair and deceptive acts and practices unlawful.²⁷ The traditional nine elements of common-law fraud were scrapped for the proof of only one element—unfair dealings.²⁸ Additionally, by enacting this chapter the legislature wanted to "preserve fundamental honesty, fair play and right dealings in public transactions."²⁹ In *State ex rel. Danforth v. Independence Dodge, Inc.*,³⁰ the Missouri Court of Appeals for the Western District held that "the growing impersonal character of the marketplace has made retail relationships less amenable to the traditional disciplines of consumer good will and the amenities of mutual acquaintanceships."³¹

23. *Ackmann v. Keeney-Toelle Real Estate Co.*, 401 S.W.2d 483, 488 (Mo. 1966).

24. L. NADER, *supra* note 9, at 5.

25. McClellan & Moore, *General Merchandising Practices Laws*, in MISSOURI CONSUMER LAW AND PRACTICE 1-3 (1979).

26. MO. REV. STAT. §§ 407.010-910 (1986).

27. *State ex rel. Ashcroft v. Mktg. Unlimited*, 613 S.W.2d 440, 445 (Mo. Ct. App. 1981).

28. *State ex rel. Danforth v. Independence Dodge, Inc.*, 394 S.W.2d 362, 368 (Mo. Ct. App. 1973).

29. *Id.*

30. 394 S.W.2d 362.

31. *Id.* at 368.

C. Public Protection Division

Along with the passage of the Merchandising Practices Act, the Missouri Attorney General established a consumer protection division. Originally, three attorneys were assigned to the division on a part-time basis, assisted by two investigators.³² The division has grown in both size and responsibility over the years and now is called the Public Protection Division. This division is divided into five major branch offices controlled by a central office.

The central office is located in Jefferson City with the primary function of initial collection and investigation of consumer complaints. All consumer complaints receive a primary review by an investigator and an attorney in order to determine whether the complaint qualifies for further investigation at one of the five branch offices. These branch offices are located in Cape Girardeau, Jefferson City, Kansas City, St. Louis, and Springfield.

The central office performs an intensive investigation of the consumer complaint, looking for patterns of fraud or deception. Once uncovered, a violation of Chapter 407 is sent to the appropriate branch office for "enforcement." The branch office then initiates any litigation necessary.

The Public Protection Division is divided into two units: Consumer Protection and Environmental Protection. The primary purposes of the Consumer Protection Unit are:

- (1) To investigate alleged violation of the state's consumer fraud law and to institute any legal proceedings necessary to protect citizens from false and misleading advertising and sales practices;³³
- (2) To investigate alleged violations of the state's antitrust law and to institute any legal proceedings necessary to protect the citizens from unlawful monopolization and restraints of trade;³⁴ and
- (3) To investigate alleged violations of the state's securities fraud law and to criminally prosecute any violation thereby preventing fraud in the sales of securities.³⁵

The Consumer Protection Unit operates a toll-free "Consumer Fraud Hotline" which is designed to allow Missouri consumers to report possible cases of misrepresentation or fraud. Consumers may also use the hotline to obtain information about a company they are considering doing business with. However, due to the confidentiality of the complaints filed with the office, only limited information regarding the number of written complaints received and their current status may be obtained. The hotline operators are prohibited from giving legal

32. J. KIRKPATRICK, OFFICIAL MANUAL: STATE OF MISSOURI 1969-1970 75 (1970).

33. MO. REV. STAT. §§ 407.010-910.

34. *Id.* §§ 416.011-.560 (1986).

35. *Id.* §§ 409.101-.950 (1986).

advice to callers for the same reason that the Attorney General may not represent individual consumers.³⁶

The Consumer Protection Unit provides only limited information to consumers and refers many consumers to other agencies. However, the Attorney General publishes several notices, brochures, and booklets to keep consumers, law enforcers, and the media up-to-date on the activities and accomplishments in consumer protection. The office regularly issues "Consumer Alerts" dealing with a specific business. The Attorney General sends these alerts to consumer groups and the media in order to urge consumers to use caution when dealing with the business which is under investigation for possible violations of the Merchandising Practices Act.

General information about consumer rights and merchandising laws are outlined in "Consumer Law Update" publications. These booklets educate consumers about such topics as land-lord tenant laws, lemon laws, credit card fraud, fraud of the elderly, and health fraud. These booklets keep consumers informed about their legal rights and the responsibilities of businesses operating in Missouri. All of these publications can be obtained by contacting the Consumer Fraud Hotline.

The many services provided by the Consumer Protection Unit are provided to all Missouri consumers regardless of where the business operates, and to any person who has a complaint about a business operating within the state of Missouri, where the transaction occurs within the state of Missouri.³⁷

III. CONSUMER COMPLAINTS

A. *Who Complains?*

During the course of working in the Consumer Protection Unit, complaint officers come in contact with many different types of complaints and consumers. In order to better understand what kind of consumers are helped and how the complaint officer views these consumers, I have classified the kinds of consumers by the typical nature of their complaints. This classification contains the following type of consumers: complainers, information gatherers, and attentive constituents.

"Complainers" is the most common category of consumers helped by the Consumer Protection Unit. About 60% of all calls and contacts made to the unit can be classified as complainers. There are different types of complainers. The first type is a person who has a specific problem with a business that can be resolved by the unit. The second type of complainer is a person who has a specific problem, but the problem either falls outside the jurisdiction of the Attorney General or the problem needs to be referred to another agency.

The second category of consumer is the "information gatherer." Contacts from this consumer account for about 25 to 30% of all calls and contacts made to

36. *Id.* § 27.060 (1986).

37. *Id.* § 407.020.1

the unit. Much like the "complainers," the information gatherers can be further separated into two subsets. The first type of information gatherer is a person who requests information unique to the office of the Attorney General. Such information might include requests for the many pamphlets and consumer updates provided by the Attorney General. The second type is a person who contacts the Consumer Protection Unit with requests for all kinds of general information. These consumers call the toll-free hotline with the hope that the operator can answer any and all question she might have concerning various topics ranging from how to renew a passport to how to file a criminal assault charge.

The final category of consumers are the attentive constituents. These consumers represent about 10 to 15% of all contacts made to the Attorney General. I borrowed the term "attentive constituents" from a study done by Boynton, Patterson, and Hedlund.³⁸ In their study, they attempted to characterize the attentive constituent as a thin stratum of middlemen standing athwart the path between legislators and the mass public.³⁹ The consumers in my classification undertake much of the same task. They are the people who contact the unit in order to report possible violations of the law and not to complain or request information. These people stand as a link between the mass public who are typically complainers and the enforcement officials who resolve the complaints.

*B. The Nature of Complaints*⁴⁰

The work of a complaints office is defined largely by the character of its intake.⁴¹ Therefore an examination of the Consumer Protection Unit's workload should reveal the true nature and characteristics of the complaints. In order to understand the volume of complaints processed, it is appropriate to begin with the number of complaints handled in a year. Over the last six years there has been a dramatic increase in the number of formal complaints registered with the Consumer Protection Unit. The number of complaints has increased steadily from 6,642 in 1985 to well over 30,000 in 1990. One explanation for such a dramatic increase is that the current Attorney General has taken a more active role in the field of consumer protection. Comparing 1989 and 1990 data, there seems to be a leveling off of formal complaints at around 30,000 a year.

There are 38 different classifications of complaints handled by the Consumer Protection Unit. These categories are shown in the Appendix. Among these 38

38. Boynton, Patterson & Hedlund, *The Missing Links in Legislative Politics: Attentive Constituents*, in PUBLIC OPINION AND PUBLIC POLICY 253 (N. Luttbeg 1974)

39. *Id.*

40. The statistics cited throughout this section were compiled while working at the Missouri Attorney General's Consumer Protection Division. A more extensive review of the Attorney General's complaint handling capabilities can be found in R. Carroll, *An Evaluation of the Executive Ombudsman: The Case of the Attorney General* (April, 24 1989) (unpublished manuscript available in University of Missouri-Columbia Department of Political Science).

41. Hill, *The Citizen Participation-Representation Roles of the American Ombudsman*, 13 ADMIN. & Soc'y 410, 410 (1982).

categories, the top ten categories by number have changed over the last four years. In 1987 the most common complaint fell within the category of General Real Estate, but in 1990 the number one complaint category was Miscellaneous Merchandise. Three possible reasons for this change are that the Miscellaneous Merchandise category became more of an overall "catch-all" category, the General Real Estate category was divided into several new sub-categories, and the general "soft" real estate market of the early nineties discouraged such activity.

C. Resolution of Complaints

At one time or another, many Missourians may need assistance for a "consumer problem." Perhaps they have doubts about the practices of a certain business—or they fear that they have become victims of fraud. An immediate call to the right information source may save consumers from unfair business practices. In 1990, the Attorney General received over 30,000 such calls from consumers needing assistance. These complaints were the primary concern of the Consumer Protection Unit of the Attorney General's office.

The consumer complaint system is designed to assist consumers in complaints where misrepresentation or fraud may exist. Resolution of a consumer complaint is somewhat analogous to the process of a bill becoming a law. Both of these processes contain many repetitive stages that are included to ensure the careful and accurate analysis of a certain problem.

The first step in the resolution of a consumer complaint is the reception of the complaint. This is called the initial contact. The six different methods of receiving a complaint are as follows:

1. Telephone hotline
2. Telephone, direct call to Attorney General
3. Letter
4. Walk-in
5. In-house
6. Referral

The first three methods are self-explanatory, but the other three deserve some explanation. A "walk-in" is a consumer who comes directly to one of the Attorney General's branch offices, whereas, an "in-house" complaint is the registering of a complaint from within the office itself. The latter occurs most commonly when employees of the Attorney General register complaints for friends and relatives. Most referrals are complaints made by the constituents of State Senators or Representatives which have been referred to the Attorney General's office by that elected official.

Once the initial contact is made, the complaint is entered into the computer as an active complaint. The next step involves collecting all the vital information needed to start resolving the complaint and having the complaint submitted in written form. This is accomplished by sending the consumer a Consumer

Complaint Form (CCF). When the CCF returns to the office, an investigator begins a formal review of the consumer complaint. All that is required to be an investigator is a para-legal or criminal justice degree.⁴² With this background, the investigator then decides what action will be taken to resolve the complaint.

The action taken by an investigator usually takes the form of a letter to the company explaining that there has been a possible violation of the Merchandising Practices Act. After several of these letters have been sent with still no response from the company in question, the complaint is upgraded to Enforcement Status and the complaint is sent to the proper branch office. Possible actions taken by the Enforcement Branch office include issuing an assurance of voluntary compliance,⁴³ civil investigative demands,⁴⁴ and injunctive relief.⁴⁵

The Attorney General only represents the interests of the state and cannot institute civil suits on behalf of individual citizens.⁴⁶ The reason for the limitation is that the Attorney General is required to represent the citizens of the state of Missouri as a whole and not individually.⁴⁷ As a result, the Enforcement Branch offices only bring suit when a trend or pattern of unlawful merchandising practice presents a threat to the "public at large." Where no pattern of misrepresentation or fraud appears to exist, the Attorney General dismisses the individual consumer complaint.

Also, the Attorney General's authority under Chapter 407 does not extend to those complaints involving poor workmanship, poor business practices faulty or defective merchandise, or negligence.⁴⁸ These kinds of complaints are typically referred to a private attorney.

IV. CONSUMER REDRESS

Before an intensive evaluation of how the Consumer Protection Unit resolves complaints, a look at other devices available to Missouri consumers is in order. The methods discussed are formal and alternative. The formal methods are "in-place" devices of consumer dispute resolution. These formal methods are currently mandated by statute or provided voluntarily by businesses.

The second group of devices are alternative consumer dispute resolution methods. This group includes methods enacted by other states in order to resolve consumer disputes. By comparing what is actually available to Missouri consumers to what is available to other consumers, we should be able to evaluate the extent of protection afforded Missouri consumers.

42. Several investigators have neither of these degrees.

43. MO. REV. STAT. § 407.030.

44. *Id.* § 407.040.

45. *Id.* § 407.100.

46. *Id.* § 27.060.

47. *Id.*

48. *See id.* §§ 407.010-910.

A. *Formal Methods of Consumer Redress*

1. The Better Business Bureau

There are over 160 Better Business Bureaus (BBB) operating throughout the United States.⁴⁹ The BBB is "an independent agency of Business, organized as a non-profit corporation which is financed entirely by membership dues or subscriptions voluntarily paid to it by responsible business and professional firms."⁵⁰ These business-financed organizations monitor advertising and selling practices, disseminate consumer information, maintain files on local businesses, and process individual consumer complaints against businesses.⁵¹

Due to the BBB's symbiotic relationship with business, many have questioned its neutrality in resolving consumer complaints.⁵² The BBB has also come under fire for its resistance to informing consumers about the nature of complaints against a particular business. This resistance is invoked in the name of confidentiality. When a consumer calls the BBB about a particular company, the consumer is refused any specific information regarding the company and receives only the number of complaints filed against the company.⁵³ The ineffectiveness of this method has been noted by the BBB:

[A] flat "yes" or "no" to a call about whether we've "had any complaints against the XYZ Company" would really tell the inquirer nothing The kind of complaints would be important Our report must give the whole picture. In other words, it isn't how many but what kind of complaints and the degree of responsibility shown by the company in making an honest effort to eliminate the causes of dissatisfaction, that counts.⁵⁴

Confidentiality poses another problem to complaint resolution—increased difficulty of proof.⁵⁵ For example, in BBB arbitration, "neither the complainant nor the arbitrator is allowed access to other complaints that the BBB may have received against the same company, evidence that in some cases could be crucial in proving, say, false promises were made to the consumer."⁵⁶

49. McGillis, *Consumer Dispute Resolution: A Survey of Programs*, 5 NAT'L INST. DISP. RESOL. 7, 7 (1987).

50. Comment, *Translating Sympathy for Deceived Consumers into Effective Programs for Protection*, 114 U. PA. L. REV. 395, 404 (1966).

51. *Id.*

52. McGillis, *supra* note 49, at 8 (Laura Nader and others have studied BBB programs and have suggested that such programs inevitably encounter serious problems of conflict of interest due to their sponsorship by business).

53. L. NADER, *supra* note 9, at 36.

54. Comment, *supra* note 50, at 405.

55. L. NADER, *supra* note 9, at 66.

56. *Id.*

In today's market, complete with its sophisticated communication technologies, the average consumer is still inadequately informed as to complaints against businesses.⁵⁷ By making complaints confidential, "where it is already impossible for the consumer to be adequately informed through word of mouth, prevents consumers from being able to learn from the experience of others."⁵⁸ In a society where public opinion is the most powerful tool of law and order, confidentiality becomes a very effective shield for businesses.⁵⁹

As a result of the BBB's questionable neutrality and ineffective response to consumer needs, most consumers are better off using the BBB only as source of information and not as a full-fledged dispute resolution device.⁶⁰ However, the BBB participates in other dispute resolution programs in order to meet the consumer's needs. These devices include the National Consumer Arbitration Program and the National Automotive Mediation/Arbitration Division which were created by the Council of Better Business Bureaus.⁶¹

2. Small Claims Court

Starting in 1913, many state legislatures created small claims courts to provide forums where minor disputes could be adjudicated without the cost of formal litigation.⁶² In 1976, the Missouri legislature followed suit and enacted Chapter 482.⁶³ Missouri's small claims court is very similar to small claims courts found in other jurisdictions.⁶⁴ Chapter 482 provides that proceedings "be conducted in an informal summary manner, and the formal rules of evidence and procedure shall not apply."⁶⁵ The statute also provides that "no discovery shall be permitted," and that "trial shall be to the judge sitting without jury."⁶⁶ These provisions are meant to ensure that the proceeding will be informal, quick, and less complex than formal adjudication.

Early on the small claims court reaped high praise and was considered the one of the most far reaching and effective forms of legal reform,⁶⁷ but critics

57. *Id.*

58. *Id.* at 67.

59. *Id.* at 66.

60. Bernstine, *supra* note 4, at 249.

61. McGillis, *supra* note 49, at 8; see also Best, *Consumer Problems and ADR: An Analysis of the Federal Trade Commission—Ordered General Motors Mediation and Arbitration Program*, 1990 J. DISP. RESOL. 267, 271-72.

62. Comment, *Small Claims Court: Reform Revisited*, 5 COLUM. J.L. & SOC. PROBS. 47, 47-48 (1969).

63. MO. REV. STAT. §§ 482.150-.365 (1986).

64. See Wiesman, *New Small Claims Court*, 32 J. MO. B. 421, 421-22 (1976).

65. MO. REV. STAT. § 482.310(3).

66. *Id.* § 482.310(5)-(6).

67. Comment, *supra* note 62, at 48.

soon turned their acclaim into harsh criticism.⁶⁸ In fact, one scholar remarked that "to encourage use of the small claims court is to encourage disappointment and despair."⁶⁹ The current criticism of small claims courts falls into three categories: lack of access, improper use by business, and insufficient protection of the poor.

Studies concerning accessibility of small claims courts accuse the courts of being either "unavailable, unusable, or invisible."⁷⁰ Lack of access arises when the hours of the court are incompatible with the normal working hours of the average consumer or when the consumer doesn't even know the court exists. A New York study of consumers in low-income housing projects found that few "poor" consumers had actual knowledge of the small claims court.⁷¹

The second criticism is that business rather than the intended individual consumer utilizes the court as a "judicial collection agency."⁷² Debt-collection use by business does not serve the average consumer; rather, it converts the process into a court of debt collectors, credit stores, corporate defendants, and insurance companies.⁷³ This use of the court causes several problems: perceptions of the court as a "business court" discourages consumers from pursuing claims in such a forum, heavy use by business crowds the court docket, and most importantly, the court is not fulfilling its intended purpose of providing individuals access to speedy, informal dispute resolution.⁷⁴

For poor consumers, the small claims court is far from being a viable alternative. The courts are so dominated by business concerns that they "are 'courts of the poor' only in the sense that many poor people are brought into them by compulsory process."⁷⁵ As a result, it is more likely that a poor litigant will be defending an action rather than bringing an action in the small claims court.⁷⁶ Low income consumers, who are ignorant of the small claims process, often confront powerful creditors and usually are denied the opportunity to adequately present their case.⁷⁷ This denial of due process along with the fact that many

68. See generally Kosmin, *The Small Claims Court Dilemma*, 13 HOUS. L. REV. 934, 943 (1976); Murphy, *D.C. Small Claims Court—The Forgotten Court*, D.C.B.J., Feb. 1971, at 15; Student Project, *The Iowa Small Claims Court: An Empirical Analysis*, 75 IOWA L. REV. 934, 943 (1976); Note, *The Persecution and Intimidation of the Low-Income Litigant as Performed by the Small Claims Court in California*, 21 STAN. L. REV. 1657, 1657-62 (1969).

69. Kosmin, *supra* note 68, at 943.

70. SMALL CLAIMS COURT STUDY GROUP, NATIONAL INSTITUTE FOR CONSUMER JUSTICE, LITTLE INJUSTICES: SMALL CLAIMS COURTS AND THE AMERICAN CONSUMER 22 (1972).

71. D. CAPLOVITZ, *THE POOR PAY MORE* 175 (1963) (only fourteen persons out of a total sample of 464 non-corporation consumers mentioned the Small Claims Court as a possible source of help.)

72. D. CAPLOVITZ, *DEBTORS IN DEFAULT—EVENTS LEADING UP TO A DEFAULT* 3-38, 11-64 (1971); see also Note, *Small Claims Court as Collection Agencies*, 4 STAN. L. REV. 237 (1952).

73. Murphy, *supra* note 68, at 15.

74. Student Project, *supra* note 68, at 444.

75. Note, *supra* note 68, at 1662.

76. Comment, *The California Small Claims Court*, 52 CAL. L. REV. 876, 884 (1964).

77. Note, *supra* note 68, at 1664.

consumers are just not aware of the court's existence add up to low participation in small claims court.⁷⁸

Thus, small claims courts have been transformed into collection courts rather than a place where poor consumers may redress their grievances.⁷⁹ Judge Skelly Wright of the United States Court of Appeals for the District of Columbia Circuit attributes this development to the fact that "business concerns are aware of their rights and the poor are not . . . they simply do not think in terms of invoking the legal process on their side. They have no confidence in courts."⁸⁰ Unfortunately, the small claims court which was designed to make consumer justice uncomplicated and inexpensive failed to accomplish this objective.⁸¹ As the result, many consumers either shy away from the "business court" or use the court to their own detriment.⁸²

3. Statutory Remedies

As previously mentioned, Missouri's Merchandising Practices Act of 1967 changed the face of Missouri consumer law. Not only did the Act eliminate the burdensome elements of common-law fraud, but it forced the Attorney General to deal with clients other than the Governor, legislators, and executive departments.⁸³ Along with this new-found commitment to the average consumer, several types of legal action also arose out of the Merchandising Practices Act: private individual actions,⁸⁴ private class actions,⁸⁵ and equitable actions on the part of the Attorney General.⁸⁶

a. Private Actions

In 1973, the Merchandising Practices Act was amended by the addition of section 407.025, which permits consumers to pursue a private civil action to recover damages and other relief.⁸⁷ This action may be brought by "[a]ny person who purchases or leases goods or services primarily for personal, family or household use, and thereby suffers an ascertainable loss of money or property" as

78. D. CAPLOVITZ, *supra* note 71, at 175.

79. Note, *supra* note 72, at 237.

80. Wright, *The Courts Have Failed the Poor*, N.Y. Times, March 9, 1969, § 6, at 102 (Magazine).

81. Bernstine, *supra* note 4, at 249.

82. Vidmar, *The Small Claims Court: A Reconceptualization of Disputes and an Empirical Investigation*, 18 LAW & SOC'Y REV. 515, 545-46 (studies have shown that defendants win as often as plaintiffs).

83. Newcomb & Bauer, *The Missouri Attorney General as a Consumer Advocate*, 23 ST. LOUIS B. J. 6, 6 (1976).

84. MO. REV. STAT. § 407.025.

85. *Id.*

86. *Id.* § 407.100.

87. *Id.* § 407.025.

a result of the unlawful merchandising practice of another person.⁸⁸ Under section 407.025, the consumer may bring suit in either the circuit court of the county where the seller or lessor resides or where the transaction took place.⁸⁹ Beyond actual damages, the consumer may recover punitive damages, attorney fees, and such equitable relief as deemed necessary by the discretion of the court.⁹⁰

Also contained within section 407.025 is the provision for private civil class actions.⁹¹ The class action found in Section 407.025 closely follows Federal Rule of Civil Procedure 23 and Missouri Rules of Civil Procedure 52.08.⁹² The only major difference being the "opt in" procedure provided in section 407.025.⁹³ This "opt in" procedure directs the court to notify each member that it "will include him in the class action if he so requests by a specified date."⁹⁴ The traditional class action problem of certification becomes even more severe when viewed in light of the "opt in" provision. If there were a large unidentifiable consumer class, no class action could exist until these persons affirmatively acted to join.⁹⁵

Even with certification, the primary effectiveness of a class action lies in injunctive relief rather than monetary damages.⁹⁶ One commentator has noted:

A consumer class action seeking recovery of damages for the entire class is much less likely to succeed than one where damages are sought only for the class representatives, accompanied by a request for injunctive relief to protect the rest of the class against future misconduct.⁹⁷

Also, some member consumers may prefer other remedies to the one chosen by the class member on their behalf.⁹⁸ In light of such complexities and possible difficulties arising with a class action, the overall viability of such an action to resolve consumer complaints is extremely limited.

88. *Id.*

89. *Id.*

90. *Id.*

91. *Id.*

92. FED. R. CIV. P. 23; MO. R. CIV. P. 53.08.

93. MO. REV. STAT. § 407.025.

94. *Id.* § 407.025.2(2)(a).

95. Calkins & Simon, *Private Causes of Action Under the Merchandising Practices Act*, 23 ST. LOUIS B. J. 14, 21 (1976).

96. Dole, *Consumer Class Actions under Recent Consumer Credit Legislation*, 44 N.Y.U. L. REV. 80, 97 (1969).

97. Eovaldi & Gestrin, *Justice for Consumers: The Mechanisms of Redress*, 66 NW. U.L. REV. 281, 293 (1971).

98. Starrs, *The Consumer Class Action—Part II: Considerations of Procedure*, 49 B.U.L. REV. 407, 419-20 (1969).

Regardless of whether the private action is brought by an individual or numerous individuals, several attorneys have expressed skeptical feelings about section 407.025.⁹⁹ One attorney suggests "that consumer activism is a movement on the wane and that Chapter 407 is basically a 'lawyers' statute whose success may depend primarily upon the willingness of attorneys either to act as plaintiffs themselves or to gamble upon what could be lengthy and extensive litigation."¹⁰⁰ But the common theme among many attorneys is "that Chapter 407 is little used primarily because few consumer claims involve large sums of money and because few consumers have either the money or the stomach to fight what could become a war of attrition against a defendant with deep pockets."¹⁰¹

This section is not the only private cause of action available to Missouri consumers. Section 408.270 and 408.256 of the Retail Credit Sales Act provides consumers redress for abridgements of statutory terms in credit cases.¹⁰² Section 409.411 of the Uniform Securities Act provides consumers with an action for damages and attorney fees for violating securities regulations.¹⁰³ Although other remedies exist, section 407.025 is by far the most amenable to the general consumer and the most sweeping in scope.¹⁰⁴

b. Public Actions

The broad authority to prosecute "unlawful practices" found in section 407.020 of the Merchandising Practices Act bestows upon the Attorney General the power to "commence any criminal actions under [Chapter 407]."¹⁰⁵ These "criminal actions" include such procedures as the Assurance of Voluntary Compliance (AVC),¹⁰⁶ the Civil Investigative Demand (CID),¹⁰⁷ and injunctive relief.¹⁰⁸

Section 407.030 provides for the assurance of voluntary compliance which is a remedy that "lies conceptually between an informal negotiation and formal adjudicatory proceedings."¹⁰⁹ The theoretical framework of the AVC is best described as an exchange of agreements between the Attorney General and the

99. Calkins & Simon, *supra* note 95, at 20.

100. *Id.*

101. *Id.* An example of "expense deterrence" is witnessed by a 1973 lawsuit filed as a class action in St. Louis County. The lawsuit "never passed the initial pleading stage, although the case had merit (and the defendant had actually admitted in writing the error of its ways). The lawsuit was not pursued because the plaintiff palled at the possible expense of notifying all members of the extremely large class." *Id.*

102. MO. REV. STAT. §§ 408.256 & .270 (1986).

103. *Id.* § 409.411.

104. Calkins & Simon, *supra* note 95, at 14.

105. MO. REV. STAT. § 407.020.

106. *Id.* § 407.030.

107. *Id.* § 407.040.

108. *Id.* § 407.100.

109. Bernstine, *supra* note 4, at 276.

alleged wrongdoer.¹¹⁰ The alleged violator agrees to discontinue the unlawful practices in exchange for the Attorney General's promise not to prosecute.¹¹¹

Despite regular use of the AVC by the Attorney General, there are two major weaknesses of the AVC as a consumer dispute resolution device: lack of evidentiary value and provision of only prospective protection for consumers. Section 407.030.1 provides that "[s]uch assurance of voluntary compliance shall not be considered an admission of violation for any purpose."¹¹² Therefore, despite the existence of the agreement between the alleged violator and the Attorney General, the Attorney General must proceed *de novo* against the violator.¹¹³ Such a limitation has led the Federal Trade Commission to reduce its reliance on the AVC in that "heavy dependence by the Commission upon voluntary compliance is unlikely to provide the public with adequate protection against marketplace abuse."¹¹⁴

The AVC's other problem reveals itself when considering the logical purpose behind the AVC—the prevention of *future* harm to consumers. One commentator notes that "the statutory scheme seems to contemplate that a primary enforcement responsibility of the attorney general is the prevention of unlawful merchandising practices in the future rather than the redress of past violations"¹¹⁵ Such prospective thrust on the part of the Attorney General leaves the consumer, who is presently harmed, with little more than a hollow promise from the wrongdoer that it won't happen again.

Section 407.040 provides the Attorney General with a type of administrative subpoena called the civil investigative demand.¹¹⁶ The CID is served upon a person or business "[w]hen it appears . . . that a person has engaged in or is engaging in any act, method, use, practice or solicitation declared to be unlawful . . . or when he believes it to be in the public interest that an investigation should be made to ascertain whether a person in fact has engaged in or is engaging in any such act, practice or solicitation"¹¹⁷ Service of the CID is "upon any person who is believed to have information, documentary material, or physical evidence relevant to the alleged or suspected violation."¹¹⁸

For all practical purposes the CID is nothing more than a type of pretrial discovery,¹¹⁹ and its use as a dispute resolution device is uncertain. Although the Missouri Supreme Court upheld the constitutionality of the CID,¹²⁰ issues

110. *Id.*

111. *Id.*; see also MO. REV. STAT. § 407.030.

112. MO. REV. STAT. § 407.030.1.

113. See Bernstine, *supra* note 4, at 277.

114. *Id.* at 277 n.119.

115. McClellan & Moore, *supra* note 25, at 1-11.

116. MO. REV. STAT. § 407.040.

117. *Id.*

118. *Id.*

119. McClellan & Moore, *supra* note 25, at 1-7.

120. *Lewandoski v. Danforth*, 547 S.W.2d 470, 472 (Mo. 1977), *cert. denied*, 434 U.S. 832 (1977).

concerning venue, the precise legal effect of failing to file a defense for not complying with a CID, and the legal basis for issuance of a CID still remain to cast doubt upon the usefulness of the CID.¹²¹

The third remedy available to the Attorney General for the protection of consumers is injunctive relief. Section 407.100 provides that "[w]henver it appears to the attorney general that a person has engaged in or is engaging in any method, act, use, practice or solicitation, or any combination thereof declared to be unlawful . . . he may, . . . seek and obtain, in an action in a circuit court, an injunction prohibiting such person from continuing such methods, acts uses, practices or solicitations, or any combination thereof or engaging therein, or doing anything in furtherance thereof."¹²²

This is arguably the best alternative for a consumer suffering from ongoing unlawful merchandising practices. Injunctive relief under Chapter 407 is attractive in that the normal requirements for the granting of injunctive relief such as irreparable injury or inadequate legal remedy are relaxed.¹²³ However, it is still very important to remember that even with the relaxed burden of proof, the Attorney General must still present the case before a trial court and it is within that court's discretion whether or not to issue an injunction even if a violation is found.¹²⁴ The standard being "the sound discretion of the court, to be executed in accordance with well-settled equitable principles and in light of all the facts and circumstances of the case."¹²⁵

It is important to keep in mind that use of any of these public actions is left purely to the discretion of the Attorney General no matter how severe the harm to the individual consumer. One commentator notes that "even when a law enforcement official believes that a particular scheme has been made actionable by statute, he often does not prosecute because of a widely held belief that, except in the most egregious circumstances, fraudulent operators should not be treated like criminals."¹²⁶ This commentator went on to state that "[l]awyers, business leaders and prosecutors have stated that judges, juries and district attorneys do not like to put businessmen in jail."¹²⁷

Missouri's practice shows similar feelings toward business. In fact, it is only after the Attorney General's investigation shows a verifiable and distinct pattern of unlawful practice that a consumer's complaint is even considered as a possible candidate for public action. Only after numerous complaints pile up against any one business and only after sending several letters asking for that business to

121. McClellan & Moore, *supra* note 25, at 1-8-1-9.

122. MO. REV. STAT. § 407.100.1.

123. *Independence Dodge*, 494 S.W.2d at 370. The court held that "[t]hat legislative determination constitutes sufficient authorization without more for the propriety of an injunction in a case under this statute." *Id.*

124. *State ex rel. Danforth v. W.E. Constr.*, 552 S.W.2d 72, 73 (Mo. Ct. App. 1977).

125. *Id.*

126. Comment, *supra* note 50, at 426.

127. *Id.*

"please stop" does the Attorney General even think about filing an AVC much less a CID or a petition for injunctive relief.

B. Alternative Methods of Consumer Dispute Resolution

Traditionally, we look to the courts to hear and determine disputes among citizens and to prevent injustices. Yet in today's society, the courts are no longer an effective or even feasible mechanism for serving the bulk of consumer needs, except, perhaps, for lawsuits involving substantial amounts for money.¹²⁸ For all practical purposes, the courts are "foreclosed to the individual citizen with a typical grievance involving non-delivery or unsatisfactory servicing of goods, landlord defaults or indifferent performance under a lease, or even personal injury or property damage claims which involve relatively minor amounts."¹²⁹ This is readily apparent when considering that "[t]he great bulk of consumer transactions is almost always too small to warrant retaining of counsel even if the consumer could afford to do so."¹³⁰

Even if the consumer claim happens to be large enough for judicial treatment, due to "the relative informality of individual consumer transactions, consumers frequently fail to retain the type of systematic, factual documentation of the transaction which is an essential prerequisite to establish the rights and wrongs of the transaction and to meet the formal burden of proof requirements imposed by the formal court system."¹³¹ In addition, most consumers "are not psychologically predisposed to assert or defend their rights within the framework of litigation."¹³² This consumer psychology expresses itself through "nagging uncertainties as to whether their feelings of dissatisfaction are meritorious" or by a simple trade off between their dissatisfaction and the other demands on their time which results in a decision to take no action.¹³³

The ex-commissioner of the Federal Trade Commission explained the consumer's psychology by stating that:

Consumers encounter a variety of problems in the marketplace which have serious impact on their own self-image, their sense of their own capabilities and their confidence in themselves as effective actors and participants in the decisions affecting their daily lives. Too often today, their basic marketplace experience is one of frustration, powerlessness

128. Jones, *Wanted: A New System for Solving Consumer Grievances*, 25 ARB. J. 234, 235 (1970).

129. *Id.*

130. *Id.* at 235-36; Rayner, *Arbitration: Private Dispute Resolution as an Alternative to the Court*, 22 U.W. ONTARIO L. REV. 33, 52 (1984).

131. Rayner, *supra* note 130, at 52; Jones, *supra* note 128, at 236.

132. Rayner, *supra* note 130, at 52.

133. Jones, *supra* note 128, at 236.

and, in some cases, outright injustice. Consumers feel themselves the victims of a basic helplessness to influence the actions of the marketplace power structure—the manufacturers, sellers and advertisers.¹³⁴

This sense of helplessness combined with the basic deficiencies in the formal legal system "substantially increase consumers' deeply felt sense of powerlessness to affect their own destinies and they enlarge the area in which injustices are perpetrated on consumers because of the lack of any effective deterrents on merchants from engaging in deceptive, unfair and unjust practices."¹³⁵

As a result, the ex-commissioner identifies the central consumer problem as "the unavailability to [consumers] of any mechanism to which they can resort in order to air their complaints, resolve differences which arise between them and their merchants or repairmen, or to vindicate injustice and unfairness when it is visited upon them in the marketplace."¹³⁶ For these reasons, informal dispute settlement procedures are particularly appropriate for the resolution of consumer complaints.¹³⁷

A recent survey of the state Attorneys General showed that more than half already have some form of informal dispute resolution mechanism for consumer protection.¹³⁸ These programs range from informal complaint mediation to formalized binding arbitration.¹³⁹ Most programs rely on some form of mediation mechanism.¹⁴⁰ All programs use volunteers, but vary in complexity from informal resolution through use of letters and telephone calls to structured and formal procedures involving face to face meetings.¹⁴¹

1. Mediation

Mediation is a process in which a neutral third party helps define issues and facilitates negotiation in an attempt to resolve a dispute or plan a transaction but does not impose a solution.¹⁴² Several state Attorneys General adopted this method of consumer resolution. Among these states, Massachusetts first started using mediation when the state legislature established the Local Consumer Aid Fund (LCAF) to help finance local community consumer dispute resolution programs as part of the Attorney General's budget.¹⁴³

134. *Id.* at 234.

135. *Id.* at 236-37.

136. *Id.* at 235.

137. Rayner, *supra* note 130, at 52.

138. Boisvert, *New Methods of Dispute Resolution and Consumer Protection*, in ATTORNEYS GENERAL AND NEW METHODS OF DISPUTE RESOLUTION 55 (M. Cochrane 1990).

139. *Id.*

140. *Id.* at 56.

141. *Id.*

142. L. RISKIN & J. WESTBROOK, *DISPUTE RESOLUTION AND LAWYERS* 4 (1988).

143. Boisvert, *supra* note 138, at 57.

Whenever a consumer complaint is filed with the Attorney General, it transfers immediately to one of the local programs which together handle more than 16,000 complaints each year.¹⁴⁴ Before the business is contacted, the mediator researches the consumer complaint, reviews the relevant law, and contacts the consumer by telephone to verify the accuracy of the complaint.¹⁴⁵ The business is then contacted and the mediator begins settlement negotiations.¹⁴⁶ This process resolves 70% of the cases.¹⁴⁷ The remaining unresolved disputes are referred to face-to-face mediation.¹⁴⁸

The face-to-face mediation program receives complaints from local consumer agencies and from small claims court.¹⁴⁹ Two co-mediators are assigned to each case, which begins with a joint session attended by all parties.¹⁵⁰ After the joint session, the mediator conducts a series of individual sessions.¹⁵¹ The Massachusetts program's success rate is 75% and compliance rate is over 90%.¹⁵² The Massachusetts Attorney General provides approximately \$23,000 annually to LCAF which funds the 24 local agencies.¹⁵³ In order to operate the face-to-face mediation program, the Attorney General received a grant from the National Institute of Dispute Resolution (NIDR).¹⁵⁴

North Carolina also provides face-to-face mediation for consumers.¹⁵⁵ However, the North Carolina system consists of privately organized, non-profit community groups, funded by the Administrative Office of the North Carolina Courts.¹⁵⁶ Not only are consumer disputes mediated but the North Carolina program also handles misdemeanors cases.¹⁵⁷ The Attorney General does not oversee or direct the program but instead contracts out cases to individual dispute settlement centers at her discretion.¹⁵⁸ In 1989, the Attorney General referred approximately 1,000 complaints to mediation centers.¹⁵⁹

In Vermont, the resolution of consumer complaints combines efforts on the part of the Attorney General and students from the University of Vermont (UVM).¹⁶⁰ UVM provides an office for an on-site Assistant Attorney General

144. *Id.* at 58.

145. *Id.*

146. *Id.*

147. *Id.*

148. *Id.*

149. *Id.*

150. *Id.* at 59.

151. *Id.*

152. *Id.*

153. *Id.* at 57.

154. *Id.* at 58.

155. *Id.* at 60.

156. *Id.*

157. *Id.*

158. *Id.*

159. *Id.*

160. *Id.* at 61.

who manages the program and teaches classes in consumer law.¹⁶¹ This Consumer Assistance Program (CAP) serves as the intake and processing center for all Vermont consumer complaints filed with the state.¹⁶² The CAP handles approximately 2,500 written complaints and 11,000 telephone calls each year of which two-thirds are resolved by letter writing and telephone mediation.¹⁶³

There are several problems with the Vermont program. Coordination between the Attorney General's Office in Montpelier and UVM in Burlington is sometimes difficult due to distance.¹⁶⁴ By using students to staff the CAP, frequent training programs become necessary due to turnover at semester's end.¹⁶⁵ Another student problem arises when school holidays and vacations leave the on-site coordinator with little or no staff.¹⁶⁶

2. Arbitration

Arbitration is an extra-judicial dispute resolution method in which parties submit their dispute to an impartial third party who makes an independent determination of the issues and enters a binding award.¹⁶⁷ Unlike mediation, arbitration resolves the dispute by rendering a final decision following the arbitration hearing. State Attorneys General use arbitration in the form of state-sponsored voluntary programs, case settlements and consent decrees mandating binding arbitration for the determination of consumer restitution.¹⁶⁸

In Maryland, the Consumer Protection Division (CPD) of the Attorney General's office administers a voluntary arbitration program for the resolution of consumer complaints.¹⁶⁹ Although within the CPD, the program is separated from the enforcement operations of the Attorney General and is staffed by a Chief Arbitrator.¹⁷⁰ Even though prohibited from involvement in enforcement actions, the Chief Arbitrator retains substantial authority in that her decisions are final and may not be modified by anyone in the office, including the Attorney General.¹⁷¹

The process starts when the mediation program housed in the Attorney General's office refers certain consumer complaints to arbitration.¹⁷² During arbitration, parties may testify, present witnesses and cross examine.¹⁷³

161. *Id.*

162. *Id.*

163. *Id.*

164. *Id.* at 62.

165. *Id.*

166. *Id.*

167. Eovaldi & Gestrin, *supra* note 97, at 306.

168. Boisvert, *supra* note 138, at 62.

169. *Id.*

170. *Id.*

171. *Id.*

172. *Id.* at 63.

173. *Id.*

Witnesses testify under oath but other rules of evidence are not strictly applied.¹⁷⁴ At the conclusion of the hearing, the arbitrator determines the weight given to all evidence presented and renders a binding award within 30 days.¹⁷⁵

In Washington, the Attorney General uses binding arbitration to determine restitution awards for each individual consumer injured by defendant found liable through traditional law enforcement mechanisms.¹⁷⁶ Arbitration is used only after establishing liability and therefore narrows the scope of issues determined by the arbitrator.¹⁷⁷ The Attorney General incorporates some of these arbitrated restitution programs into consent decrees in which private arbitration association arbitrate the restitution disputes.¹⁷⁸

3. The Consumer Ombudsman

On January 1, 1971, the first Consumer Ombudsman took office in Sweden.¹⁷⁹ In the seventies, Denmark, Finland and Norway also established Consumer Ombudsman institutions.¹⁸⁰ In all four countries, the Consumer Ombudsman was established as a supervisory body with the task of controlling the market methods used by businesses.¹⁸¹ The Consumer Ombudsman differs from the Classical Ombudsman in that its primary concern handling complaints against business, whereas the primary function of the classical ombudsman is to resolve complaints against the government or administrative bureaucracy.¹⁸²

In Sweden, the office arose out of the Market Court Act¹⁸³ which provides that "for questions concerning marketing practices there shall be a Consumer Ombudsman."¹⁸⁴ The main function of the Consumer Ombudsman is "to serve as a watchdog over business practices before they cause harm to the consumer."¹⁸⁵ As a result, the Consumer Ombudsman's activity centers toward unfair marketing practices. The scope of this activity includes monitoring advertising, packaging and labeling of consumer products.¹⁸⁶ The Consumer Ombudsman is also responsible for prohibiting improper terms in contracts.¹⁸⁷

174. *Id.*

175. *Id.*

176. *Id.* at 64.

177. *Id.*

178. *Id.* These private associations include the Better Business Bureau and the Washington Arbitration Service.

179. King, *The Consumer Ombudsman*, 79 COM. L.J. 355, 355 (1974).

180. Graver, *A Study of the Consumer Ombudsman in Norway with Some Reference to the Other Nordic Countries*, 9 J. CONSUMER POL'Y 1 (1986).

181. *Id.*

182. L. HILL, *THE MODEL OMBUDSMAN* 8 (1976).

183. June 29, 1970.

184. *Id.* at art. 11.

185. Graver, *supra* note 180, at 3; King, *supra* note 179, at 357.

186. King, *supra* note 179, at 356.

187. *Id.*

A careful screening process begins once a consumer problem comes to the Consumer Ombudsman's attention.¹⁸⁸ The complaint is investigated by gathering evidence to support the consumer's complaint.¹⁸⁹ The business in question is then contacted for its side of the story.¹⁹⁰ Once a possible violation surfaces, the Consumer Ombudsman proceeds to negotiation with the offending business.¹⁹¹ Negotiation is the ombudsman primary function and is preferred over taking consumer complaint directly to court.¹⁹²

Depending upon the extent of the violation, the negotiation may begin with one business or with several businesses in the form of a trade association.¹⁹³ Once the Consumer Ombudsman reaches a settlement with a trade association, several businesses may be affected.¹⁹⁴ Even if negotiation fails, several choices of action remain. The Consumer Ombudsman can issue a cease and desist order¹⁹⁵ or may seek injunctive relief under the statute.¹⁹⁶ These options are very similar to the remedies currently available to the Missouri Attorney General in the form of AVC and injunctions.

In the four Nordic countries currently using the Consumer Ombudsman; the institution's primary function is to obtain voluntary compliance with existing consumer protection legislation.¹⁹⁷ However, Norway and Finland empowered their Consumer Ombudsman to impose injunctions upon traders in cases of urgency, and in both Sweden and Finland, the Market Court can levy fines.¹⁹⁸ In Denmark, the Consumer Ombudsman can even initiate criminal proceedings.¹⁹⁹

In Sweden, the Consumer Ombudsman is known as a consumer's advocate and citizens consider the office their primary method for obtaining consumer protection.²⁰⁰ The results sought by the Consumer Ombudsman affect more than just the individual consumer's problem with an individual business. This type of

188. *Id.* at 357.

189. *Id.*

190. *Id.*

191. *Id.*

192. *Id.* at 357-58.

193. *Id.*

194. *Id.*

195. The Market Court Act, art. 9.

196. *Id.* at art. 13.

197. Graver, *supra* note 180, at 2.

198. *Id.*

199. *Id.* In fact, the Danish Consumer Ombudsman "is the only one [Consumer Ombudsman] who may act not only to defend consumers' interests, but also in order to regulate competition between firms." *Id.* at 3-4.

200. King, *supra* note 179, at 359. However, "in no Nordic country is the Consumer Ombudsman a general consumer protection agency." Graver, *supra* note 180, at 3. The Consumer Ombudsman's powers are "limited to certain areas referring to *economic* interests of consumers—with Swedish exception relating to consumer safety—and the tasks are limited to the protection of consumers *collectively*, not individually (here Finland constitutes an exception)." *Id.* at 3. In all four countries, "there are other institutions which pursue the general consumer interest." *Id.* at 4.

preventative law assures that some future consumers will not have to face the difficult choice of whether to complain or sue over certain kinds of business practices.

As a dispute resolution method, the Consumer Ombudsman is a combination of both traditional ombudsman complaint handling and business negotiation. Although most complaints settle through negotiation, the statutory remedies available to the Consumer Ombudsman allow him to resolve even those that cannot be negotiated.²⁰¹

V. MISSOURI'S NEED FOR A "TRUE" CONSUMER OMBUDSMAN

A. Alternatives

The sheer number of complaints made to the Attorney General's office each year bears witness to the frustration and powerlessness felt by Missouri consumers. Each call or complaint represents a cry for help in what we call a consumer driven market. But business forced the consumers out of that driver's seat. Both the types of complainers and subject matter of these complaints show that primary problem in Missouri's consumer market is not the typical big business taking advantage of the little guy, but little business misrepresenting every day consumer items.

The alternative dispute resolution devices mentioned above shows signs of providing relief for Massachusetts,²⁰² North Carolina,²⁰³ Vermont,²⁰⁴ Maryland,²⁰⁵ and even Washington.²⁰⁶ Although these programs help consumers, they contain inherent weaknesses. The mediation programs primarily rely upon community consumer groups to identify and resolve complaints. Implementation of a similar program in Missouri would require establishing these community resolution centers throughout the state.²⁰⁷ Even proponents of informal justice methods recognize that "[i]t appears to be easier to manipulate bureaucracies and obtain outside funding than to engage in the slow and arduous task of community organizing, using volunteers and relying on minimal funding."²⁰⁸ This seems unnecessary since the Missouri Attorney General already provides the necessary infrastructure in the form of the Consumer Protection Unit.

201. King, *supra* note 179, at 360.

202. Boisvert, *supra* note 138, at 57.

203. *Id.* at 60.

204. *Id.* at 61.

205. *Id.* at 62.

206. *Id.* at 64.

207. There are currently three mediation centers in Missouri that, roughly speaking, could serve such a function. These centers are the Center for the Study of Dispute Resolution at the University of Missouri-Columbia School of Law, the Office of Human Relations of the Kansas City Government, and the Department of Sociology at the University of Missouri-St. Louis.

208. R. ABEL, *THE POLITICS OF INFORMAL JUSTICE: THE AMERICAN EXPERIENCE* 85 (1982).

The volume of consumer complaints alone brings into question the viability of the community consumer groups. Currently, Missouri's complaint caseload is nearly three times that of Vermont's and twice that of Massachusetts'. Funnelling these complaints into a student operated mediation program²⁰⁹ or community controlled mediation would take time and money better spend on improving the current system already in place.

Increasing use of arbitration in the consumer sector not only allows insight into its effectiveness but also brings to the surfaces its drawbacks. In consumer arbitration, the consumer is rarely assisted or represented by an advocate.²¹⁰ This fact along with the practice of holding the proceedings *in camera*, makes the actual process difficult to judge.²¹¹ Furthermore, since different arbitrators are used in each confidential proceeding, patterns of practice remain hidden.²¹² This inherent masking of practices severely limits the effectiveness of arbitration as a preventative force.²¹³ However, the Consumer Protection Unit's primary function is to search out and find these patterns and trends.

There are some signs of life in Missouri's statutory attempt at the resolution of consumer complaints. Once notice under section 407.040 puts the "fear of God" into an unsuspecting wrongdoer, the possibility of a negotiated settlement arises in the form of a consent injunction.²¹⁴ A consent injunction can occur even after the suit is filed.²¹⁵ The negotiated settlement takes form in a stipulation by the parties and is of great value "to all concerned in saving time and cost involved in litigation."²¹⁶ The major drawback of this injunction is its lack of use as a tool for individual complaint resolution.

These alternatives could very well solve the current consumer dilemma, but only through additional funding, community support, and administrative planning. Before any system is put in place, compromises between the business sector and politicians need to be developed along with the need to inspire grassroots community support. All these things take time and money—something that the Missouri consumer has very little of these days. As a result, the Missouri consumer needs a complaint system that can be made operational without expensive start-up costs or long-term deliberations concerning its organization.

209. *Id.* at 61.

210. Gregg, *Characteristics of a Model Consumer Dispute Resolution Mechanism*, in CONSUMER DISPUTE RESOLUTION: EXPLORING THE ALTERNATIVES 31 (1983).

211. *Id.*

212. *Id.*

213. *Id.*

214. McClellan & Moore, *supra* note 25, at 1-13.

215. *Id.*

216. *Id.*

B. Missouri Attorney General as an Ombudsman

Under Lieutenant Governor Harriet Woods, Missouri established the office of an executive ombudsman. This office functions primarily as a grievance officer for administrative abuse. This is the traditional role of the classical ombudsman originating in the Scandinavian countries of Sweden, Finland, and Denmark.²¹⁷ A comparison between the characteristics of this traditional ombudsman and the Consumer Protection Unit reveal many similarities in the processing of complaints. It was these similarities that prompted me to consider the ombudsman concept as a solution to Missouri's consumer crisis.

1. Missouri Attorney General as a Classical Ombudsman

The original ombudsman institutions in Sweden and Finland have a number of characteristics that make them unique among grievance-handling bodies. Donald Rowat described five of these features as being (1) a member of the legislature, (2) an impartial investigator, (3) having no direct control over the court or administration, (4) possessing investigative initiative, and (5) having economically efficient means of handling complaints.²¹⁸ Of the five distinguishing ombudsman characteristics, four are prominently displayed by the CPU: impartial investigator, limitation of power, investigative initiative, and economically efficient means of handling complaints.

The CPU, like the Ombudsman, is an impartial investigator. Since the Attorney General is not dependant upon the legislature or chief executive for continued tenure, the office's impartiality is even greater than that of the classical ombudsman.²¹⁹ This situation allows the Attorney General to conduct investigations on matters involving even the governor.²²⁰

The CPU is limited in the scope of its power by the Merchandising Practices Act. Much like the ombudsman, the Attorney General is limited in his power by the constitution and by statutory law.²²¹ These limitations affect not only the types of complaints handled by the office, but also how the complaints will be resolved. The Attorney General is also given substantial prosecutory power, more so than the ombudsman. Whereas, the ombudsman rarely uses his prosecutory power, this power is the major tool of the Attorney General.²²²

The most commonly used power of the ombudsman is the practice of investigation. Most of the ombudsman's time and energy is spent investigating

217. L. HILL, *supra* note 182, at 8.

218. S. ANDERSON, *OMBUDSMAN FOR AMERICAN GOVERNMENT* 9 (1968).

219. D. ROWAT, *supra* note 2, at 4.

220. Only if the governor's conduct falls under the jurisdiction of the Merchandising Practices Act.

221. *See supra* notes 46-48 and accompanying text.

222. *See* MO. REV. STAT. § 407.020.

courts and administrative agencies.²²³ The amount of time spend on investigation is also the greatest time expenditure of the CPU.²²⁴ All complaints processed by the unit are given a preliminary investigation which requires a substantial amount of time and effort by the division investigators.

The fourth common feature of the two institutions is the manner in which they handle complaints. The CPU, like all ombudsmen, centralized its complaint process. The unit created a procedure which "filters" all complaints through a central office, in order to separate the true violations from marginal infractions. This process is similar to the ombudsman's power to decline action on a complaint.²²⁵ In Norway, for example, the ombudsman can "determine whether there are sufficient grounds for dealing with a complaint" and can "dismiss a complaint which he finds obviously unfounded."²²⁶ From the perspective of the unit, this is a desirable safeguard against overloading the machinery of the complaint system.

Another common strand among the procedures of the two institutions is that both utilize the mail as the primary medium of investigation.²²⁷ To initiate a complaint, one must first call or write the complaint officer. After this stage, all contact between the client, the target of the complaint and the complaint officer is handled by mail. A letter is all that is required to initiate a complaint, but the complaint must be in writing.²²⁸ This requirement can be found in most nations which have a national ombudsman.²²⁹ This method of handling complaints by mail is economically efficient.

2. Missouri Attorney General as an Executive Ombudsman

There have been many adaptations of executive ombudsmen in American state and local governments.²³⁰ In some cases, executive ombudsmen are established after efforts to create a classical ombudsman failed and in other cases there is a firm conviction that the classical Scandinavian model would not work.²³¹ In any event, executive ombudsmen are now just as important to the American bureaucracy as the classical ombudsman.

Alan Wyner defines an executive ombudsman "as a centralized complaint-handling officer who has been appointed to office and who serves at the pleasure

223. S. ANDERSON, *supra* note 218, at 10.

224. Newcomb & Bauer, *supra* note 83, at 9.

225. W. GELLHORN, *OMBUDSMEN AND OTHERS: CITIZENS' PROTECTORS IN NINE COUNTRIES* 428 (1967)

226. *Id.*

227. Valdes, *The Self-perception of the Ombudsman: A Comparative and Longitudinal Survey*, 9 *OMBUDSMAN J.* 1, 9 (1991).

228. *Id.*

229. W. GELLHORN, *supra* note 225, at 429.

230. See Weiss, *Comparing Legislative and Executive Ombudsmen in the United States*, 7 *OMBUDSMAN J.* 37, 38 (1988).

231. *Id.* at 38.

of an elected or appointed chief executive."²³² The fact that the executive ombudsman is appointed by a chief executive and therefore dependant upon the chief executive for continued tenure is the major difference between the classical and executive ombudsmen. The potential disadvantage of this arrangement is clear: the executive ombudsman's allegiance to the person who appointed him may prevent him from assuming an impartial attitude when investigating complaints damaging to the chief executive.

The shared powers of the executive and the classical ombudsman are illustrated by the powers of the Oregon executive ombudsman, which is typical of the ombudsmen found in the United States.²³³ These powers are:

1. The Ombudsman is charged to investigate, on his own initiative or on complaint of any person, administrative action of any state agency.
2. When the Ombudsman finds that agency action is objectionable he is directed to submit his criticism to the agency concerned, including any recommendations to the agency in question.
3. The Ombudsman is required to report to the governor and to the legislature.
4. The Ombudsman will be available for special assignment upon the governor's request.
5. The Ombudsman will have the responsibility of identifying patterns or clusters of problems, procedures, and policies.
6. The Ombudsman's workload will include field contact, observation, and investigation.
7. The Ombudsman will have the opportunity to help determine priorities and positions.²³⁴

The similarities between the CPU and ombudsman in complaint resolution is best illustrated in the striking similarities found between it and Gwynn's outline of ombudsman activities. The seven activities of the Oregon Executive Ombudsman are virtually identical to CPU's procedure for complaint resolution. The only distinctive difference is that the Oregon Ombudsman deals with administrative complaints as opposed to consumer complaints.

Besides the four defining characteristics of the ombudsman, two common features are also worth noting: the use of the press, and the role as protector. Both the ombudsman and the Attorney General make use of the press to inform the public of current investigations. In Sweden, the press plays a large part in the Ombudsman's work, both in stimulating his activity and in publicizing its consequences.²³⁵ The same is true for the Attorney General. This is

232. A. WYNER, *EXECUTIVE OMBUDSMAN IN THE UNITED STATES* 207 (1973).

233. *Id.*

234. *Id.*

235. W. GELLHORN, *supra* note 225, at 227.

accomplished by distributing daily press releases to all major forms of media in Missouri. These press releases describe the actions taken by the Attorney General to resolve possible violations of the Merchandising Practices Act.

The final characteristic shared by both institutions is the role of protecting citizens. One of the many names given to the ombudsman is that of "citizen protector." This is an accurate description of the ombudsman's primary function—that of protecting citizens from an inhuman, inaccessible, and inefficient bureaucracy. The role of protector also describes the primary function of the CPU. The Merchandising Practices Act, which provides for the protection of Missouri consumers from unfair and deceptive acts, commands the Attorney General to fulfill this role.²³⁶

3. Missouri Attorney General not a "True" Ombudsman

Although there are similarities between the CPU and the ombudsman, the Attorney General is not a "true" ombudsman. This fact is illustrated by many differences between the institutions. One difference from the classical ombudsman is that the Attorney General is an elected official. The classical ombudsman calls for the complaint official to be an officer appointed by the legislature. The Attorney General, being an elected official of the executive branch, may feel more identification with the executive branch as with the legislature.²³⁷ As mentioned earlier, it is conceivable that this situation can lead to a lack of independence and impartiality on the part of the Attorney General. Thus, the Attorney General may find it expedient to dismiss certain complaints as unjustified. Even the present Attorney General of Missouri has not escaped this criticism.²³⁸

The heart of the ombudsman's job is to investigate complaints by citizens of injustice at the hands of public officials. The office, in handling these complaints, is a "court of last resort," when members of the public tangle with the civil service. Being the court of last resort means that all possible remedies to a complaint must be exhausted before the ombudsman can take action. Therefore, in cases where complaints are filed first with the ombudsman, the ombudsman helps the complainant by explaining what steps can be taken to secure review, and in most instances that would be sufficient action at this juncture.²³⁹

However, the CPU functions just the opposite on many occasions. A large majority of the complaints that are filed with the CPU are filed by complainants

236. MO. REV. STAT. § 407.010.

237. A. WYNER, *supra* note 232, at 138.

238. Missouri's Attorney General, William Webster, was accused by Missouri Democrats of having dropped charges against a nursing home because it had contributed money to Governor Ashcroft's campaign and his own campaign for reelection. Kraske, *Missouri Democrats Dig at Nursing Home Settlement: Ashcroft, Webster Become Targets*, Kansas City Star, Sept. 25, 1988, at A1, col. 1.

239. W. GELLHORN, *supra* note 225, at 428.

who have not even begun to exhaust all their remedies. Most of the complaints, when filed with the Attorney General, are being brought to public attention for the first time with any agency.²⁴⁰ The CPU, much like the ombudsman, refers clients to the proper agency, but unlike the ombudsman, the CPU can review a complaint before exhaustion of all remedies.

C. Proposal for Missouri Consumer Ombudsman

Although the Consumer Protection Unit is not a "true" ombudsman, it does perform many of the same functions of an ombudsman and in the same way an ombudsman would perform them. With this notion in mind, it is not impossible to imagine that the Consumer Protection Unit could become a "true" ombudsman complete with the all the benefits of that office. But before we transplant the CPU from the Attorney General's office and into its own independent existence, we must provide this new office with some guidelines on handling consumer complaints. The absence of such guidance could lead to a failure to protect the "individual" consumer as demonstrated by the current system. The framework in which the Missouri Consumer Ombudsman would operate should roughly follow the guidelines set forth below.

1. Creation

First, the Consumer Protection Unit, currently housed in the Attorney General's Public Protection Division, will be given independent status under the direction of an Consumer Ombudsman. In conforming with the traditional role of the ombudsman, this ombudsman should be appointed by the Missouri General Assembly. Similar to the classical ombudsman, Missouri Consumer Ombudsman will answer only to the General Assembly or to a specially created sub-committee on consumer affairs.

Funding for the office will be allocated partially from the General Assembly and from the Attorney General's consumer protection fund which consists of money judgments assessed against violators of the Merchandising Practices Act. Since the Attorney General's office will no longer be responsible for the CPU, the funds and staff currently allocated to this unit will be transferred to the Consumer Ombudsman. Therefore, the Consumer Ombudsman will not require any additional funding over that currently allotted to consumer protection in Missouri. Of course, as the office develops and is used by more consumers, additional funding will be needed.

240. In fact, the BBB urges many consumer to file complaints with the Attorney General office before they take any action.

2. Jurisdiction

The Consumer Ombudsman will retain the authority granted to the Attorney General over consumer affairs. The primary source of this authority being the Merchandising Practices Act. The Consumer Ombudsman will not, however, be limited to pursuing only claims protecting the Missouri public. This limitation, found in the Missouri Constitution, applies only to the Attorney General. Therefore, investigating patterns of unlawful practices remains the primary function of the Public Protection Division within the Attorney General's office and investigating individual complaints becomes the new function of the Consumer Ombudsman.

Just as the Nordic countries differ upon the appropriate amount of power granted to the Consumer Ombudsman,²⁴¹ the Missouri legislature is free to examine these pre-existing institutions as models for the Missouri Consumer Ombudsman. Whether the legislature chooses to grant the Consumer Ombudsman injunctive power as found in Norway and Finland or even criminal prosecutorial power as found in Denmark,²⁴² depends upon how they see the Consumer Ombudsman's role in relation the Attorney General's office. At the very least, the Consumer Ombudsman will need some form of enforcement power in order to "entice" businesses to comply with the suggested solution to a consumer complaint.²⁴³

A possible solution to the appropriate grant of authority is to have concurrent jurisdiction between the Consumer Ombudsman and the Attorney General. All initial consumer contact will occur through the office of the Ombudsman. These complaints will then be reviewed and investigated according to the needs of the individual consumer. If a pattern or trend of consumer abuse surfaces, the relevant consumer files will be transferred to the Attorney General for enforcement under the Merchandising Practices Act.

We must keep in mind that a true ombudsman acts only as a "court of last resort."²⁴⁴ Therefore, the Consumer Ombudsman's initial contact with consumers must inform them of their alternatives rather than start proceedings against the business. Law students operating the hotline accomplish this task by giving consumers a summary of their options after listening to their complaint. If further research is needed on a particular complaint, the student will send the consumer a CCF. After it is apparent that a consumer needs help, the Consumer Ombudsman will take an active role in the investigation of the complaint.

241. Graver, *supra* note 180, at 2.

242. *Id.*

243. These enforcement powers may take the form of existing remedies found in the Merchandising Practices Act, such as AVC's, CID's, and injunctive relief. MO. REV. STAT. §§ 407.010-910.

244. S. ANDERSON, *supra* note 218, at 38-40.

The Consumer Ombudsman will be able to not only investigate individual complaints but will be able to serve as the consumer advocate for all Missourians. By assuming the current framework within the CPU, the Consumer Ombudsman can maximize the usefulness of the consumer fraud hotline, the CPU investigative staff, and the CPU staff of attorneys. The role of "consumer protector" will be the Ombudsman's first priority with the hope that, as in Sweden, the office will become known throughout Missouri as the consumer's advocate.²⁴⁵

3. Organization

The office will consist of the Consumer Ombudsman, staff attorneys, investigators, and hotline operators. The current CPU uses primarily undergraduate political science majors as hotline operators. Under the newly created office, a law school clinic placement program would provide the needed legal expertise to inform Missouri consumer of their rights and remedies.²⁴⁶ Similar to the Vermont Mediation program, the Ombudsman will be able to use law students to process much of the consumer complaint caseload.²⁴⁷ These operators will be supervised by staff attorneys and due to their legal training will be able answer questions posed by both the "complainers" and the "information gatherers." The voice of Missouri consumers will finally be heard and not dismissed just because ten other Missourians have not complained about the same company.

The Consumer Ombudsman will not experience the same level of problems found in Vermont's student program.²⁴⁸ Since the office will be located in Jefferson City only 30 miles away from the University of Missouri-Columbia School of Law, distance will not impair accessibility or coordination. If a problem does exist, the clinical placement director at the law school should be able to work out the necessary scheduling conflicts. Training and holiday breaks pose no more of a threat to the system than currently experienced with the use of undergraduates. In fact, by using law students, training time will be reduced due to legal skills already learned at school.

4. Functions

Professor Chris Wheeler, working under a Carnegie Foundation Grant administered by the Center for the Study of Responsive Law, identified certain characteristics of a good complaint handling mechanism.²⁴⁹ Commentators

245. King, *supra* note 179, at 359.

246. These students will need to be Supreme Court Rule 13 Certified. Supreme Court Rule 13 Certification allows law students who have completed at least 50 credit hours and who are in good standing with the Missouri Bar to provide legal assistance in some matters involving indigent persons or any matter on behalf of the State. MO. SUP. CT. R. 13.

247. Boisvert, *supra* note 138, at 61.

248. *Id.*

249. Gregg, *supra* note 210, at 27.

found this list very persuasive in formulating their own model consumer dispute resolution mechanisms.²⁵⁰ Professor Wheeler stated that in meeting the needs of the individual consumer, the procedures of a complaint handling mechanism should:

1. be visible to the consumer
2. be accessible to consumers of all economic strata in terms of:
 - a. ease of entry
 - b. cost
 - c. availability and convenience
 - d. language
3. encourage the speedy resolution of a dispute
4. see that both sides to a dispute are directly involved in the resolution process
5. encourage finality and conclusiveness of the resolution of a dispute
6. ensure that the results of dispute settlement efforts are actually carried out
7. keep the consumer informed as to the status of the case
8. provide useful information on other avenues of redress should dispute settlement efforts fail, or the agency determine that the issue lies outside its formal or informal jurisdiction.²⁵¹

Commentators have added to this list: the need to provide the consumer with an advocate or advisor and the need to open the dispute settlement process to public scrutiny.²⁵²

Upon review of this list, it is readily apparent that the current CPU meets most of Professor Wheeler's criteria. Under the Consumer Ombudsman, consumer awareness will be heightened by the centralization of consumer disputes into one functional forum. Advertising of both the hotline and the Ombudsman's services should be increased so that all consumers, rich or poor, will have access to the office.

Since the CPU will no longer have to compete within the Attorney General's agenda, which may include various topics from abortion to capital punishment, a more concentrated effort will result in the speedy resolution of consumer complaints. This single-minded focus will also allow additional attention to ensuring increased involvement by both sides of the dispute.

The most significant improvement over the old system will be the increased flow of useful information to consumers using the consumer fraud hotline. Under the current system, hotline operators are restrained from giving legal advice or anything resembling legal advice. This is exactly what a consumer advocate should be doing—advocating consumer rights. By using law students under the

250. *Id.*

251. *Id.*

252. *Id.*

supervision of a staff attorney, consumers will be able to access essential legal knowledge just by dialing the 1-800 number. This will give universal access to all consumers needing help.

5. Complaint Resolution Process

Just as the Nordic versions of the Consumer Ombudsman seek to effectively handle a large number of cases while using comparatively few resources, likewise, the Missouri version will have the same goal.²⁵³ As mentioned above, all initial consumer contact will be through the office of the Consumer Ombudsman. Through use of its investigative initiative, this office will respond to consumer complaints either by letters to the business or eventually by bringing both sides of the dispute together in either the context of voluntary dispute resolution or a civil suit. By housing the full force of consumer complaint resolution under one roof, the Consumer Ombudsman will be able to choose the best available method of dispute resolution.

For example, the Consumer Ombudsman might choose binding arbitration similar to that used in the Maryland system.²⁵⁴ The Consumer Ombudsman would serve as the Chief Arbitrator responsible for overseeing consumer arbitrations conducted by volunteer arbitrators throughout the state.²⁵⁵ This would allow both the business and the consumer an impartial forum for the resolution of the complaint.

Providing the Consumer Ombudsman with unbridled discretion concerning consumer disputes allows for the experimentation and development of effective resolution devices. In the initial stages of this development, I suggest that the Consumer Ombudsman use a negotiation process similar to that used in Sweden.²⁵⁶ Once the complaint is within the complete control of the office, the Consumer Ombudsman will contact both sides to determine the whole story.²⁵⁷ If the office uncovers a violation of the consumer's rights, the Ombudsman will enter into negotiation with the business as the consumer's advocate. As witnessed in Sweden, this process should resolve a large number of consumer complaints to the satisfaction of the consumer.²⁵⁸

VI. CONCLUSION

Twenty-four years ago, Missouri implemented its first attempt at consumer protection. That attempt failed. The major cause of this failure is the inaccessibility of effective remedies to combat the power and money behind

253. Graver, *supra* note 180, at 2.

254. Boisvert, *supra* note 138, at 62.

255. *Id.* at 63.

256. King, *supra* note 179, at 356.

257. *Id.*

258. *Id.* at 358.

business. Considering a situation similar to that found in Missouri, Roscoe Pound explained "with respect to the everyday rights and wrongs of the great majority of an urban community, the machinery whereby rights are secured practically defeats rights by making it impracticable to assert them when they are infringed."²⁵⁹

If not in the courts, then where is the average consumer to find redress? My analysis of this situation led me to consider the ombudsman as Missouri's answer.

As mentioned earlier, the CPU already functions in a fashion that is very similar to an ombudsman, but it is the creation of a "true" Consumer Ombudsman that allows the office to provide much needed help and guidance to "individual" Missouri consumers. There are other alternatives, but these require time, money and intensive effort by the government, business and consumers. The average consumer needs protection now and should not have to wait another twenty-four years before the General Assembly responds to their needs. This is especially true when help is only a phone call away in the form of the Consumer Ombudsman.

259. Pound, *The Administration of Justice in the Modern City*, 26 HARV. L. REV. 302, 316 (1913).

APPENDIX

COMPLAINT CATEGORIES

Financial Fraud

1. Securities and Commodities
2. Business Opportunities and Franchises
3. Pyramids, Chain Letters, Work-at-Home Schemes
4. Lotteries and Sweepstakes
5. Bankruptcy
6. Miscellaneous

Automotive and Odometer

7. Automotive Repair
8. Odometer Rollback and Title Violations
9. General Misrepresentations in Auto Sales
10. General Warranty Issues
11. Miscellaneous

Real Estate

12. Time-Share Sales and Promotions
13. Recreational Land Development
14. General Real Estate
15. Landlord/Tenant
16. Home Repair and Remodeling
17. Mobile Homes
18. Energy Fraud
19. Travel Related Promotions
20. Pest Control
21. Miscellaneous

Health and Insurance

22. Health Fraud and Quackery
23. Health Spas
24. Pre-Need Burial Plans
25. Insurance
26. Billing Practices
27. Miscellaneous

Miscellaneous Merchandise

28. Propriety Schools and "Diploma Mills"
29. Home Furnishings and Appliances
30. Publications
31. Bulk Meat Sales
32. Office Supplies
33. Sporting Goods
34. Electronics
35. Miscellaneous

Charitable Solicitation

36. Charitable Organizations
37. Profession Fundraisers

Antitrust

38. Antitrust