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Combatting Consumer Fraud in Missouri: The Development of Missouri's Merchandising Practices Act

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COMBATTING CONSUMER FRAUD IN MISSOURI: THE DEVELOPMENT OF MISSOURI’S MERCHANDISING PRACTICES ACT

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I. INTRODUCTION ......................................... 365
II. THE 1967 MERCHANDISING PRACTICES ACT ............. 368
III. THE 1973 AMENDMENTS .................................. 376
IV. THE 1985 AMENDMENTS .................................. 383
V. THE 1986 AMENDMENTS .................................. 393
VI. LEADING CASES ........................................ 404
VII. CONCLUSION ............................................ 414

The primary purpose of this Article is to review the historical development and present status of Missouri’s Merchandising Practices Act, Chapter 407, and the recent court decisions that have arisen under the Act or otherwise have an impact thereon. Special emphasis will be given to the expanding role of the Attorney General to enforce the Act, and recent statutory enactments that will serve to more effectively combat consumer fraud in Missouri.

I. INTRODUCTION

As the State of Missouri grew from one based on agriculture and a bucolic life to one of modern urbanization, the marketplace changed as well. As the marketplace grew dramatically in size, it became increasingly impersonal. Goods were produced in one part of the country, packaged in another, and consumed in yet another. As the marketplace became impersonal, the level of knowledge and trust a consumer had in his merchant was not nearly as attainable as before. In an international marketplace, the consumer was unable to protect himself from merchandising fraud and had to rely more
upon government regulation for protection. The United States Chamber of Commerce estimates that consumers annually lose 5.5 billion dollars to white-collar fraud and deceptive trade practices. It found that there is "more crime committed against consumers every day than there is crime in the streets. The public is constantly being fleeced." The federal government was the first to perceive a need for consumer protection legislation and enacted the Federal Trade Commission Act of 1914. This act, however, was primarily concerned with encouraging competition in the business arena. It was not until the Wheeler-Lee Amendment in 1938 that consumer-oriented protection became a concern of the government. The Wheeler-Lee Amendment enlarged the statutory mandate under section 5 of the Act by declaring "unfair or deceptive acts or practices" unlawful. No longer was it necessary to show

1. CHAMBER OF COMMERCE OF THE U.S., A HANDBOOK ON WHITE COLLAR CRIME 6 (1974). This dollar figure relates only to the loss of consumer victims to consumer fraud, illegal competition, and deceptive practices. The estimate by the Chamber of Commerce concerning total annual dollar loss of "some" white-collar crimes was estimated to be 47.78 billion. Id.

2. Id. at 25. The Chamber of Commerce further noted that "consumers are not the only losers. Responsibly run companies lose sales and market share to those firms which rely on deception and fraud. And the loss of confidence in business resultant from consumer fraud hits the ethical as well as the unethical firm." Id. Thus the effect of active enforcement action with stringent and broad "anti-fraud" laws is the protection of not only the consumer but the honest entrepreneur.


4. Id. Section 5 of the 1914 statute reads:

   Unfair methods of competition in commerce are hereby declared unlawful.

   The commission is hereby empowered and directed to prevent persons, partnerships, or corporations except banks, and common carriers subject to the Acts to regulate commerce, from using unfair methods of competition in commerce.

   Whenever the commission shall have reason to believe that any such person, partnership or corporation has been or is using any unfair method of competition in commerce, and if it shall appear to the commission that a proceeding by it in respect thereof would be to the interest of the public, it shall issue and serve upon such person, partnership, or corporation a complaint stating its charges in that respect, and containing a notice of a hearing upon a day and at a place therein fixed at least thirty days after the service of said complaint. . . .


6. The [Wheeler-Lee] amendment added the phrase "unfair or deceptive acts or practices" to the section's original ban on "unfair methods of competition" and thus made it clear that Congress, through section 5, charged the FTC with protecting consumers as well as competitors. The House Report on the amendment summarized congressional thinking: "[T]his amendment makes the consumer, who may be injured by an unfair trade practice, of

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injury to competition. Prior government attempts to regulate the marketplace had been concerned solely with the businessman; only recently have the interests and protection of the consumer been championed by government. Pursuant to the Wheeler-Lee Amendment, a considerable body of federal jurisprudence arose defining the contours of consumer fraud. 7

Nevertheless, after the 1930s the idea of government protection of the consumer waned until the late 1950s and early 1960s when the states began to pick up the slack left by the federal government. 8 The federal government's role in regulation was slowly de-emphasized. While virtually all states are interested in the elimination of white-collar fraud, each has its own focus and emphasis.

Until 1967, a Missouri citizen who had been victimized by fraud in a consumer transaction had available only the private legal remedies embodied in the common law of Missouri, his own initiative in implementing those remedies and, of course, his financial ability to do so. The private legal action available to the consumer was inadequate. The consumer's private action at common law for fraud in Missouri required that he overcome serious legal obstacles and burdens in order for him to be successful. Under Missouri's common law, fraud was never presumed but had to be established from the evidence with the burden resting upon the one alleging it. 9 Missouri courts delineated nine distinct elements of the offense, each involving a question of fact that had to be proved. Those elements included: 1) a representation; 2) its falsity; 3) its materiality; 4) the speaker's knowledge of its falsity or ignorance of the truth; 5) the speaker's intent that it should be acted upon by the hearer in a manner reasonably contemplated; 6) the hearer's ignorance of its falsity; 7) his reliance on its truth; 8) his right to rely thereon; and, 9) his consequent and approximate injury. 10 The general rule in Missouri was that fraud had to relate to representations of present or pre-existing facts, and could not be predicated upon representations of matters or things to be done in the future. 11

9. Hardwicke v. Hamilton, 121 Mo. 465, 26 S.W. 342 (1894); Lowther v. Hays, 225 S.W.2d 708 (Mo. 1950).
10. Yerington v. Riss, 374 S.W.2d 52 (Mo. 1964); Powers v. Shore, 363 Mo. 59, 248 S.W.2d 1 (1952) (en banc); Williams v. Miller Pontiac Co., 409 S.W.2d 275 (Mo. Ct. App. 1966).
11. Yerington, 374 S.W.2d at 58.
If the amount involved in the transaction was small, a consumer was left without an effective recourse or remedy for the alleged consumer fraud. Concomitantly, the Missouri consumer was left with little hope for protection against similar injuries or occurrences in the future.

The year 1967 heralded a new era for Missouri consumers. In that year the Missouri General Assembly enacted the state's Merchandising Practices Act, Chapter 407, a modest and laconic bill that nonetheless chipped away at the harsh doctrine of caveat emptor. This modest initial effort by the legislature to protect the consumer grew noticeably in 1973 and dramatically in 1985 and 1986. In its present form, the Merchandising Practices Act stands as one of the most effective and all-encompassing consumer protection laws passed by a state.

As it now exists, the Merchandising Practices Act embraces within one agency, the Attorney General's office, the authority to proceed administratively, civilly, or criminally against a "person" engaged in consumer fraud.

The balance of this Article will focus upon Missouri's evolving Merchandising Practices Act and recent court decisions affecting the Act. First, the major component parts of the original 1967 Act will be discussed to establish a foundation to aid in understanding the subsequent amendments and case law. Secondly, the more significant amendments to the Act passed in 1973, 1985, and 1986 will be highlighted. Finally, certain cases that have arisen under or impacted upon the Act will be identified and briefly analyzed.

II. THE 1967 MERCHANDISING PRACTICES ACT

The original Merchandising Practices Act of 1967 contained only fourteen sections. These included section 407.010—definitions; section 407.020—unlawful merchandising practices defined and exemptions from the coverage

12. Mo. Rev. Stat. §§ 407.010-.130 (Supp. 1967). Author's note: footnote citations will be to the volume where the section being discussed was first published in the Missouri Revised Statutes and may not be the citation to where the statute is presently found. Textual citations regarding specific sections of the Merchandising Practices Act are designed to be a quick reference to the specific statute under discussion by applicable year.

13. This form of legislation, called the Consumer Fraud Acts, differs from the Unfair Trade Practices and Consumer Protection Law developed by the Federal Trade Commission in conjunction with the committee on Suggested State Legislation of the Council of State Governments. For a discussion of the development and composition of the three alternative versions of the model act, see NATIONAL CONSUMER LAW CENTER, UNFAIR AND DECEPTIVE ACTS AND PRACTICES 4-5 (1982). As noted therein, Missouri and six other states have enacted a version somewhat different than the three alternative models developed by the Federal Trade Commission. It may be assumed that the legislature enacted the Consumer Frauds Act, rather than a "little FTC Act," because Missouri already had comprehensive laws dealing with anti-competitive business activities.
of the Act; section 407.030—assurances of voluntary compliances for violation of the Act; section 407.040—civil investigative demand authority and procedures; section 407.050—procedures for producing materials demanded by a civil investigative demand; section 407.060—confidentiality of documents produced pursuant to a civil investigative demand; section 407.070—procedure to extend return date of a civil investigative demand; section 407.080—penalties for noncompliance with a civil investigative demand; section 407.090—legal remedies to compel compliance with a civil investigative demand; section 407.100—injunctive relief for certain violations of the Act; section 407.110—penalties for violation of injunctions; section 407.120—saving clause for other remedies outside of the Act; and finally, section 407.130—Attorney General's recovery of cost for litigation under the Act. Certain statutory provisions are merely procedural and are self-explanatory, and have not been subject to amendment, and as such will not be discussed in depth in the body of this article. The substantive provisions, however, will be discussed anon regarding their content and evolution.

The triggering section, or "subject matter jurisdiction" section, of the Merchandising Practices Act appears in section 407.020. Although this section has been subjected to recent "legislative fine tuning" to broaden its scope and account for decisional law, the initial section in the 1967 version of the Act stated:

The act, use or employment by any person of any deception, fraud, false pretense, false promise, misrepresentation, or the concealment, suppression, or omission of any material fact with intent that others rely on such concealment, suppression or omission in connection with the sale or advertisement of any merchandise, is declared to be an unlawful practice. . . . 14

It is apparent from the reading of this statute that the legislative purpose of the Merchandising Practices Act was to protect consumers in the marketplace not only from actively committed fraud (i.e., misrepresentation, deception, or false promise) but also from passive fraud (i.e., concealment or omissions of material facts). Clearly this statutory enactment appears to tremendously reduce the burden of proof that was necessary to prove fraud at common law. The fact that the courts have interpreted this section to effectuate the statute's consumer protection philosophy will be discussed in a subsequent section of this article. 15

While certain terms of the Act were clearly defined as to scope and meaning, the elements or perimeters of the "unlawful practices" of the section (i.e., deception, fraud, false pretense, false promise, misrepresentation, or the concealment, suppression, or omission of any material fact) were not.

15. For a discussion and analysis of leading Missouri cases interpreting section 407.020, see infra text accompanying notes 177-86.
Hence, the enforcement actions of the Attorney General and the resulting appellate decisions have been crucial in determining the type of conduct prohibited by the Merchandising Practices Act.

The key terms defined by the legislature in the 1967 Act were "advertisement," "merchandise," "person," and "sale." These were defined as follows:

(1) "Advertisement" includes the attempt by publication, dissemination, solicitation or circulation to induce directly or indirectly any person to enter into any obligation or acquire any title or interest in any merchandise;

(2) "Merchandise" includes any objects, wares, goods, commodities, intangibles, real estate or services;

(3) "Person" includes any natural person or his legal representative, partnership, corporation (domestic and foreign), company, trust, business entity or association, and any agent, employee, salesman, partner, officer, director, member, stockholder, associate, trustee or cestui que trust thereof;

(4) "Sale" includes any sale, offer for sale, or attempt to sell merchandise for cash or on credit.

An analysis of these defined terms clearly indicates that the legislative intent behind the initial Act was to broadly define the key terms of the Act so as to provide effective protection for consumers in the marketplace who were not otherwise protected by existing law. "Person" was defined to include natural persons as well as all conceivable types of businesses. The definition of "merchandise" included virtually all types of goods and services, tangible and intangible. "Advertisement" included all oral or written, "direct or indirect" inducements to purchases. And finally, "sale" included not only final sales transactions, but also all "attempts" and offers to sell. These definitions for the most part have been left intact by the subsequent amendments since their broad and inclusive nature was clearly set forth in the initial Act. One notable exception to be discussed later is the definition of the term "sale."

Although the initial "subject matter" terms of section 407.020 were expansively defined to reach most all types of mercantile transactions, the legislature purposefully exempted from the coverage of the Act a few very limited areas. The legislature excepted the media when there was no knowledge that an advertisement disseminated to the public violated the Act. The legislature also excepted from the unlawful practices section of Chapter 407 "any advertisement which is subject to and in compliance with the rules and regulations of and the statutes administered by the Federal Trade Commission." This was subsequently deleted by amendment and will be discussed

17. For a discussion of the legislative intent embodied in amending the definition of "sale" to include leases, see infra text accompanying notes 69, 122-23.
19. Id.
later. Finally, section 407.020, did not apply to any institution or company under the direction or supervision of the Director of the Division of Savings and Loan, the Director of the Division of Insurance, or the Commissioner of Finance, unless the directors of those divisions specifically requested the Attorney General to implement the powers of the Act. The legislature excluded the advertising media from the unlawful conduct of their advertisers, except where the media had knowledge of the false, misleading, or deceptive character of the advertisement so that the sanctions to be imposed for violations of section 407.020 would properly impinge only upon that class of irresponsible merchants that shared culpability with the "person" perpetrating the fraud. Similarly, institutions already subject to regulation and supervision by other state administrative agencies expert in specialized areas were appropriately left under their jurisdiction unless the directors of those agencies believed that an entity they regulated had engaged in consumer fraud which was of a type properly handled by the Attorney General under the powers granted by the Act. In those instances the directors of the enumerated administrative agencies could refer the activity uncovered by their investigation to the Attorney General for appropriate action.

Section 407.030 of the 1967 Act provided that the Attorney General could, subject to circuit court approval, enter into an Assurance of Voluntary Compliance "in the administration of sections 407.010 to 407.130" with any person who he believes has violated these sections. The Assurance of Voluntary Compliance is an agreement between the suspected violator and the Attorney General that the alleged unlawful activities will cease. The person entering into an Assurance of Voluntary Compliance with the Attorney General does not admit any wrongdoing, but promises to stop whatever specified activity he allegedly was engaged in and to adhere to the other provisions of the Act. An inherent weakness in this section (i.e., the unenforceability of the assurances of voluntary compliance) was corrected by an amendment discussed below.

The next section of the initial 1967 Merchandising Practices Act to be discussed is section 407.040. This section created and established procedures for a investigative tool known as the civil investigative demand.

The civil investigative demand is an administrative subpoena that grants to the Attorney General expansive authority to investigate, prior to litigation,
any suspected violation of the Act. The Attorney General was authorized by this statute to issue an investigative demand when it appeared that a person had engaged in or was engaging in any practice declared to be unlawful by sections 407.010 to 407.130, or when it was in the public interest that an investigation be made. The original section 407.040 limited the investigative demand to require the production of documentary material and further provided that the investigative demand was not applicable to criminal proceedings. These constraints were changed by subsequent amendment. The statute further required that each investigative demand state the nature of the alleged violation, the applicable statute, what documentary material was required, a return date within which the documentary material was to be produced, and to which member of the Attorney General's staff production was to be made. This statute also prohibited any request made in an investigative demand which would be unreasonable or improper if presented in a subpoena duces tecum issued by a court of the State of Missouri, which would require the disclosure of any privileged documentary material, or which for any other reason could not be required by a subpoena duces tecum.

26. Id.
27. Mo. Rev. Stat. § 407.045 (Supp. 1985). These constraints embodied in the original Act were deleted by amendment in 1985; moreover, the legislature envisioned the Attorney General's use of the investigative demand in both civil and criminal proceedings. This legislative intent is found in the 1985 amendment which states:

In any civil investigative demand served under section 407.040, no individual shall be permitted to refuse to answer any question material to the matter in controversy or to refuse to produce documentary material or testify on the ground that the testimony or documentary material required of him may tend to incriminate him or subject him to any penalty; but, if such individual asserts his rights against self-incrimination, he shall not be subject to criminal prosecution or to any action for a criminal penalty or forfeiture on account of any transaction, matter or thing concerning which he may testify or produce documentary material. To avail himself of this section, such individual need only make his assertion of his right against self-incrimination on the record or known to the Attorney General.

Mo. Rev. Stat. § 407.045 (Supp. 1985). It is clear from the above-quoted enactment that an investigative demand can now be used in criminal investigations; axiomatically, if the target of the investigation is an anticipated defendant in a criminal case, all constitutional safeguards such as those embodied in Miranda v. Arizona, 384 U.S. 436 (1966), must be observed during all phases of the investigative demand process.

29. Id.
30. Id. at § 407.040(2)(2).
31. Id. at § 407.040(2)(3).
32. Id. at § 407.040(2)(4).
33. Id. at § 407.040(3)(1).
34. Id. at § 407.040(3)(2).
issued by a court of this state.\textsuperscript{35} The legislature then prescribed the methods by which service of the investigative demand could be made.\textsuperscript{36} The legislature provided in 1967, via section 407.050, that documentary material which is the subject of an investigative demand issued pursuant to the provisions of section 407.010 to 407.130 be produced for inspection and copying during normal business hours at the principal office or place of business of the person served, or at such other times and places as may be agreed upon by the person served and the Attorney General.\textsuperscript{37}

The 1967 version of section 407.060 required that documents produced pursuant to a demand under sections 407.010 to 407.130 be kept confidential by the Attorney General.\textsuperscript{38} This has been modified by subsequent amendment.\textsuperscript{39} Section 407.060 also declared that the Attorney General could use such documentary material or copies thereof in the enforcement of section 407.010 to section 407.130 in any court, provided that such material which contains trade secrets shall not be presented except with the approval of the court in which the action is pending after adequate notice to the person furnishing such material.\textsuperscript{40} Pursuant to the original section 407.070 the investigative demand could be challenged by the subject “person” any time before the return date or within 20 days after the demand had been served, whichever was shorter.\textsuperscript{41} The recipient of the investigative demand was required to show good cause for setting aside the demand or modifying it.\textsuperscript{42} In order to make the investigative demand a useful tool that was not taken lightly, section 407.080 of the Act made the failure to comply with such demand a criminal offense punishable by a fine not to exceed $500 or by imprisonment for a term of not more than one year, or both.\textsuperscript{43} In addition to the criminal penalties, section 407.090 allowed the Attorney General to file a petition seeking a court order that the investigative demand be honored.\textsuperscript{44} Any order so entered was subject to appeal to the supreme court, and disobedience thereof could be punished as contempt.\textsuperscript{45} Most of the in-

\textsuperscript{35} \textit{Id.}
\textsuperscript{36} \textit{Id.} at § 407.040(4).
\textsuperscript{37} \textit{Id.} at § 407.050.
\textsuperscript{38} \textit{Id.} at § 407.060.
\textsuperscript{39} Mo. REV. STAT. § 407.060(1) (Supp. 1985) (enacted 1985). The amendment modified the original requirement of confidentiality to the extent that disclosure may now be made “to law enforcement agencies of this state, another state or the United States for enforcement of the laws of such sister state concerning similar acts as prohibited by this chapter.” \textit{Id.} This allows for reciprocal sharing of information among law enforcement agencies so that multi-state perpetrators of consumer fraud may be more effectively prosecuted.
\textsuperscript{40} Mo. REV. STAT. § 407.060 (Supp. 1967).
\textsuperscript{41} \textit{Id.} at § 407.070.
\textsuperscript{42} \textit{Id.}
\textsuperscript{43} \textit{Id.} at § 407.080.
\textsuperscript{44} \textit{Id.} at § 407.090.
\textsuperscript{45} \textit{Id.}
vestigative demand procedures and enforcement provisions are in the same form today as when first enacted in 1967. Hence, no further discussion is warranted. The injunction provision of the initial section 407.100 granted the Attorney General the authority to petition the circuit court for an injunction prohibiting a person from continuing any practices in violation of sections 407.010 to 407.130. The original section required that the Attorney General give three days notice to the proposed defendant of any injunction action he intended to bring in circuit court, but this constraint was deleted by a subsequent amendment. The circuit court was authorized to make such orders or judgments as were necessary to prevent the alleged practice from continuing or to restore to any person any monies or property, real or personal, which may have been acquired by means of the statutorily prohibited unlawful practices. This original injunction section has been drastically strengthened by subsequent amendments. These amendments shall be discussed shortly.

The original section 407.110 provided that if a person violated the terms of an injunction issued under section 407.100, he was subject to a civil penalty of not more than $5,000 per violation. According to the terms of this section, the original court issuing the injunction retained jurisdiction for the granting of penalties.

The last two provisions of the 1967 Act of importance are sections 407.120 and 407.130. The former section is a "savings clause" enacted so as not to defeat other laws that could effectively afford remedies or protection to consumers in the marketplace. The latter statute provided that the Attorney General could recover "costs for the use of the state" in his litigation if he could show that the violations were willful. Subsequent amendments to the 1967 Act have greatly broadened the types of monetary orders that can be granted for enforcing these laws.

While the 1967 Merchandising Practices Act, in certain respects, constituted the first effective consumer protection law in the state, it was inadequate in many ways. It failed to address certain types of prevalent consumer fraud; and further lacked broad, effective enforcement provisions.

48. The contrast between the original injunction section (407.100) and its expansion by amendments is highlighted infra in text accompanying notes 65-67, 92-99, 111.
50. Id. at § 407.120.
51. Id. at § 407.130.
By subsequent amendments and case law, these legislative gaps have been closed. The first amendments to be discussed were enacted in 1973.\(^5\)

53. Although the 1973 amendments to the Act constitute the Act's first significant expansion, in 1969 and 1971 a few statutory changes were made that merit mentioning. Moreover, between 1971 and 1985 several amendments occurred that are not addressed in the text of this article. While these amendments and enactments do not warrant the devotion of a section of this article to them, a brief discussion is in order.

The 1969 amendment enacted a section concerning the delivery of unordered merchandise to consumers. It states:

Where unsolicited merchandise is delivered to a person for whom it is intended, such person has a right to refuse to accept delivery of this merchandise or he may deem it to be a gift and use it or dispose of it in any manner without any obligation to the sender.

Mo. Rev. Stat. § 407.200 (1969). Since this statutory language is unusually plain and clear, no further explanation of its meaning is required.

In 1971, the legislature added four sections to the Merchandising Practices Act. Two sections relate to gun purchases in contiguous states. Mo. Rev. Stat. §§ 407.500, .505 (Supp. 1971). The other sections mandate keeping records concerning the sale of used copper wire, id. at § 407.300, and for used bronze cemetery vases and receptacles, id. at § 407.305. These statutes are unrelated to the remainder of the Act and probably were placed in the Act merely because their subject matter was a type of merchandise. Since no case law has developed under these sections, no further analysis is warranted.

In 1974, the legislature amended the Merchandising Practices Act to include a new section entitled "Pyramid Sales Schemes." While this section also includes certain provisions applicable to franchises, this discussion will be limited to three sections dealing with unlawful pyramid sales schemes. A pyramid sales scheme:

includes any plan or operation for the sale or distribution of goods, services or other property wherein a person for a consideration acquires the opportunity to receive a pecuniary benefit, which is not primarily contingent on the volume or quantity of goods, services, or other property sold or distributed or to be sold or distributed to persons for purposes of resale to consumers, and is based upon the inducement of additional persons, by himself or others, regardless of number, to participate in the same plan or operation. . . .


 Generally speaking, a pyramid sales scheme is an illegal multi-level marketing program in which people make their profits by bringing more people into the program who do the same without regard to any quantity of merchandise sold for ultimate resale to the public. These marketing schemes also terminate with more people losing money than those making a profit. These schemes are now punishable by criminal prosecution under Mo. Rev. Stat. section 407.420 (1986), and may be enjoined under the terms of Mo. Rev. Stat. section 407.550 (1973). A leading case on this law is State of Missouri ex rel. Ashcroft v. Wahl, 600 S.W.2d 175 (Mo. Ct. App. 1980).

In 1980, the legislature enacted the "Motor Vehicle Franchise Practices Act."

Mo. Rev. Stat. §§ 407.810 to 407.835 (Supp. 1980). This law requires fair dealing between the franchisor and franchisee of new motor vehicle franchises. It also creates private rights and remedies for violations thereof. Again, these statutes were probably placed by the legislature into the Merchandising Practices Act merely because motor vehicles are merchandise. Since the law is not otherwise related to the Merchandising
III. THE 1973 AMENDMENTS

Six years subsequent to the passage of the 1967 Act, the first significant amendments were passed that enlarged the scope of the initial Act by expanding existing provisions and enacting new ones. The major sections that were broadened include section 407.010—definitions;\(^5^4\) section 407.040—civil investigative demands;\(^5^5\) and, section 407.100—injunctions.\(^5^6\) The new statutory provisions contained in the 1973 amendments included section 407.025—private civil actions and remedies under the Act;\(^5^7\) section 407.105—appointment of receivers;\(^5^8\) sections 407.150-407.555—vehicle odometer tampering,\(^5^9\)

Practices Act, it will not be further discussed in this Article.

The “going-out-of-business” statute was also enacted by our legislature in 1980. Mo. Rev. Stat. § 407.800 (Supp. 1980). This statute initially provided that any business in the city of St. Louis, St. Louis County, or Jackson County which advertises or conducts a going-out-of-business sale, shall first file notice with the Attorney General. Moreover, the statute provided that the sale must be concluded within sixty days. Violations of this statute were declared to be a violation of Mo. Rev. Stat. section 407.020 (Supp. 1980), and could be stopped by injunctions under Mo. Rev. Stat. section 407.100 (Supp. 1980). This section was amended in 1986 to include all counties in Missouri. Mo. Rev. Stat. § 407.800 (1986). The legislative intent behind this statute was to stop fictitious, perpetual going-out-of-business sales that defraud the public. By and large this has been accomplished. The legislature in 1982 passed new enactments that required retailers or manufacturers of farm machinery or equipment to repurchase those items from the retailer upon certain contingencies. These provisions are contained in Mo. Rev. Stat. sections 407.850 to 407.885 (Supp. 1982), but will not be discussed in this Article since they do not concern “consumer protection.”

Two pieces of legislation were enacted in 1984 and engrafted onto the Merchandising Practices Act. The first group of statutes, or “mini-acts” concerns the creation of rights, remedies and responsibilities between artist and art dealer regarding fine art. These provisions are Mo. Rev. Stat. sections 407.900 to 407.910 (Supp. 1982), and will not be discussed in this Article.

The second enactment in 1984 is what has commonly become known as the “Lemon law.” This “mini-act” is contained in Mo. Rev. Stat. sections 407.560 to 407.579 (Supp. 1984). This type of legislation, directed towards providing remedies to consumers who purchase innately defective new vehicles, could properly be the topic of a law review article of its own so a detailed analysis will not be provided here. Suffice it to say that the law requires that a dealer or manufacturer who cannot correct a defect with a new vehicle that impairs the “use, market value or safety” of the vehicle after a reasonable number of attempts, must restitute to the consumer or provide at no cost a comparable replacement vehicle. The statute does, however, provide certain set off and other defenses for the dealer or manufacturer.

\(^5^5\) Id. at § 407.040.
\(^5^6\) Id. at § 407.100.
\(^5^7\) Id. at § 407.025.
\(^5^8\) Id. at § 407.105.
\(^5^9\) Id. at §§ 407.510, .515, .520, .525, .530, .535, .540, .545, .550, .555.
and sections 407.700-407.720—home solicitation sales. One purpose of the 1973 amendments was to primarily define terms that were not defined in the original Act. The new definitions included “documentary materials,” “examination of documentary materials,” and “trade” or “commerce.” Each of these newly defined terms appeared in the important civil investigative demand section of the 1967 Act, but the terms were not defined at all. These new definitions made it clear exactly what type of documentation and materials the Attorney General could compel to be produced and when this can take place. The new definitions state:

(2) “Documentary material,” the original or a copy of any book, record, report, memorandum, paper, communication, tabulation, map, chart, photograph, mechanical transcription, or other tangible document or recording, wherever situate;

(3) “Examination of documentary material,” the inspection, study, or copying of such material, and the taking of testimony under oath or acknowledgment in respect of any documentary material or copy thereof; . . .

(7) “Trade” or “commerce,” the advertising, offering for sale, sale, or distribution of any services and any property, tangible or intangible, real, personal, or mixed, and any other article, commodity, or thing of value wherever situate, and includes any trade of commerce directly or indirectly affecting the people of this state.

The next section of the 1967 Act that was substantively amended in 1973 is the section regarding the issuance and procedures of the civil investigative demand, section 407.040.

Under the 1967 version of the Act, the Attorney General could issue a civil investigative demand for “documentary material relevant to the subject matter of an investigation.” The effectiveness and overall value of the civil investigative demand was extremely limited by this narrow scope. Not only was “documentary material” not defined, it was the only type of evidence that could be sought by a civil investigative demand.

In 1973 the legislature responded to these inadequacies by expanding the type of evidence for which a civil investigative demand could be issued and by establishing a new statutory investigative technique. Pursuant to the provisions of the 1973 amendment, in addition to “documentary material,” “physical evidence” and relevant “information” could also be demanded from any person who possessed knowledge about the suspected violation. Moreover, the civil investigative demand under the 1973 amendment was no longer limited to the production of “cold” documentation. The 1973 amendment vested in the Attorney General the power not only to compel the

60. Id. at §§ 407.700, .705, .710, .715, .720.
61. Id. at § 407.010(2), .010(3), .010(7).
production of records but also required a person to “appear and testify” regarding relevant information to the investigation.64

As a result of this 1973 amendment, the civil investigative demand has become the most powerful and effective investigative tool possessed by the Attorney General to enforce the Merchandising Practices Act.

The final section of the existing 1967 Act that was significantly amended in 1973 was the statutory mandate that permits the Attorney General to seek injunctions for conduct that violates the provisions of the Act. The statutory provisions of the original 1967 Act permitted the Attorney General to seek injunctive relief from the appropriate court prohibiting the unlawful conduct or prohibited practice, and further to seek money judgments to provide restitution to consumers suffering economic loss as a result of the illegal conduct.65 In 1973, by the inclusion of an amendment to the injunction statute, the legislature conferred upon the courts the power to appoint a receiver to preserve the assets of judgment debtors under the Merchandising Practices Act.66 By utilization of the statutory receiver, assets that otherwise might be wasted or hidden by the defendant can now be preserved for distribution to consumers that were financially harmed by the fraud. This receiver power has been further broadened by other amendments discussed below.67

In addition to modifying existing sections of the 1967 Merchandising Practices Act, the legislature in 1973 enacted several new sections to broaden its scope and afford greater protection to consumers. The new private cause of action section is the first discussed.

The enforcement authority under the original Merchandising Practices Act of 1967 was completely vested in the Attorney General. As noted, the Attorney General could seek injunctions, obtain assurances of voluntary compliance, and recover the cost expended in bringing the enforcement action. While the Attorney General’s role in enforcing the Act has traditionally been aggressive and expansive, the Attorney General, due to limited resources and other constraints, cannot actively investigate and litigate every case throughout the state in which consumer fraud is suspected. The General Assembly recognized this fact in 1973 and enacted a brand new statutory section, section 407.025 which created a private cause of action under the Merchandising Practices Act.

The new private cause of action statute addresses two main topics: lawsuits by individual private litigants and class action lawsuits.

The statutory provision creating the private civil lawsuit for individual litigants is straightforward and has, therefore, provided an effective means

64. Id.
67. See infra note 98 and accompanying text.
by which consumers can protect themselves from fraud. The section states:

Any person who purchases or leases goods or services primarily for personal, family or household purposes and thereby suffers an ascertainable loss of money or property, real or personal, as a result of the use or employment by another person of a method, act or practice declared unlawful by Section 407.020, may bring a private civil action in either the circuit court of the county in which the seller or lessor resides or in which the transaction complained of took place, to recover actual damages. The court may, in its discretion, award punitive damages and may award to the prevailing party attorney's fees, based on the amount of time reasonably expended, and may provide such equitable relief as it deems necessary or proper. 68

Several components of this section are worth mentioning. This "private cause of action" section concerns the "lease" of "goods and services" in addition to the sale or purchase. It was not until the 1986 amendments to the Act that the "leasing" of merchandise clearly fell within the scope of the Act. 69 Further discussion on this appears below. 70 Also worth mentioning is the fact that "punitive damages" are allowed under the private cause of action statute of the 1973 Act. This not only serves to monetarily punish violators of the Act, but also provides incentive for attorneys to take cases they otherwise might decline because of the small monetary amounts involved.

The second portion of section 407.025 that concerns class actions will not be discussed here. This section is extremely complex with many technical obstacles that must be met before a class can be "certified" and an action can be maintained under the Act.

The next new 1973 statutory section added to the 1967 Act is section 407.105, which establishes the rights, powers, and duties of a receiver appointed under section 407.100. Under this section the receiver is empowered to "sue for, collect, receive and take into his possession" virtually all records and assets acquired by the defendant by the unlawful practices giving rise to the lawsuit. Moreover, the receiver was empowered, with the approval of the court, to settle the estate and distribute all of the assets to satisfy both the consumers' and other creditors' claims. 71

By amendment in 1973, the legislature created the first "mini-act" within the Merchandising Practices Act. This new mini-act was directed towards curtailing and punishing the activity of altering the mileage on vehicles by mechanically rolling back the miles on the odometer. The blatant fraudulent

69. See infra notes 122-23 and accompanying text. Neither "legislative history" nor existing case law under the Merchandising Practices Act explain why leasing was covered under the private cause of action section but not under the general "anti-fraud" provision (Mo. Rev. Stat. § 407.020 (1986)) of the Act.
70. See infra notes 122-23 and accompanying text.
practice of rolling back the mileage on odometers is a widespread and age-old problem. It has recently been estimated many used vehicles being offered for sale have had their odometers tampered with to show less than actual mileage. Generally speaking, vehicles with few miles appearing on the odometer command greater prices upon resale. The 1973 "Odometer Act" served to combat this multimillion dollar fraud by various approaches.

First, under section 407.515 of the law, the "sale or use" of any device "which causes an odometer to register any miles other than the true mileage driven" is declared unlawful. Additionally, the practice of disconnecting odometers, or altering the mileage thereon, was declared unlawful by section 407.520, while the operating of a vehicle with its odometer disconnected or malfunctioning was likewise declared to be a violation under section 407.525. To assist in the detection of odometer fraud, the legislature enacted section 407.530 that required the transferrers of a vehicle to attest to the true mileage of the vehicle or set forth the reasons why this was not possible on the vehicle's title or other transferring documents.

The 1973 "Odometer Act" contained a variety of provisions to enforce the mandates of the new law. First, both the conspiracy and the individual act of violating the provisions of the law were declared to be misdemeanors, and the second conviction of conspiracy was declared to be a felony. Odometer tampering is reportedly a standard operating procedure of many used-car dealers (Consumer Reports Vol. 34 p. 250), who turn back mileage in the knowledge that high-mileage cars have low sale values. After a car has traveled 30,000 miles, prices start falling off sharply and beyond that distance, a two-year-old car loses approximately $10 of value for every 1,000 miles traveled. It is estimated that odometer tampering on used cars costs consumers one billion dollars a year. Odometer tampering has safety ramifications as well. For example, a driver of a car with 75,000 miles on the odometer is more likely to take the mechanical condition of his car for granted than is the driver of a car that has traveled 25,000 miles. The National Highway Safety Bureau in 1967 proposed a safety standard requiring tamperproof odometers on all passenger vehicles.

... Odometer tampering is technically easy. The favorite technique is called "picking" (most operators use specially shaped ice picks). The "picker," after removing the instrument panel lens or boring through a partition behind the speedometer, reaches into the odometer drum and manipulates the digits mechanically, usually only the 10,000th place. The tampering is rarely detectable by a used car shopper. Also, the tamperer can spin the speedometer cable with a high-speed electric motor to the desired low reading. Spinning is most commonly used by the amateur, however, because it can take hours to spin off just a few thousand miles. Disconnecting the speedometer cable is the simplest way to change the odometer reading. Dealers sometimes disconnect the speedometer cable on a new car to be used as a demonstrator or to be driven cross-country to the point of sale.


72. Odometer tampering is reportedly a standard operating procedure of many used-car dealers (Consumer Reports Vol. 34 p. 250), who turn back mileage in the knowledge that high-mileage cars have low sale values. After a car has traveled 30,000 miles, prices start falling off sharply and beyond that distance, a two-year-old car loses approximately $10 of value for every 1,000 miles traveled. It is estimated that odometer tampering on used cars costs consumers one billion dollars a year. Odometer tampering has safety ramifications as well. For example, a driver of a car with 75,000 miles on the odometer is more likely to take the mechanical condition of his car for granted than is the driver of a car that has traveled 25,000 miles. The National Highway Safety Bureau in 1967 proposed a safety standard requiring tamperproof odometers on all passenger vehicles.

ondly, a private cause of action was created under section 407.545 whereby the purchaser of a vehicle with an altered odometer could bring litigation to recover triple damages, or fifteen hundred dollars, whichever was greater, plus attorney's fees. Also, the law vested in the Attorney General and prosecuting attorneys the authority to bring civil actions for injunctive relief to prohibit the unlawful practice. Finally, the perpetration of any activity in violation of the odometer laws could subject a vehicle dealer to revocation of his state license to sell vehicles, pursuant to the mandate of section 407.555. While these 1973 odometer laws represented a sound beginning to combat this persistent fraudulent conduct, subsequent amendments, which will be discussed later in this Article, greatly bolstered the strength of these laws.

Another new set of laws, or "mini-act," enacted by the legislature in 1973 as amendments to the Merchandising Practices Act is the "Home Solicitation Sales Act." These laws are contained in sections 407.700 to 407.720. These laws basically provide that in certain home solicitations, i.e. door-to-door sales, the consumer has a three-day period in which to rescind the purchase contract and receive a refund of his money. The purpose of this law was to provide the consumer monetary relief in sales situations that typically involve extreme high pressure sales tactics.

Under section 407.700 "home solicitation sale" is defined as follows:

"Home solicitation sale" means a consumer credit sale of goods, or services, except the sale of real property or interest therein, or the sale of personal property which is incident to the sale of real property or interest therein, in which the seller or a person acting for him engages in a personal solicitation of the sale at a residence of the buyer and the buyer's agreement or offer to purchase is there given to the seller or a person acting for him. It does not include a sale made pursuant to a preexisting revolving charge account, or a sale made pursuant to prior negotiations between both parties present at a business establishment at a fixed location where goods or services are offered or exhibited for sale.

The primary limitations of this statutory definition are that the transaction must be a credit transaction, only personal property and services are covered, and the purchase must result from an unsolicited offer. Section 407.705 establishes both the consumer's "right of rescission" and the procedure therefor. That section mandates that, with certain specified exceptions, the consumer can rescind a home solicitation sale by "midnight of the third business day" after the day on which the buyer signs the purchase agreement.

74. See infra notes 169-71 and accompanying text.
75. Id. at § 407.550.
77. The term "business day" was not defined in the original 1973 "mini-act." Due to the repeal of the "Blue Laws" throughout the state and the trend for businesses to stay open longer and on Saturday, Sunday and holidays, the meaning...
The exceptions from this "right of rescission" are contained in section 407.705 (1973), which provides that:

3. The buyer may not cancel a home solicitation sale if (1) The buyer requests the seller to provide goods or services without delay because of an emergency; and (2) The seller in good faith makes a substantial beginning of performance of the contract before the buyer gives notice of cancellation; and (3) In the case of goods, the goods cannot be returned to the seller in substantially as good condition as when received by the buyer.79

Although these limitations are largely fair and reasonable since unjust enrichment could accrue to the consumer in their absence, the second provision has been subject to abuse by door-to-door solicitors. That provision provides that rescission is not available if the seller has made "a substantial beginning of performance on the contract" before notice of rescission is given. In several types of businesses, for example home repair and remodeling, tree trimming, and pest infestation service, certain less than reputable business people commence the work, often of shoddy quality, immediately upon the signing of the contract. By this technique, they avoid the "right of rescission" by claiming that they made a "substantial beginning" on the contract. Consumers subjected to this unethical procedure do not have adequate time to check on the reputation of the contractor or price shop to make sure they are getting a fair deal. Due to the economic harm resulting to many consumers each year from this practice, the General Assembly should consider amending this statute to close up this loophole in the Home Solicitation Sales Act.

A few other provisions of this Act warrant mentioning. Section 407.710 provides that the seller of a home solicitation contract must provide the buyer with written notice in 10-point boldface type of his right to rescind the contract. Obviously this is important because the statutory right of rescission would have only limited value unless the consumer was fully apprised of that right.

The final sections to be mentioned in the Home Solicitation Sales Act are the sections that establish the rights and duties of the seller and buyer after the "right of rescission" is exercised. These statutes are section 407.715 and section 407.720.

Under the terms of these sections, the seller must, within ten days of the contract rescission, return all money received from the buyer and return of the term "business day" became blurred. In 1986, the legislature addressed this problem, amending the statute to read, in pertinent part: "the term 'business day' shall mean any day except Saturday, Sunday, and legal holidays." Mo. Rev. Stat. § 407.705 (1986).

79. Id. at § 407.705(3).
the contract with the word “cancelled” stamped on its face. All goods returned by the buyer must be in the same condition as when given by the seller. Finally, the buyer is under a duty to return any goods received from the seller subsequent to the rescission. Although this “Home Solicitation Sales Act” contained certain internal flaws, it nonetheless has provided a level of protection to consumers in an area that was previously void.

While the 1973 amendments to the Merchandising Practices Act were very significant measures directed towards consumer protection, the amendments to the Act enacted in 1985 were the most far reaching and dramatic up to that point in time. Those amendments are discussed next.

IV. THE 1985 AMENDMENTS

These amendments were signed into law by the Governor on May 31, 1985, and were designed to accomplish four main goals: first, the anti-fraud provisions of the Act contained in section 407.020 were enlarged to encompass an additional type of “unlawful practice” and to more clearly specify the jurisdictional coverage of the Act; next, new enforcement provisions and remedies were added to the Act; third, new statutory enactments were passed to respond to certain case developments that had a negative impact on consumer protection in the state; finally, the new “Time-Share Act” was created to respond to a tremendous number of consumer complaints that the Attorney General was receiving in this previously unregulated industry.

The otherwise broad scope of section 407.020 was further enhanced in 1985 by changing the term “unfair practice” to “unlawful practice.” The utilization of this term was intended to give Missouri’s consumer protection law the same sweep as found in the Federal Trade Commission Act. The

80. Id. at § 407.716(1).
81. Id. at § 407.715(2).
82. Id. at § 407.710.
84. See supra note 5 and infra note 86. The word “unfair” is broader than and inclusive of the word “deceptive.” For example, acts which have been declared “unfair” for reasons other than “deception” include “commercial bribery.” American Distilling Co. v. Wisconsin Liquor Co., 104 F.2d 528 (7th Cir. 1939); FTC v. Grand Rapids Varnish Co., 41 F.2d 996 (6th Cir. 1929). But “commercial bribery” and case law on that subject do not fully establish the breadth of the term “unfair practice.” A discussion of the scope of this term and its legislative history is found in FTC v. Sperry and Hutchinson Co., 405 U.S. 233 (1972). The Sperry Court found that the FTC, like a court of equity, could consider fairness and public values beyond those enshrined in the letter or encompassed in the spirit of the antitrust laws:

The Commission has described the factors it considers in determining whether a practice that is neither in violation of the antitrust laws nor deceptive is nonetheless unfair: (1) whether the practice, without necessarily having been previously considered unlawful, offends public policy as it has been estab-
term "unfair practice" has traditionally been used to combat such nebulous concepts as extreme high pressure sales tactics and unconscionably high prices as relating to consumer transactions. A second significant amendment to section 407.020 was the declaration that the "unlawful practice" could be stopped whether it occurred "in or from" Missouri. This section made it clear that the Attorney General could stop fraudulent tactics originating from Missouri and impacting upon citizens of other states and also those originating from other states but defrauding Missouri consumers. If an unscrupulous entrepreneur preys upon residents of states other than Missouri but uses Missouri as his home base, the Attorney General now has specific au-

lished by statutes, the common law, or otherwise—whether, in other words, it is within at least the penumbra of some common-law, statutory, or other established concept of unfairness; (2) whether it is immoral, unethical, oppressive, or unscrupulous; (3) whether it causes substantial injury to consumers (or competitors or other businessmen). . . . Sperry, at 244 n.5. But see infra note 127 (discussing the FTC's recent position on the three factor test).

Subsequently, the Seventh Circuit Court of Appeals has noted that Sperry stands for the proposition "that the FTC had the authority to prohibit conduct that, although legally proper, was unfair to the public." Spiegel, Inc. v. FTC, 540 F.2d 287, 292 (7th Cir. 1976).

85. See, e.g., Wilbanks Carpet Specialists, 84 F.T.C. 510 (1974) (high pressure tactics and inducement of "consumers into signing customer contracts without giving the consumer sufficient time to consider carefully the purchase, and the terms of the consequences thereof." Id. at 522); Tri-State Carpets, 84 F.T.C. 1078 (1974) (pressuring customers to sign contracts in haste, misleading and unfair selling operations which are harsh, deliberate and sophisticated, and subjecting to further pressure those consumers who sign contracts but subsequently desire to cancel); Arthur Murray Studio, 78 F.T.C. 401 (1971), aff'd, 458 F.2d 622 (5th Cir. 1972) (intense, emotional, and unrelenting sales pressure); Household Sewing Machine Co., 76 F.T.C. 207 (1969) (deceptive "bait and switch" high pressure sales tactics presented in privacy of consumer's home "where the non-commercial atmosphere may lower resistance to the sales pitch." Id. at 242-43); Murphy v. McNamara, 27 U.C.C. Rep. (Callaghan) 911 (Conn. Super. Ct. 1979) ("an agreement for the sale of consumer goods entered into with a consumer having unequal bargaining power and which agreement calls for an unconscionable purchase price, constitutes an unfair trade practice under CUTPA."). Id. at 920 (footnote omitted)); State v. Ralph Williams' North West Chrysler Plymouth, 87 Wash. 2d 298, 553 P.2d 423 (1976) (sale of new and used automobiles at unconscionably high prices).


The act, use or employment by any person of any deception, fraud, false pretense, false promise, misrepresentation, unfair practice or the concealment, suppression, or omission of any material fact with intent that others rely upon such concealment, suppression, or omission, in connection with the sale or advertisement of any merchandise in trade or commerce in or from the state of Missouri, is declared to be an unlawful practice. Any act declared unlawful by this subsection violates this subsection whether committed before, during or after the sale or advertisement.

Id.
The fact that the operation has its “situs” in Missouri is a sufficient “nexus” for jurisdiction to attach. Conversely, fraudulent operations such as “boiler room operations,” domiciled in sister states but soliciting in Missouri, now clearly fall under the coverage of the Merchandising Practices Act.

The third amendment to section 407.020 was the inclusion of the phrase “Any act declared unlawful by this subsection violates this subsection whether committed before, during or after the sale or advertisement.” The original Act, as well as the pre-1985 amendments, failed to provide any guidance regarding a nexus between the “unlawful act” and the “sale or advertisement” of the merchandise. The statutory terms merely specified that the fraud must be “in connection with” the “sale or advertisement.” Since the phrase “in connection with” is nondescript as to scope, and has been subject to a very narrow definition in security sales violations, the new phrase was necessary to make it clear that the legislature intended to confer jurisdiction over consumer fraud whether it occurred “before, during or after” the solicitation or sales transaction. The second type of amendments enacted in 1985 are those directed at specifically elaborating and expanding on the enforcement provisions and remedies under the Merchandising Practices Act. New civil remedies were set forth and strong criminal penalties were also created by the 1985 amendment.

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87. This type of issue, involving a similar factual scenario, was raised in State ex rel. Ashcroft v. Marketing Unlimited of America, 613 S.W.2d 440 (Mo. Ct. App. 1981), where defendants contended that no cause of action was stated because the contractual agreements occurred outside the state of Missouri. The appellate court did not discuss this issue in its opinion. See infra text accompanying notes 180-86. In order to prevent future litigation of this issue, the legislature enacted the “in or from” language to indicate clearly that an adequate statutory nexus existed to make the unlawful conduct, such as that described in the text, actionable in Missouri.

88. A “boiler room operation,” as the term is used in the area of consumer fraud, typically involves an unscrupulous entrepreneur using numerous commissioned salesmen who solicit unsuspecting consumers nationwide by telephone from a central location for the purpose of selling a given product. By analogy, judicial definition of “boiler room operation” in the area of securities solicitation is instructive. For example, the court in United States v. Sawyer, 759 F.2d 1494 (11th Cir. 1986), defined the term “boiler room activity” as:

offering to customers securities of certain issuers in large volume by means of an intensive selling campaign through numerous salesmen by telephone or direct mail, without regard to the suitability to the needs of the customer, in such a manner as to induce a hasty decision to buy the security being offered without disclosure of the material facts about the issuer.

*Id.* at 1497 n.1.

89. The phrase “in connection with,” which in security fraud cases relates to fraud in the actual sale, has been held to mean that the fraud must touch upon the sale. Valente v. Pepsi Co., 454 F. Supp. 1228 (D. Del. 1978); Rich v. Touche Ross & Co., 415 F. Supp. 95 (S.D.N.Y. 1976).
In addition to the above mentioned changes to section 407.020, an entire new subsection was passed by the legislature. This final 1985 amendment to section 407.020 is potentially one of the most important tools ever created to combat consumer fraud in Missouri. This new amendment is subsection three, which simply states: "Any person who willfully and knowingly violates the provisions of this section with the intent to defraud shall be guilty of a class D felony." While a handful of other states make the knowing and willful violation of some provisions of their consumer protection laws a misdemeanor,\(^{90}\) Missouri appears to be the only state that

\(^{90}\) See, e.g., Md. Com. Law Code Ann. § 13-411 (1983) (subject to a fine not exceeding $1,000 or imprisonment not exceeding one year or both); Mont. Code Ann. §§ 30-14-142(3), -142(4) (1985) (a fine of not more than $2,000 or imprisonment for not more than one year, or both); Neb. Rev. Stat. § 87-303.08 (1981) (designated a class III misdemeanor; maximum three months imprisonment or $500 fine or both); Neb. Rev. Stat. § 87-303.09 (1981) (willful violation of the terms of an injunction, declaratory judgment, or assurance of voluntary compliance is designated a felony punishable by a fine of not more than $5,000 or imprisonment of not more than five years, or both) [Note: while this criminal penalty is the same as in Missouri, the difference is that the sanction is applicable in Missouri upon an initial violation of the Act while in Nebraska there must be a violation of the terms of an existing court order against the subject activity]; Nev. Rev. Stat. §§ 598.640(3), .640(4) (1985) (knowingly and willfully engaging in a deceptive trade practice is: a) for the first offense, a misdemeanor, b) for the second offense, a gross misdemeanor, c) for the third and all subsequent offenses, imprisonment of not less than one year nor more than six years or by a fine not more than $5,000, or both) [Note: in Missouri, an initial violation of the Act is a felony, the similar stringent penal provisions in Nevada are only applicable upon a third or subsequent offense occurring within ten years of the initial violation]; N.H. Rev. Stat. Ann. §§ 358-A:6(I), -A:6(II) (1984) (a “natural person” is guilty of a misdemeanor and “any other person” is guilty of a felony; the identical penalties are imposed for the violation of terms of an injunction). [One is left to wonder about the deterrent effect of designating a violation of consumer protection laws a felony if that increased punishment can only be imposed on legal entities]; Wis. Stat. Ann. § 100.26(3) (West Supp. 1986) (any person who intentionally refuses, neglects, or fails to obey any regulation or order made or issued under Wisconsin’s “main” consumer protection law, section 100.20, shall for each offense be fined not less than $25 nor more than $5,000, or imprisoned for not more than one year, or both).

Although this list is comprehensive it is not intended to be completely inclusive; rather, for the purposes of this article, the foregoing list provides virtually all of the states which have enacted criminal sanctions for violations of their consumer protection laws. The list is insightful in that it establishes that Missouri prescribes a felony for an initial violation of its consumer protection law. Typically, of the relatively few states that prescribe criminal penalties, they involve modest fines and terms of imprisonment. As may be seen, most penalties have a maximum imprisonment of one year and are designated misdemeanors. While a few states make it a felony to violate the terms of a court order, or to repeatedly violate the specific law, Missouri achieves more of a deterrent effect with its more stringent law; and, due to the fact that enhanced punishment sections already exist for the repeat offender, see Mo. Rev. Stat. § 558.016 (Supp. 1984), Missouri discourages repeated violations of
designates an initial violation of its consumer fraud section to be a felony. When utilized in conjunction with the administrative, injunctive, and other penal aspects of the Act, this criminal provision should greatly enhance consumer protection in our state. When the unscrupulous businessman or promoter is faced with the possibility of a criminal indictment and up to five years in prison, this presents a deterrent effect much greater than the prospect of mere misdemeanor prosecutions or substantial civil penalties. In addition to these criminal penalties, the civil remedies, sanctions, and procedures were legislatively modified in 1985 to make the Merchandising Practices Act more workable and effective. First, this Article will discuss the amendments to the injunction statute, section 407.100, then, the new enactments allowing the Attorney General to collect monies from violators of the Act to defray all costs and fund future efforts will be discussed.

The first significant amendment to section 407.100 concerned the deletion of a condition precedent to the Attorney General’s seeking injunctive

Chapter 407. It is only appropriate, and in response to the effectiveness of its antitrust and securities law, that Missouri’s Merchandising Practices Act carries with it criminal penalties similar to those found in this state’s antitrust and securities statutes.

A final caveat should be made with regard to the listing herein. The list was drawn up to show what other states have enacted in regard to criminal penalties for violations of their "main" consumer protection law. Criminal sanctions for violations of purely antitrust laws, or other peripheral provisions of a particular state’s consumer protection laws have not been included. In this regard it may be mentioned that since the 1920s many states have enacted statutes proscribing false advertising and providing modest criminal penalties (misdemeanors) for a violation thereof. Because these provisions have rarely been enforced they were not included in the list.

With state regulation of consumer fraud now in full blossom, activity under Missouri’s new act has been stimulated. Along with the increase in restitution and civil penalties collected by Missouri under the Act in recent years, more lawsuits have been filed and it is this writer’s opinion that the new criminal sanctions will provide a powerful tool to deter and punish any egregious consumer fraud. While it will be noted later in this article that the federal bankruptcy laws hinder consumer protection enforcement, in that they can vitiate the effect of awards for civil penalties and restitution, the consumer fraud artist will find criminal penalties much harder to avoid.

Since “intent to defraud” is a requisite element of a criminal violation of Mo. Rev. Stat. section 407.020 (Supp. 1985), when the Attorney General or local prosecuting attorneys commence criminal actions under this section they will be required to meet a heavier burden of proof than would be true of civil enforcement actions brought under the Act. In 1981, an appellate court decision held that an intent to defraud need not be shown in a civil case. State ex rel. Ashcroft v. Marketing Unlimited of Am., 613 S.W.2d 440 (Mo. Ct. App. 1981); see infra text accompanying notes 180-81, discussing this case. The capacity to deceive was pivotal for showing a civil violation of the Act. Marketing Unlimited, at 445. Obviously, the new language creating the felony for violation of this section is in conflict with the language of the court in Marketing Unlimited. As such, the judicial ruling in Marketing Unlimited, and other cases in Missouri regarding mens rea and scienter, may not be applicable to prosecutions brought under the new criminal provisions.
relief under the Act. Under both the original Act and the 1973 amendments, the Attorney General was required to notify the suspected violator of his intentions to sue “at least three days prior to the institution of [an injunctive action].” The legislative philosophy of this notice requirement encouraged prelitigation negotiations, but the net affect was that true con men could flee the jurisdiction or hide assets prior to the filing of the lawsuit. The legislature cured this undesirable side effect to the notice requirement by deleting it as a condition precedent in the 1985 amendments.

The next major change in section 407.100 that occurred via the 1985 amendments concerned a modification of the statutory violation for which an injunction could be sought. It will be recalled from previous discussion that the Attorney General’s initial injunctive power was confined to “practices declared to be unlawful by sections 407.010 to 407.130” of the Act. While this statutory language was adequate when initially drafted since these sections encompassed the entire Act, with the enactment of the subsequent amendments, including the “mini-acts,” this became far too narrow a scope for the Act. The “Unsolicited Merchandise” statute passed in 1969 contained no enforcement provision whatsoever. Moreover, the “Pyramid Sales Schemes Act” only mandated injunctive relief with no mention made of restitution or enforcement costs; and the “Odometer Act” was likewise limited as to remedies. In recognition of this limitation, in 1985 the legislature amended section 407.100 to give the Attorney General the authority to seek the broad sweeping equitable relief for all “practices declared to be unlawful by the chapter.” As a result, this amendment provided effective enforcement to all the expansive unlawful conduct enumerated in the broadened Merchandising Practices Act, including the “Unsolicited Merchandise” section, the Pyramid Sales Schemes Act, and the Odometer Act.

The next major amendment to section 407.100 concerns the awarding of civil penalties for violations of the Act. This amendment is found in subsection six, which states:

The court may award to the state a civil penalty of not more than one thousand dollars per violation; except that, if the person who would be liable for such penalty shows, by a preponderance of the evidence, that a violation resulted from a bona fide error notwithstanding the maintenance of pro-

93. Id.
96. Id. at § 407.100(1) (Supp. 1985).
While civil penalties have been allowed under the Act since its inception, the injunctive provision of this new statutory enactment for the first time created a civil fine or penalty of up to one thousand dollars per violation of the Act itself. This provision should serve to help make intentional violations of the Merchandising Practices Act a money losing venture for the con man. Prior to passage of the civil fine and criminal sanction sections, the worst thing that could happen to violators of the Act was that they could be enjoined and required to pay back their ill-gotten gains to their victims. Now, intentional violations of the Act can result in criminal prosecutions and true out-of-pocket losses.

Section 407.100 was also amended in 1985 to enumerate, for the first time, additional types of injunctive or equitable relief that the Attorney General may seek for violations of the Act. These new provisions, which are contained in subsection two, state:

In any action under subsection 1 of this section, and pursuant to the provisions of the Missouri Rules of Civil Procedure, the attorney general may seek and obtain temporary restraining orders, preliminary injunctions, temporary receivers, and the sequestering of any funds or accounts if the court finds that funds or property may be hidden or removed from the state or that such orders or injunctions are otherwise necessary.

This new section recognizes the exigent and transient nature often present in consumer fraud matters. With the new measure of temporary restraining orders, temporary receivers, and the power to freeze the assets, the Attorney General is now equipped to stop these frauds and preserve the status quo until a full trial can be conducted on the merits. The final significant change to section 407.100 is the new 1985 amendment that made restitution orders "payable to the state." Since this amendment is discussed in detail later in this article, suffice it here to say that the intent behind this amendment was to preclude consumer debt resulting from fraud from being discharged in bankruptcy.

Additional amendments enacted anew in 1985 created further penalties assessable to violators of the Act. Under the provisions of section 407.130 the Attorney General can collect monies to cover "the cost of the investigation and prosecution" of the violator. While the "costs for the use of the state" were recoverable under the original Act, this term is not clear as to its meaning or scope. Now, however, under the new terms it is clear...
that attorneys’ fees and investigative expenses are collectible against violators of the Act.

By statutory amendment in 1985, the legislature created a final type of penalty by statutorily declaring that the Attorney General could be awarded an additional amount of money, payable by the violator, equal to ten percent of the total restitution ordered.¹⁰² This new fund was entitled the “Merchandising Practices Revolving Fund”,¹⁰³ and the proceeds of that fund are authorized for use in the “investigation, prosecution and enforcement” of violations of the Act.¹⁰⁴ This shifts the burden, at least in part, of funding action under the Act away from the taxpayer to the violators of the Act. Furthermore, this additional penalty should have a deterrent effect upon would-be violators of the Act.

Several cases arose after the 1973 amendments to the Act that injured the consumer protection philosophy of the Merchandising Practices Act. Two amendments enacted in 1985 were aimed at rectifying the harm of this decisional law. These cases will be discussed in some detail in a subsequent section of this article,¹⁰⁵ but they will be mentioned here briefly for a full understanding of the 1985 amendments addressing them.

In 1978, the Attorney General sought civil penalties for violation of an assurance of voluntary compliance entered into ten years earlier between his office and a business called European Health Spa. The assurance of voluntary compliance was entered into pursuant to the terms of section 407.030. That section does not specifically relate to civil penalties but does state: “Matters thus closed may at any time be reopened by the attorney general for further proceedings in the public interest pursuant to section 407.110.”¹⁰⁶ Section 407.110 established that violations of injunctions could be punished by a penalty of “not more than five thousand dollars per violation.”¹⁰⁷ The Attorney General opined in the enforcement action against European Health Spa that the cross-referencing between sections 407.030 and 407.110 represented a legislative intent to provide civil penalties for violations of an assurance of voluntary compliance. The appellate court disagreed and held that these statutes do not establish such penalties, nor was it the legislature’s intent to do so. The net affect of this ruling was to make assurances of voluntary compliance meaningless since their violations were not punishable. In 1985, the legislature responded to this case through the enactment of subsection two of section 407.030. That subsection states:

¹⁰² Id. at § 407.130(3) (Supp. 1985).
¹⁰³ Id. at § 407.140(1).
¹⁰⁴ Id. at § 407.140(2).
¹⁰⁵ See the leading cases section of this article for a discussion of all cases impacting Chapter 407.
¹⁰⁷ Id. at § 407.110.
Any person who violates the terms of a voluntary assurance of compliance entered into under subsection 1 of this section shall forfeit and pay to the state a civil penalty of not more than two thousand dollars per violation. For the purposes of this subsection, the circuit court of a county approving a voluntary assurance of compliance shall retain jurisdiction, and the attorney general acting in the name of the state may petition for recovery of civil penalties under this subsection.108

Although the Attorney General has not been compelled to seek penalties under this new provision for violations of an assurance of voluntary compliance, the legislative intent is now unmistakable: such violation can be punished by civil penalties up to two thousand dollars per violation. A second case, discussed in detail infra,109 that hampered enforcement of the Merchandising Practices Act, thus prompting a legislative response, is the federal bankruptcy case of In re Cannon.110

In this action the Attorney General sought summarily to intervene in a federal bankruptcy proceeding and claim nondischargeability on behalf of consumers who were named in an injunction to receive restitution from the party petitioning for bankruptcy. The bankruptcy court disallowed the Attorney General’s effort by holding that he lacked standing because he was not a “creditor” under the bankruptcy code in that monies were not owed to him.

The legislature, via subsection 4 of section 407.100, responded by conferring a type of creditor status upon the Attorney General’s injunctive actions. The subsection simply states:

The court, in its discretion, may enter an order of restitution, payable to the state, as may be necessary to restore to any person who has suffered an ascertainable loss. . . .111

The legislative intent behind the phrase making restitution “payable to the state” is to create “creditor” status in the Attorney General so that he can attempt to enforce his injunctions even in the face of a bankruptcy by the party enjoined.

A capstone to the 1985 amendments in the consumer protection area was the enactment of the “Time-Share Act.” The Attorney General has in recent years experienced a large increase in the number of complaints relating to the promotion and sale of recreational time-share interests.112 As an ex-

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109. See infra text accompanying note 232.
110. In re Cannon, 741 F.2d 1139 (8th Cir. 1984).
112. Computerized records maintained by the Attorney General reveal that the Attorney General received the following number of time-share related complaints: 1981—13 complaints; 1982—87 complaints; 1983—113 complaints; 1984—653 complaints.
panding industry, the development, promotion, and sale of time-share inter-

ests resulted in abuses, misrepresentations, and high-pressure sales tactics. 

A deep consumer concern with the extravagant, hyperbolic promotional lit-
erature and pressuring sales tactics is manifest in sections 407.600 to 407.630. 

A major part of this new legislation, patterned after similar statutes in other 
states, deals with the regulation of advertisements by resorts which utilize 
sweepstakes, gift awards, or other types of promotional devices. So long as 
the seller utilizes free offers, gift enterprises, drawings, sweepstakes, or dis-
counts as a promotional program to lure consumers to tour his resort, the 
Missouri Attorney General must receive a copy of the original promotional 
program material used in connection with the sale of the time-share property 
not less than 14 days prior to its release to the public. Within ten days 
thereafter, the Attorney General is required to make a determination of 
approval or disapproval on these promotional devices.

Approval by the Attorney General of time-share promotional literature 
could not be used as an endorsement of the Attorney General by the seller. No mention of the Attorney General, his review, or his approval can be 
utilized in the literature itself.

A minimum of six disclosures must be found in the time-share pro-
motional literature: it must state that it is in connection with the sale of a 
time-share interest; it must state the name of each time-share plan or business 
entity participating in the promotional program; it must state the day and 
year by which all prizes listed or offered will be awarded; it must state the 
method by which all prizes are to be awarded; it must state the odds of 
winning each prize listed; and it must state the manufacturer's suggested 
retail price of each prize.

It is important to note that the law requires the Attorney General to 
approve or disapprove time-share promotional literature not only upon the 
basis of the six enumerated factors, but also with an eye for the standards 
set out in section 407.020 to assure the promotional literature is not mis-
leading. Because the consumer lured to a time-share resort by promotional 
literature may be subjected to high pressure sales tactics and end up pur-
chasing property he had no intention of buying before he left home, the new 
law provides specific relief for this contingency: the purchaser is provided a 
five day "right of rescission" of the time-share contract for any or no reason

113. Much of Missouri's "time-share mini-act" was patterned after Florida 
law. See FLA. STAT. ANN. ch. 721 (West Supp. 1986) (especially sections 721.05(1), 
(11), (14), (15), (16), (27), (28), (29), (30); 721.06; 721.11; and 721.111).


115. Id.

116. Id.

117. Id.

118. Id. "Approval of materials shall be based on the standards set out in 
section 407.020 and this section." Id.
The time-share industry is required to give the consumer written notice of this right to cancel the contract in 18-point boldface type. The notice reads as follows:

YOU HAVE THE RIGHT TO CANCEL THIS AGREEMENT WITHIN FIVE DAYS AFTER THE DATE OF THIS AGREEMENT. CANCELLATION MUST BE IN WRITING AND IF SENT BY MAIL, ADDRESSED TO THE OTHER CONTRACTING PARTY AS SHOWN ON THIS AGREEMENT, CANCELLATION WILL BE ACCOMPLISHED AT THE MOMENT THIS LETTER IS POSTMARKED, IF SENT BY MAIL, THE LETTER MAY BE CERTIFIED WITH A RETURN RECEIPT REQUESTED. YOUR RIGHT TO CANCEL CANNOT BE WAIVED.

The time-share law also regulates exchange programs in depth. Exchange programs are the opportunity for and procedure by which the assignment or exchange of time-share periods among purchasers in the same or other time-share plans can be effectuated. For the sake of brevity this statute will not be discussed in this Article. While the amendments enacted in 1985 brought major reform to the Merchandising Practices Act that greatly enhanced consumer protection in our state, the 1986 amendments were likewise of major importance.

V. The 1986 Amendments

The amendments enacted by the legislature in 1986 to the Merchandising Practices Act fall into the following main topics: the leasing of merchandise was brought within the mandates of the Act; section 402.020 (1985) as well as certain other sections were amended to combat charitable solicitation fraud; the language that required that advertisements comply with the rules and laws regulated by the Federal Trade Commission was deleted; the Attorney General was granted criminal prosecution authority; cease and desist authority and rule promulgation authority under the Act were granted; the “Charitable Organizations and Solicitations Law” was created; and finally, the criminal penalty for “odometer fraud” was increased to a class D felony. The triggering activity under the original Act was that there be a “sale, offer for sale, or attempt to sell merchandise.” With the growing “rent-to-own” industry and expanding popularity of leasing vehicles and household goods, the legislature deemed it desirable to enact consumer protection legislation in this area. Their method of doing so was extremely simplistic, and merely

120. Id.
121. Id. at § 407.625.
122. While the private cause of action section as enacted at Mo. Rev. Stat. section 407.025 (Supp. 1973) statutorily covered the leasing of merchandise, the remaining provisions of Chapter 407 creating and vesting enforcement powers in the Attorney General made no mention of the leasing or renting of merchandise. The legislative intent for this differentiation between governmental and private causes of action is unknown.
involved redefining the term "sale" under the Act. The 1986 amendment defined "sale" as "any sale, lease, offer for sale or lease, or attempt to sell or lease merchandise for cash or on credit."123 This redefinition of a single term accomplished the legislative purpose of protecting the public from fraud without the need to create a new "mini-act" on the topic. Functionally, the lessee of merchandise is afforded the same broad protection under the Merchandising Practices Act as the purchaser. Moreover, the perpetrators of fraud in the leasing industry are now subjected to the same penalties as "persons" that commit fraud when advertising or selling merchandise. The "anti-fraud" provisions of the Act, section 407.020, were again amended in 1986. The main purpose of this 1986 amendment was to declare unlawful the fraudulent practices in connection with "the solicitation of any funds for any charitable purpose." With the newly enacted regulatory provisions of the "Charitable Organizations and Solicitations Law," to be discussed, it was deemed desirable by the legislature to also specifically declare fraudulent charitable solicitation to be illegal. This 1986 amendment, in pertinent part, provides:

The act, use or employment by any person of any deception, fraud, false pretense, false promise, misrepresentation, unfair practice or the concealment, suppression, or omission of any material fact in connection with the sale or advertisement of any merchandise in trade or commerce or the solicitation of any funds for any charitable purpose as defined in section 407.453, in or from the state of Missouri, is declared to be an unlawful practice.124

While it seems clear that the initial Act and the subsequent amendments through 1985 were sufficiently broad to protect the public from fraud if merchandise was being sold in the charitable solicitation drive, the pure donations that were solicited and received during such activity probably did not fall within the coverage of the Act because no offer for sale or actual sale transpired.125 Under the 1986 amendments, this possible inadequacy was succinctly resolved by the addition of the new phrase.

Another amendment passed in 1986 to be briefly discussed concerns the deletion of an exemption from the coverage of the initial Act. One will recall that the 1967 Act and all subsequent amendments through 1985 held that "Any advertisement which is subject to and complies with the rules and

124. Id. at § 407.020(1).
125. In the various actions brought by the Attorney General against questionable fundraising activities under the Act, in every instance some type of merchandise, such as tickets to the circus or a sporting event, or advertising space in a law enforcement publication, was being sold with the proceeds purportedly benefiting some charitable purpose. However, many fundraising drives concern the mere solicitation of donations with no merchandise being provided and in such a situation the applicability of the Act was in question.

http://scholarship.law.missouri.edu/mlr/vol52/iss2/3
regulations of and the statutes administered by the Federal Trade Commis-
sion" was exempt from the coverage of the Act. With the evolving nature
of the Federal Trade Commission's enforcement efforts, it was deemed by
the legislature to be inadvisable to continue to have the enforcement scope
and coverage of the Act tied to the whims of a volatile federal agency.

127. The Federal Trade Commission's role in consumer protection is currently
not well defined. This is due to the current trend toward federal deregulation and
resource cutbacks affecting many federal agencies. It is also caused by the Commission
being less active and less predictable in rule promulgation and commencing far fewer
"consumer protection" lawsuits than in earlier years. For these reasons, the Missouri
legislature "untied" the scope of the Merchandising Practices Act from the activities
of the Federal Trade Commission. Even if the Federal Trade Commission finds that
a practice does not violate federal law or has not specifically ruled on the issue, a
state may independently evaluate the conduct in light of the language and scope of
the particular state's own consumer protection law. See Murphy v. McNamara, 36
Conn. Supp. 183, 416 A.2d 170 (1979); Perlman v. Time, Inc., 64 Ill. App. 3d 190,

As background for the foregoing, it may be noted that three reports highly
critical of the Federal Trade Commission were published in 1969: AMERICAN BAR
ASSOCIATION, REPORT ON THE ABA COMMISSION TO STUDY THE FEDERAL TRADE COM-
MISSION (1969); E. COX, R. FELLMUTH & J. SCHULZ, "THE NADAR REPORT" OF THE
Chi. L. Rev. 47 (1969). In the unofficial report of the American Bar Association
Commission to Study the Federal Trade Commission, the view was generally expressed
that not only was the Federal Trade Commission conducting fewer investigations but
that:

for an agency employing over 400 lawyers, and charged with responsibility
for enforcement of statutes in important and developing areas of law, to
initiate a grand total of 23 contested cases in a year is disturbing. With such
an obvious distinction by the FTC to proceed formally, we fear that the
business community may cease to take seriously the guides, rules and other
administrative pronouncements by the FTC, and also may cease to take
seriously the statutes the FTC is empowered to enforce.

AMERICAN BAR ASSOCIATION at 25-26. In response to these criticisms, the FTC allo-
cated greater resources on behalf of "consumer protection" activities. In 1975 the
Congress expanded the jurisdiction of the FTC by passing the Magnuson-Moss War-

II:2 (1983), for a more extensive discussion. In 1980 the Congress restricted the
jurisdiction of the Federal Trade Commission by limiting the Commission's regulatory
power over several industries and giving Congress the power to veto proposed trade
96-252, 94 Stat. 374 (codified at 15 U.S.C. §§ 45-46, 50, 57a-1, 57b-1-b-4, 57c, 58
(1982)).

The Federal Trade Commission had used three factors to consider whether a
practice was "unfair." See supra note 84. Recently it announced that the second
factor was duplicative and that the Commission had never relied on it exclusively for
a finding of unfairness; and, in the future the Commission would rely only on the
An additional amendment enacted in 1986 served to further enhance or expand the Attorney General’s enforcement role under the Act. As will be recalled, the 1985 amendments made all violations of the Act committed “with the intent to defraud” a class D felony. However, the 1985 amendments were silent regarding whose duty it was to commence and prosecute these criminal cases, so presumably that power was solely vested in local prosecuting attorneys and circuit attorneys, with the Attorney General only becoming involved upon request of those local prosecutors. By amendment in 1986, that prosecutorial limitation was removed. The 1986 statute provides:

It shall be the duty of each prosecuting attorney and circuit attorney in their respective jurisdictions to commence any criminal actions under this section, and the attorney general shall have concurrent original jurisdiction to commence such criminal actions throughout the state where such violations have occurred.

The vesting of the criminal authority concurrently with the Attorney General is based upon sound reasoning. First, the Attorney General has been enforcing the provisions of the Merchandising Practices Act for nearly twenty years and is familiar with its mechanics and nuances. Secondly, the Attorney General has traditionally been active in litigating consumer fraud or “white collar crime” cases, both civil and criminal, in such areas as anti-trust and securities fraud. Finally, any given instance of consumer fraud is typically statewide, and often national, in scope. The Attorney General’s presence throughout the state and his nationwide contacts with peers is very beneficial in attacking this type of widespread fraud. Thus conferring of criminal authority upon the Attorney General will prove to be an important tool to curtail economic fraud in Missouri.

other two factors. See Letter of FTC, 5 Trade Reg. Rep. (CCH) 50, 421 (Dec. 17, 1980). In March 1982, the National Association of Attorneys General opposed “any amendments to section 5(a) of the FTCA that would circumscribe the scope of consumer protection statutes at the state level and would undermine the ability of states to protect their citizens.” See National Association of Attorneys General, Resolution re: FTC Authorization (March 1982).

130. Missouri antitrust law is found at Mo. Rev. Stat. Chapter 416 (1978). Therein, see especially sections: 416.051 (vesting in the Attorney General the authority to bring criminal prosecutions); 416.061 (vesting in the Attorney General the authority to bring civil injunctive actions); 416.081 (antitrust revolving fund created for the office of the Attorney General); 416.091 (civil investigative demand authority vested in Attorney General); 416.111 (relating to testimony to be given pursuant to an investigation or proceeding brought to enforce the provisions of sections 416.011 to 416.161).
131. The “Regulation of Securities” law in Missouri is found in Mo. Rev. Stat. Chapter 409 (1978); therein, see especially sections: 409.409 (providing for injunctive relief); 409.410 (referring to authority vested in the Attorney General to bring criminal prosecutions).
An additional new power was conferred upon the Attorney General by the amendments enacted in 1986. That is the authority to issue and serve extra-judicial orders to cease unlawful activities under the Merchandising Practices Act.

When the Attorney General believes that a person has engaged in, is engaging in, or is about to engage in any consumer fraud as defined and delineated in the Act, he may issue a cease and desist order to that person prohibiting the unlawful practice, provided that he gives notice of his intention to do so at least two days before he issues the order. In that period of time, the person to whom the cease and desist order is directed shall have the opportunity to respond to the proposed order. Thereafter, the cease and desist order may be issued and is effective for ten days. Service thereof is to be obtained in the same manner as provided for in the investigative demand section of the Act. This new enforcement device permits the Attorney General to stop the prohibited practices expeditiously. He can intensively investigate the matter aided by the issuance of investigative demands, if necessary, to gather the appropriate documents so that a temporary restraining order may be sought within the ten days the cease and desist order is in effect. Persons who violate the terms of a properly served cease and desist order are subject to criminal prosecution since such violations are statutorily deemed to be class D felonies.

While the issuance of cease and desist orders is new to Missouri, the practice has been utilized to some degree by the Federal Trade Commission and several other states. New Jersey has enacted a cease and desist law

133. Id.
134. Id. at § 407.095(2).
135. Id.
136. Id. at § 407.095(3).
137. Indeed, the authorization to issue cease and desist orders under a consumer protection law is infrequently found. The federal statute is cumbersome and without provisions to allow for the swift issuance of such an order to stop the "quick hitting" and mobile consumer fraud artist. See 15 U.S.C. § 45(b)-(j) (1984). States with more effective cease and desist authority are:

1) Delaware: Del. Code Ann. tit. 29, § 8612(b)(1) (1983). The Division of Consumer Affairs is authorized to issue cease and desist orders for violations of Delaware's consumer protection statute, title 6, § 2513. No hearing need be held before or after the order is issued. The order must be in writing and must state its basis, but no notice need be given. If the conduct does not cease immediately a hearing is held to determine whether the violator is to be held in contempt. This is the most summary cease and desist authority reviewed. The only hearing that need be held is the one to enforce a violation of the order. Nevertheless, the procedure outlined has been held to be in compliance with constitutional law when an order was issued to stop a pyramid chain scheme. See Space Age Prods. v. Gilliam, 488 F. Supp. 775 (D. Del. 1980). The Space Age Prods. court held no "liberty" or "property" interests under the fourteenth amendment were implicated since the uni-
similar in substance to, but different in content from Missouri's.\textsuperscript{138} Similarly, the State of Delaware also has statutory provisions that confer this authority upon the Attorney General.\textsuperscript{139}

With the recognition of certain constitutional restraints,\textsuperscript{140} the cease and desist order should provide the Attorney General with a new viable and expeditious device with which to battle consumer fraud in Missouri.

The next amendment to the Act passed in 1986 discussed concerns rule promulgation under the Merchandising Practices Act. Section 407.145 is an entirely new section enacted in 1986 that conferred upon the Attorney General the authority to promulgate rules to carry forth the legislative intent of the Act.\textsuperscript{141} That new statute states:

lateral expectation of profits to be derived from a particular sales scheme does not rise to the level of a "property" interest and no revocation of a previously granted license was involved.

2) Florida: \textit{Fla. Stat. Ann.} § 501.208 (West Supp. 1986). A cease and desist order may be issued but a hearing thereon must be held within 30 days and judicial review is provided for. The order does not become effective until 10 days after all administrative action is concluded or a final order is made by the judiciary if an appeal is taken. Florida provides a civil penalty of up to \$5,000 for the violation of an effective order. Florida's provision may be contrasted with Missouri's in that, in Missouri, a cease and desist order can become effective in two days and the penalty for its violation is designated a Class D felony.

3) Maryland: \textit{Md. Com. Law Code Ann.} § 13-403 (1983). An order is preceded by charges upon which a hearing is held within 10 days. Thereafter an order may issue. If a violator does not comply with an order, the state may proceed with enforcement thereof. There does not appear to be any real deterrent to Maryland's law since only the otherwise available remedies are provided if it is not complied with.

4) New Jersey: \textit{N.J. Stat. Ann.} § 56:8-18 (West Supp. 1986). This section provides that the Attorney General may issue a cease and desist order after a hearing when he finds "that an unlawful practice has been or may be committed." Violations of the order entail penalties up to \$25,000. This statute appears very effective and is quite similar to Missouri's. While a violation of a cease and desist order is a felony in Missouri, and not in New Jersey, Missouri's order expires 10 days after it is effective, whereas there is no such self-termination in the New Jersey law. Both laws appear to be an effective answer to rapidly unfolding fraud.

\textsuperscript{138} See \textit{supra} note 137.

\textsuperscript{139} See \textit{supra} note 137.

\textsuperscript{140} Due process is afforded by the terms of Mo. Rev. Stat. section 407.095 (1986). First, the Attorney General is required to provide two days notice to businesses he intends to issue an order against. Such notice affords the business an opportunity to be heard before the order is effective. Second, the order statutorily elapses after 10 days. Additionally, the Attorney General is currently drafting rules to further define the specific procedure for the issuance of a cease and desist order. The rules, for example, will provide for an immediate hearing and allow for an expeditious appeal from any adverse holding.

\textsuperscript{141} Pursuant to this mandate, the Attorney General is currently promulgating rules for many of the provisions and "mini-acts" contained in the Merchandising Practices Act. It is anticipated that rule drafting will be concluded and subject to public comment early in 1987.
The attorney general shall have the authority to promulgate, in accordance with the provisions of chapter 536, RSMo, all rules necessary to the administration and enforcement of the provisions of this chapter. Such rules may include, but need not be limited to, provisions designating the size and style of type which shall be used in written disclosures required by any provision of this chapter for which the size and style of type have not been otherwise designated.\textsuperscript{142}

The rules promulgated by the Attorney General under this section are subject to suspension by the Joint Committee on Administrative Rules if they are "beyond or contrary" to the Attorney General's promulgation authority or inconsistent with the legislative intent of the Act.\textsuperscript{143}

Certain topics that have been the subject of repetitive amendments to the Merchandising Practices Act could easily fall within the scope of rules promulgated under the Act. As such, these "fine tuning" or explanatory changes will no longer burden the legislature but rather can be more expeditiously handled under the rule promulgation authority of the Attorney General. These rules, once promulgated, should greatly enhance the Attorney General's efforts in enforcing and interpreting the legislative intent underpinning the Merchandising Practices Act.

In 1986, the legislature created an additional "mini-act" within the Merchandising Practices Act. These new statutes are entitled the "Charitable Organizations and Solicitations Laws."\textsuperscript{144} The broad legislative philosophy or intent underlying these new laws is to make detection and effective prosecution of "charitable fraud" possible, while at the same time avoiding "over regulation" that could be detrimental to bona fide, legitimate charities.

The "Charitable Organizations and Solicitations Law" is divided into the following main sections: section 407.453—registration requirement and exemptions for charitable organizations; section 407.459—the establishment of a public registration register to be maintained by the Attorney General; section 407.462—initial and annual registration statement and exemptions of charitable organizations; section 407.466—professional fundraisers’ registration; section 407.469—annual report requirement of charitable organizations; section 407.472—civil investigative demand authority to investigate possible violations of the "Law," and authorization to enjoin violations under section 407.100.

In order to better understand the scope of the "Charitable Organizations and Solicitations Law," the definitions of major terms utilized in the provisions of that law will be set forth here. "Charitable organization" is defined as "any person as defined by section 407.010, who does business in this state

\textsuperscript{143} Id. at § 407.145(2).
or who holds property in this state for any charitable purpose and who engages in the activity of soliciting funds or donations for, or purported to be for, any fraternal, benevolent, social, educational, alumni, historical or other charitable purpose." A "charitable purpose" is defined as "any purpose which promotes, or purports to promote, directly or indirectly, the well-being of the public at large or any number of persons, whether such well being is in general or limited to certain activities, endeavors or projects." A "solicitation" is broadly defined as "any request or appeal, either oral or written, or any endeavor to obtain, seek or plead for funds, property, financial assistance or other thing of value, including the promise or grant of any money or property of any kind or value for a charitable purpose." Explicitly excluded from the definition of a "solicitation" are unsolicited contributions unless such are given in conjunction with the solicitation drive. Also excluded from the definition of a "solicitation" are "direct grants or allocation of funds received or solicited by any affiliated fund-raising organization by a member agency." The definition of a "professional fundraiser" includes "any person, as defined in section 407.010, who is retained under contract or otherwise compensated by or on behalf of a charitable organization primarily for the purpose of soliciting funds." Excluded from the definition of a "public fundraiser" is "any bona fide employee of a charitable organization who receives regular compensation and is not primarily employed for the purpose of soliciting funds.

Section 407.456 declares it to be unlawful, absent an exemption, for charitable organizations to solicit funds unless proper registration has been filed for the organization and its fundraisers. That section states:

no charitable organization may solicit funds in this state, nor employ a professional fundraiser to solicit funds in this state, for any charitable purpose unless it, and each professional fundraiser employed by it, files all registrations and reports required by sections 407.450 to 407.478.

The registration requirement of these sections does not apply to religious organizations, educational institutions, fraternal or other benevolent and

145. Id. at § 407.453(1).
146. Id. at § 407.453(2).
147. Id. at § 407.453(6).
148. Id. at § 407.453(6)(b).
149. Id. at § 407.453(6)(a).
150. Id. at § 407.453(4).
151. Id.
152. Id. at § 407.456(1).
any society, sect, persuasion, mission, church, parish, congregation, temple, convention or association of any of the foregoing, diocese or presbytery, or other organization, whether or not incorporated, or any employee thereof,
social institutions, hospitals and auxiliaries of hospitals, matters covered under the Campaign Finance Disclosure laws, or, organizations which have obtained an exemption from payment of federal income taxes as provided by federal law. While these exemptions are quite broad and therefore relieve many organizations from the registration requirements of the "law," the type of organizations that are exempted have not typically been perpetrators of fraud on the public. Section 407.459 of the new "law" requires the Attorney General to "establish and maintain a register of all documents filed by charitable organizations in accordance with the provisions of sections 407.450 to 407.478." These records generally are open for public inspec-

no part of the set earnings of which inures to the benefit of any private party or individual associated with such organization, and that otherwise qualifies as an exempt organization under section 501(c)(3) of title 26, United States Code, as amended, that either:

(a) Meets at more or less regular intervals for worship of a supreme being or higher power, or for mutual support or edification in piety or with respect to the idea that a minimum standard of behavior from the standpoint of overall morality is to be observed; or

(b) Is, including but not limited to, any nursing, boarding, retirement, children's or orphan's home, or any foundation, commission, hospital, school, college, university, seminary, or other entity, which is owned, operated, controlled, supervised or principally supported by, or associated with, through the sharing of common religious bonds and convictions, any organization which meets the requirements of [subdivision (5) of this section]. . . .

Id.

154. Mo. Rev. Stat. § 407.453(3) (1986). Section 407.453(3) defines "educational institution" as "a school, college or other institution which has a defined curriculum, student body and faculty, and which conducts classes on a regular basis. . . ."

155. Mo. Rev. Stat. § 407.456(2)(3) (1986). Section 407.456(2)(3) states that the registration requirement shall not apply to: "Fraternal, benevolent, social, educational, alumni, and historical organizations, and any auxiliaries associated with any of such organizations, when solicitation of contributions is confined to the membership of such organizations or auxiliaries. . . ."

156. Mo. Rev. Stat. § 407.456(2)(4) (1986). Section 407.456(2)(4) states that the registration requirement shall not apply to: "Hospitals and auxiliaries of hospitals, provided all fund-raising activities and solicitations of contributions are carried on by employees of the hospital or members of the auxiliary and not by any professional fundraiser who is employed as an independent contractor. . . ."


158. Mo. Rev. Stat. § 407.456(2)(6) (1986). Section 407.456(2)(6) states that the registration requirement shall not apply to: "Any organization that has obtained an exemption from the payment of federal income taxes as provided in section 501(c)(3) of title 26, United States Code, as amended, if, in fact, no part of the net earnings of the organization inure to the benefit of any private party or individual associated with such organization."

tion. The only exception to the open inspection provision is that the Attorney General may withhold from public inspection information or documents he has obtained during an investigation under the Act, or "which otherwise may be withheld from public inspection by law."160 This register should serve to establish a body of information from which the public can acquire information about certain charities and decide whether it is desirable to donate to those charities.

Section 407.462 of the new "law" provides that unless otherwise exempt from the "law,"161 no charitable organization shall solicit donations or employ professional fundraisers to solicit donations unless they have filed an initial registration, under oath, with the Attorney General in a manner in which he designates.162 Moreover, certain organizations are also required to file annual reports.163

The annual report shall be sworn to under oath, and shall be in the form and manner prescribed by the Attorney General. Excepted from the annual report requirement are charitable organizations which receive money from an incorporated community chest or the United Fund if the latter two entities are complying with all provisions of the charitable organizations and solicitations law.164 Further excepted from the annual report requirement are charitable organizations which do not actually raise or receive contributions in cash, goods, or services valued in excess of the dollar amount established by the Attorney General by rule, which amount shall not be less than $10,000.165 Local affiliates of a statewide or national charitable organization need not file annual reports if such reports are filed by the state or national organization.166

Section 407.466 provides that a professional fundraiser must be registered with the Attorney General, in the form and manner prescribed by him, before the professional fundraiser may attempt to solicit on behalf of a charitable organization.167 This section will allow the Attorney General to ascertain the nature and background of any person utilized by a charitable organization as a fundraiser, and to immediately determine if any person against whom a complaint is received is so registered. If he is not, of course, immediate action to enforce the regulations of the consumer protection laws of Missouri can be effectuated.

160. Id.
163. Id. at § 407.462(2).
164. Id. at § 407.462(2)(1).
165. Id. at § 407.462(2)(2).
166. Id. at § 407.462(2)(3).
167. Id. at § 407.466(1).
Section 407.469 mandates that all charitable organizations required to submit an annual report shall, upon request, disclose the percentage of funds solicited which were spent on the cost of fundraising.168

Pursuant to section 407.472, the Attorney General is granted the authority to issue investigative demands when he believes that "a person has engaged in, is engaging in, or is about to engage in any method, use, act or practice declared to be unlawful by sections 407.450 to 407.478."169 Moreover, under this section, the Attorney General is specifically authorized to initiate litigation pursuant to the injunctive section 407.100 to enjoin any activities in violation of the new "law."170 All of the provisions of sections 407.100 to 407.140 are applicable to injunctive actions which commence under subsection 2 of section 407.472.171

As mentioned previously in this article, in addition to enacting the "Charitable Organizations and Solicitations Law," in 1986 the legislature also addressed the topic of potential "charitable fraud" in other sections of the Act.172 In 1986 the legislature amended section 407.020 to specifically include as an "unlawful practice" the "employment by any person of any deception, fraud, false pretense, false promise, misrepresentation, unfair practice, or the concealment, suppression, or omission of any material fact in connection with the solicitation of any funds for any charitable purpose."173 Ergo, criminal prosecutions could be commenced for intentional "charitable fraud" pursuant to the mandate of subsection 4 of section 407.020.174 With the registration requirements of the new "law" and the strong criminal and civil remedies created for illegal charitable solicitation, consumers in Missouri now have real protection from being "ripped-off" by "charitable fraud."

The final amendment to the Merchandising Practices Act enacted by the legislature in 1986 concerns the enhancement of the punishment provision of the odometer fraud provisions of the 1973 Act.175

Under the terms of the 1973 Act, it was declared to be a misdemeanor to disconnect, reset, or alter the mileage of a vehicle's odometer with the intent to defraud.176 With the typical monetary loss that is suffered by a consumer victimized by "odometer fraud" being so great, it was not logical

168. Id. at § 407.469(1).
169. Id. at § 407.472(1).
170. Id. at § 407.472(2).
171. Id.
172. See supra note 124 and accompanying text.
174. Id. at § 407.020(4).
to punish such conduct as a mere misdemeanor. Hence, by amendment in 1986, the legislature elevated the status of odometer fraud to a class D felony. In the years to come, this enhanced criminal status of odometer fraud should prove to have a real deterrent effect upon this persistent consumer problem.

VI. LEADING CASES

Since the passage of the first Merchandising Practices Act in 1967, case law arising under the Act and collateral to it have served to define the scope and meaning of the Act. Certain of those leading cases will now be discussed. While it was clear from the Act itself that the legislative intent behind the Merchandising Practices Act was to protect the public from consumer fraud, it was not known whether the courts would strictly construe the Act in accordance with common fraud principles or broadly construe it under a lesser burden.

The answer to this question came on April 2, 1973, in the form of an opinion from the Missouri Court of Appeals, Kansas City District, in State ex rel. Danforth v. Independence Dodge.177 In that case the Attorney General sought an injunction against a car dealer upon the basis of three specific factual scenarios. The allegations concerned the sale of a wrecked automobile that had been represented by the defendant to be new; the sale of an automobile which had an odometer reading that did not accurately reflect the true mileage of the car; and the sale of an automobile which was not in the condition in which it was represented to be.

Of particular interest is the “Cox transaction” in which Mr. David E. Cox purchased a Dodge automobile in August 1969. Mr. Cox called the defendant’s place of business in response to a newspaper advertisement and was shown a 1969 Dodge Monaco which, according to Mr. Cox, was represented to him as having been driven only by defendant’s general manager and as being a new car in every respect except that it had been driven a little over 3000 miles. Mr. Cox testified that, in reliance upon those assurances, he purchased the automobile.

Immediately thereafter, Mr. Cox experienced major mechanical difficulties. Evidence at trial indicated that contrary to the statements of defendant, the Dodge Monaco had been purchased by the defendant from a used car dealer the day before it was sold to Mr. Cox. A witness for Mr. Cox disclosed that defendant knew the car had been wrecked prior to the time it was purchased from the used car dealer and sold to Mr. Cox.

The court in Independence Dodge gave great deference to the trial court’s opportunity to personally observe the witnesses. It is of major importance that the court held that the testimony found credible by the trial court estab-

lished that the defendant's conduct fell within the prohibition of section 407.020. The crucial language of the court which established the scope and intendment of section 407.020 is as follows:

The purpose of these statutes is to supplement the definitions of common law fraud in an attempt to preserve fundamental honesty, fair play and right dealings in public transactions. In order to give broad scope to the statutory protection and to prevent ease of evasion because of overly meticulous definitions, many of these laws such as the Missouri statute 'do not attempt to define deceptive practices or fraud, but merely declare unfair or deceptive acts or practices unlawful . . . ' leaving it to the court in each particular instance to declare whether fair dealing has been violated.\(^{178}\)

The court of appeals made it clear that the broad sweep of section 407.020 and the legislative mandate found in the Act to protect the Missouri consumer against unfair practices was to be given liberal scope.

It was now clear that not only could the Attorney General bring a cause of action on "the relation of" private individuals to enjoin unfair trade practices, but that the common law requirements and burdens placed upon a plaintiff alleging fraud were now supplanted. The newly created right was given shape and definition in *Independence Dodge*:

Defendant objects to the issuance of an injunction against it on the ground that there was no showing of a lack of adequate legal remedy or that irreparable injury was threatened. The basic fallacy in this argument is that it approaches the situation as if this were merely an ordinary suit between private litigants. That is not the situation. This new public right of action was created for the very reason that private causes of action had proven largely ineffective to prevent consumer fraud. In actual practice, experience had shown that individual action by consumers is much too costly in that the expense of litigation usually outweighs the amount of likely recovery. Furthermore, the onerous provisions of adhesion contracts make recovery in this type of case difficult, while at the same time the growing impersonal character of the marketplace has made retail relationships less amenable to the tradition of the disciplines of consumer goodwill and the amenities of mutual acquaintanceship. It is upon these considerations that legislatures throughout the country, including Missouri, have created this new remedy and have implemented it by authorizing the issuance of injunction where consumer fraud is found. That legislative determination constitutes sufficient authorization without more for the propriety of an injunction in a case under this statute.\(^{179}\)

The Merchandising Practices Act was further delineated, defined, and broadened to a considerable extent by *State ex rel. Ashcroft v. Marketing Unlimited*,\(^ {180} \) decided on January 27, 1981, by the Missouri Court of Appeals,

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178. *Id.* at 368 (citation omitted).
179. *Id.* at 370 (citation omitted).
Eastern District. In November 1977, the Attorney General sought an injunction, restitution, and the appointment of a receiver against defendant company and its principles. The Attorney General alleged a violation of section 407.020 in that defendants entered into various contracts with Missouri citizens promising distributorships and the supplying of goods therefor. The evidence presented at trial established that defendants took the money of Missouri consumers, blatantly violated the terms of the contracts, did not provide the goods to be used in the distributorships, and did not fulfill numerous other contractual and oral promises. The basic provisions of the written contracts provided that in return for payment the Missouri consumers would receive retail outlets, machines, or racks with which to sell candy. The Missouri consumers also testified that defendants promised to repurchase any unused inventory or to refund their investment if financial success was not born out. The trial court ruled in favor of defendants finding that "a breach of contract is not to be equated with an unlawful act which constitutes a violation of Chapter 407 RSMo 1969 as amended (Supp. 1975)." 181

The Eastern District Court of Appeals disagreed and reversed the lower court. In language startling in its sweep, the court clearly embodied in its opinion the intent of the legislature and the breadth of section 407.020. Relying on Independence Dodge, the court noted that by the very terms and language of section 407.020 the elements of common law fraud need not be proven to establish consumer fraud under the Act. 182 The court concluded that because the injunctive relief provided for in section 407.100 is remedial and not punitive, the Act should be given a liberal construction. 183 In reaching its decision in Marketing Unlimited, the court compared and contrasted Missouri's Merchandising Practices Act with similar consumer protection laws found in New Jersey, Delaware and Arizona. 184 The court concluded that consumer protection laws are not only to be given broad scope and liberally interpreted by not requiring proof of common law fraud, but that the Merchandising Practices Act was to be construed to prevent those representations and activities which merely have the capacity to mislead. 185 The court ruled that the capacity to mislead is the prime ingredient of deception and that intent to deceive is not an essential element of an offense under the Act. 186

The administrative subpoena power possessed by the Attorney General, and embodied in the civil investigative demand provisions of the Merchandising Practices Act, has also been subjected to judicial interpretation.

181. Id. at 444.
182. Id. at 445.
183. Id.
184. Id. at 445-46.
185. Id. at 445.
186. Id. at 445, 447.
Once again, the seminal case providing judicial guidance is *Independence Dodge*.\textsuperscript{187} In addition to the discussion in this article regarding that case, the court also established that the issuance of an investigative demand is not a prerequisite to the Attorney General filing a lawsuit for injunctive relief pursuant to section 407.100.\textsuperscript{188} The court discussed the rationale and policy reasons for the investigative demand and its use as a tool by the Attorney General and stated:

The purpose of the Civil Investigative Demand procedure is to provide a form of pre-trial discovery for the benefit of the Attorney General. A comparison of the provisions of section 407.040, which creates this new procedure, with the Federal Antitrust Civil Process Act, 15 U.S.C.A. section 1312, reveals that our new Civil Investigative Demand proceeding is patterned after the parallel provisions of the Federal procedure which is also entitled 'Civil Investigative Demand'. The new procedure under section 407.040 is also similar to the pre-trial discovery opportunities given to the Missouri Attorney General in antitrust cases under section 416.300, RSMo 1969, V.A.M.S.

Under neither of those other Federal or Missouri provisions has it ever been intimated that the pre-trial discovery had to be pursued as a necessary prerequisite to the filing of a suit for coercive relief.\textsuperscript{189}

The investigative demand sections were subsequently the subject of further appellate court review. The Missouri Supreme Court, en banc, had occasion to rule on the constitutionality of section 407.040, when it decided the case of *Lewandowski v. Danforth*,\textsuperscript{190} on March 14, 1977.

In *Lewandowski* appellants were the principles of Pen Pals International, and were the subject of an attorney general's investigative demand. Appellants instituted the lawsuit by filing a petition to set aside the investigative demand in the Circuit Court of Jackson County. The Missouri Supreme Court referred favorably to *Independence Dodge*, and noted the parallel between Missouri's investigative demand statutes and the Federal Antitrust Civil Process Act.\textsuperscript{191} The Missouri Supreme Court then examined sections 407.040 and 407.070 and determined that persons "served with a CID are fully afforded the protection of procedural due process."\textsuperscript{192} The court noted that due process is not a static or rigid concept, and by its very nature "due process negates any concept of inflexible procedures universally applicable to every imaginable situation."\textsuperscript{193} The court added that the procedures re-

\begin{itemize}
  \item \textsuperscript{187} State ex rel. Danforth v. Independence Dodge, 494 S.W.2d 362 (Mo. Ct. App. 1973).
  \item \textsuperscript{188} Id. at 366.
  \item \textsuperscript{189} Id.
  \item \textsuperscript{190} 547 S.W.2d 470 (Mo. 1977) (en banc), cert. denied, 434 U.S. 832 (1977).
  \item \textsuperscript{191} 547 S.W.2d at 472.
  \item \textsuperscript{192} Id.
  \item \textsuperscript{193} Id. (quoting Cafeteria Workers v. McElroy, 367 U.S. 886, 895 (1961)).
\end{itemize}
quired in any given factual scenario must begin with a determination of the precise nature of the government function involved as well as of the private interest that has been affected by governmental action.194 The court concluded that the governmental function involved in an investigative demand, where the person to whom it is directed is suspected of a merchandising practice violation, is a function of considerable importance to the general public.195 However, the court further found that the legislature did not bestow unbridled authority upon the Attorney General to investigate suspected violations of Missouri's consumer protection laws at the expense of any individual entitlement to procedural due process.196 The investigative demand statutes were found constitutional because section 407.040 required reasonable notice of the conduct under investigation, specified notice of the documents to be produced, and the opportunity to challenge the investigative demand prior to responding to it.197 Therefore recipients had their opportunity to be heard as well as other constitutionally mandated requirements. It is interesting to note that the Missouri Supreme Court ended its opinion in Lewandowski by stating that it was premature for appellants to assert that the investigative demand was inappropriate because it requested trade secrets since such claims were not ripe until the Attorney General sought to use the alleged trade secret material in court.198

Thus, Lewandowski not only affirmed the constitutionality of the investigative demand statutes, but also reinforced the notion of the important public function the Attorney General plays when he investigates a suspected merchandising practices violation. In 1980 the Missouri Supreme Court, en banc, once again had the opportunity to review the investigative demand statutes of the Merchandising Practices Act in State ex rel. Ashcroft v. Goldberg.199 In Goldberg, the court referred to the investigative demand sections of the Act as those which the legislature clearly intended “to aid in the discovery and prevention of fraudulent and deceptive practices in the advertisement and sale of any merchandise described in section 407.010(4).”200 The Goldberg case had its genesis in an investigative demand issued by the Attorney General that was directed to Goldberg, to which Goldberg did not respond. The Attorney General sought to compel Goldberg to answer the investigative demand by filing a petition in the trial court pursuant to section 407.090. The Missouri Supreme Court noted that section 407.040 did not apply to criminal proceedings,201 and that the criminal penalties applicable

195. Id.
196. Id.
197. 547 S.W.2d at 473.
198. Id.
199. 608 S.W.2d 385 (Mo. 1980) (en banc).
200. Id. at 386.
201. Id. at 387.
under section 407.080 when an investigative demand is evaded did not apply to the case before the court because there was no suggestion that Goldberg's conduct was of the sort specifically condemned in those penal provisions. Thereafter, the court noted a minor difficulty with section 407.090 in that it required an appeal directly from the circuit court to the supreme court when a final order was entered requiring compliance with an investigative demand. The court stated that the Act was not unconstitutional simply because the appellate procedure designated therein, as it concerned an investigative demand, had become obsolete by virtue of constitutional change. Since the substantive provisions of the law were clearly severable from the challenged procedure for appeal, Goldberg's claim that the investigative demand statutes were unconstitutional was found wanting.

The technical conflict between sections 407.040 and 407.050, in that the former requires that material subject to an investigative demand be made available "at such reasonable time and place as may be stated in the investigative demand," and the latter section states that the material requested "shall be produced during normal business hours at the principal office or place of business of the person served, or at such other times and places as may be agreed upon by the person served and the Attorney General," was an issue the court felt to be of more concern to the legislature. The court simply noted that regardless of the technical conflict in language between those sections as to the place where the requested material was to be produced, any challenge made as to the place of production was to be made first to a circuit court in a motion to set aside or to modify an investigative demand. The court further ruled that without such a motion being made, Goldberg "ha[d] waived such a minor discrepancy." The Goldberg court put its imprimatur once again upon Independence Dodge by quoting from it to the effect that the Civil Investigative Demand Procedure is to provide a form of pretrial discovery for the benefit of the Attorney General. Finally, the supreme court in Goldberg found that the investigative statutes did not violate any constitutional rights Goldberg may have had pertaining to unreasonable search and seizure, self-incrimination, due process, or equal protection. All of those contentions raised by Goldberg were rejected based primarily upon Lewandowski. The court's language indicated that in the
case before it the only issue was one of a civil remedy for the failure to comply with an investigative demand.\textsuperscript{213} The court ended its opinion by concurring with the trial court and ordering that Goldberg comply with the investigative demand issued by the Attorney General.\textsuperscript{214} Another section of the Merchandising Practices Act that has been the subject of litigation is section 407.030. As previously discussed, that section concerns an enforcement remedy called an assurance of voluntary compliance. The next case discussed resulted in a ruling that, for all practical purposes, assurances of voluntary compliance were totally unenforceable.\textsuperscript{215}

In \textit{State of Missouri, ex rel. Danforth v. European Health Spa, Inc.},\textsuperscript{216} the Attorney General and the health spa entered into an assurance of voluntary compliance in 1968 wherein certain alleged advertising practices were agreed to be ceased. Ten years later, in March 1978, the Attorney General filed a petition for civil damages pursuant to section 407.110 alleging that the health spa had committed certain acts in violation of the assurance of voluntary compliance. After a thorough review of the legislative history of sections 407.030 and 407.110, the court concluded that the legislature did not intend to, and did not in fact, provide for civil penalties in the event a party failed to comply with any provision of an assurance of voluntary compliance.\textsuperscript{217} In the absence of penalties for violations of assurances of voluntary compliance, this remedy became valueless and allocated to a dormant status.

However, as discussed above, the General Assembly effectively responded to this judicial interpretation in the 1985 amendments to the Merchandising Practices Act. Subsection 2 of section 407.030 (1985) now provides:

\begin{quote}
Any person who violates the terms of an assurance of voluntary compliance entered into under subsection 1 of this section shall forfeit and pay to the state a civil penalty of not more than two thousand dollars per violation. For the purposes of this subsection, the circuit court of a county approving a voluntary assurance of compliance shall retain jurisdiction, and the attorney general acting in the name of the state may petition for recovery of civil penalties under this subsection.\textsuperscript{218}
\end{quote}

As a result of this new statutory enactment, the assurance of voluntary compliance now constitutes an effective and frequently enforced tool of the Attorney General for violations of the Merchandising Practices Act.

An additional limitation of the Merchandising Practices Act that has been judicially highlighted concerns the authority of the Attorney General

\begin{itemize}
\item \textsuperscript{213} \textit{Id.}
\item \textsuperscript{214} \textit{Id.}
\item \textsuperscript{215} \textit{State ex rel. Danforth v. European Health Spa, 611 S.W.2d 259 (Mo. Ct. App. 1980).}
\item \textsuperscript{216} 611 S.W.2d 259 (Mo. Ct. App. 1980).
\item \textsuperscript{217} \textit{Id.} at 263-64.
\item \textsuperscript{218} \textit{Mo. Rev. Stat.} § 407.030(2) (1985).
\end{itemize}
to seek injunctive relief for violations of the Act. In State of Missouri ex rel. Danforth v. W. E. Construction Company,\textsuperscript{219} the Attorney General filed a petition for injunction under the Act against W. E. Construction Company, a corporation, and its president and chief stockholder, Floyd Edwin Harris. Evidence was adduced at trial that defendant Harris promised various purchasers assistance in moving to their new homes, that certain roads would be dead-end streets, and that if purchasers were dissatisfied, the corporation would build another home for them; but all the representations were never fulfilled. The trial court found that these false promises were admissible under the Act and issued an order enjoining the corporation but denied injunctive relief against the individual defendant, Floyd Edwin Harris.\textsuperscript{220} The Attorney General appealed the denial of injunctive relief against Harris. The appellate court affirmed the orders issued by the trial court.\textsuperscript{221} The appellate court noted that the language of section 407.100 was not mandatory and did not require the court to issue the injunction.\textsuperscript{222} The court stated that an injunction was not a matter of right "but [its] granting rests in the sound discretion of the court, to be exercised in accordance with well-settled equitable principles and in the light of all the facts and circumstances of the case."\textsuperscript{223} It was of considerable interest that the court stated in W. E. Construction Co. that "trade regulation acts generally do not make it mandatory for the court to issue an injunction in every instance where it finds that a defendant in a proceeding brought thereunder has committed a violation. The issuance of an injunction in such cases is a matter of discretion."\textsuperscript{224} The appellate court found that there was an evidentiary basis for the trial court's finding that Harris made misrepresentations to purchasers.\textsuperscript{225} However, the appellate court concluded that regardless of the correctness of the trial court's finding in regard to Harris, it was within the proper exercise of the trial court's discretion not to issue an injunction against him "in view of the fact that he had ceased and desisted from engaging in the construction business, and presented no prospect of re-entering the field."\textsuperscript{226} The appellate court went on to state that "it is well recognized that rights already lost, and wrongs already perpetrated, cannot be corrected in such manner."\textsuperscript{227}

Although this decision is not broad sweeping because the appellate court stressed the discretionary powers of the trial court in issuing injunctions, and the ad hoc approach utilized, it nonetheless somewhat negatively impacts

\textsuperscript{219.} 552 S.W.2d 72 (Mo. Ct. App. 1977).
\textsuperscript{220.} Id. at 72-73.
\textsuperscript{221.} Id. at 75.
\textsuperscript{222.} Id. at 73.
\textsuperscript{223.} Id. (citation omitted).
\textsuperscript{224.} Id. at 73-74 (citation omitted).
\textsuperscript{225.} Id. at 74.
\textsuperscript{226.} Id.
\textsuperscript{227.} Id. (citation omitted).
upon the Merchandising Practices Act. The mere cessation by a violator of the Act of the unlawful activities should not form the basis for the denial of an injunction. Absent a specific injunctive court order, and the significant penalties attached thereto for violation of the order, there is nothing to legally prevent the violator from resuming the unlawful activities once the "dust has settled." This problem should be addressed by a future amendment to the Merchandising Practices Act.

Some additional cases have arisen collateral to the Merchandising Practices Act that have served to hinder enforcement of the important consumer restitution aspect of the Act. These cases concern the federal Bankruptcy Code and the negative effect these laws can have on consumers who have been subjected to fraud. The first hinderance in enforcing the Act during a pending bankruptcy is set forth in the Bankruptcy Code itself. This concerns the "automatic stay provisions" of the code that block or halt collateral non-bankruptcy litigation unless an exemption from those provisions can be shown.\(^\text{228}\) A second obstacle that has been encountered by the Attorney General in seeking to protect defrauded consumers in the face of pending bankruptcy concerns the requisite "creditor" status that must exist before a claim for restitution can be filed with the bankruptcy court.

In *State of Missouri ex rel. Ashcroft v. Cannon*,\(^\text{229}\) the Missouri Attorney General filed an action with the St. Louis County Circuit Court alleging violations of the Merchandising Practices Act based upon misrepresentations of the defendants regarding employment contracts. Subsequent to the filing of the lawsuit, and just several days before trial was to commence, defendant Cannon filed for personal and corporate bankruptcy. During subsequent negotiations between the Attorney General and defendant Cannon, a consent injunction was agreed upon and approved by the St. Louis County Circuit Court. According to the terms of the court order, the defendant was prohibited from the unlawful conduct and required to pay restitution to eight victims named in the order. The Attorney General then filed the order with the bankruptcy court and petitioned the court not to discharge the eight victims in bankruptcy. The ultimate ruling of the bankruptcy court was that the Attorney General lacked standing to make this claim since he was not a "creditor" under the terms of the Bankruptcy Code.\(^\text{230}\) As discussed above, the legislature reacted to this decision by amending section 407.100 in 1985 to allow the Attorney General to seek, and the circuit court to grant, restitution "payable to the state" to be distributed to the aggrieved consumer.\(^\text{231}\) The effective date of this new law was May 31, 1985. Thus the state, through

\[\text{228.} \ \text{11 U.S.C. § 362 (1982).}\]
\[\text{229.} \ \text{31 Bankr. 823 (E.D. Mo.), aff’d, 36 Bankr. 450 (E.D. Mo. 1983), aff’d, 741 F.2d 1139 (8th Cir. 1984).}\]
\[\text{230.} \ \text{Id. at 826-27.}\]
\[\text{231.} \ \text{Mo. Rev. Stat. § 407.100(4) (1985).}\]
the Attorney General, could attack dischargeability in bankruptcy since the "creditor status" has been legislatively conferred. A short time after Cannon, the Attorney General filed a claim in another bankruptcy proceeding alleging nondischargeability on another injunction and restitution order he had obtained. This case is entitled In re Danzig. In the injunction obtained by the Attorney General in In re Danzig, the restitution had been ordered by the court to be paid to the state pursuant to the new law, subsection 4 of section 407.100. Since the bankruptcy court found that the alleged fraud in the state action occurred before the effective date of the new law, the court denied the Attorney General's claim and ruled that the new law was to have prospective application only. A final obstacle is encountered by the Attorney General when he seeks to protect victims of consumer fraud from discharge in a bankruptcy proceeding. That obstacle concerns the different burdens of proof required under the Bankruptcy Code and the Merchandising Practices Act. The Bankruptcy Code provides that "money, property or services" obtained from a consumer creditor based upon "false pretenses, a false representation, or actual fraud" are not dischargeable in bankruptcy. Federal case law interpreting this section uniformly holds the consumer creditor must establish that the false statement was intentional and he relied thereon to his monetary detriment. However, the burden to establish fraud under the Missouri Merchandising Practices Act and other states' consumer protection laws is much less, and intent to defraud and consumer reliance are not required. This dissimilarity of the burden of proof required under federal and state law may result in the necessity of conducting a second trial in the bankruptcy court, utilizing the greater burden of proof even though a thorough and favorable state proceeding has already been concluded with consumer restitution being ordered. This obviously is a waste of resources and forestalls relief for the victimized consumer.

While the bankruptcy courts and code serve a necessary function, they are subject to abuse by unscrupulous con men discharging consumers from whom they stole money. The passage of proposed federal legislation would have favorably resolved this problem for the consumer. The pertinent language of the senate bill stated:

233. Id. at _____.
(a) A discharge under section 727, 1141, or 1328(b) of this title [11 USCS § 724, 1141, or 1328(b)] does not discharge an individual debtor from any debt—

(10) to the extent that such debt arises from a judgment or consent decree entered in a court of record existing at the time of filing or thereafter rendered, or from a claim requiring the debtor to make restitution to, for the benefit of, or for distribution by a governmental entity as a result of a violation of state law by the debtors; . . .

If this legislation had been passed the roadblock encountered by the Missouri Attorney General in Connor and Danzig in his effort to protect consumers would have been effectively removed. The consent injunctions and judgments he obtains under the Merchandising Practices Act would have become non-dischargeable in bankruptcy and thus the last main loophole to meaningful consumer protection would have been closed.

VII. CONCLUSION

The year 1967 heralded in the first comprehensive “consumer protection” statute, called the “Merchandising Practices Act,” to afford a level of economic protection for Missouri consumers in the marketplace. In a sense, the 1967 Act was simplistic and “under-gunned.” The initial Act only covered the advertisement and sale of “merchandise” and the proscribed unlawful conduct, i.e. misrepresentations, fraud, deception, false promise, etc., was punishable solely by civil governmental action. With the subsequent legislative amendments and developmental case law, however, the Act evolved into one of the most far reaching, all encompassing, consumer protection laws in the nation.

By amendment in 1973, the Merchandising Practices Act was expanded to provide for private civil litigation. Consumers who were defrauded in the marketplace could seek private recourse for out-of-pocket losses and attorney’s fees without any longer being required to meet the difficult and complex common law fraud standard. Additionally, 1973 saw the first “mini-act” incorporated within the Merchandising Practices Act. This was the “Odometer Fraud Act” directed at combatting the multi-million dollar intentional fraud of odometer tampering.

In appellate decisions that arose under the Merchandising Practices Act, it became clear that Missouri courts were strongly disposed to liberally interpreting the various provisions of the Act to effectuate its consumer protection philosophy. It was soon made clear by the courts that actions brought under the Merchandising Practices Act were a distinct alternative to common law fraud cases. Not only were reliance and detrimental damages not required to be shown to maintain a lawsuit under the Act, it became irrelevant whether

239. Id.
anyone was actually deceived. All that was needed for actionable conduct under the Act was that the conduct had a capacity to deceive. The actor's intent in regard to the unlawful conduct was likewise deemed irrelevant by the courts.

Augmenting this decisional law, the legislature in 1985, and again in 1986, enacted strong new enforcement provisions to the Act and created new laws within the Act, all directed at increasing economic protection for the public.

The “Time-Share Act” was created in 1985 to provide effective protection to consumers in a new industry that had a disproportionate share of dissatisfied customers. By statutory enactment, the legislature conferred upon the Attorney General the right to review the promotional literature of these businesses prior to its dissemination to assure that the literature complied with the spirit of the Merchandising Practices Act. Moreover, the legislature enacted a statute that provides that purchasers of time-shares were entitled to cancel the contract and receive a return of their money within five days of the purchase. The legislature in 1985 also created strong criminal penalties for intentional violation of the “anti-fraud” provisions of the Act. Such commissions of the enumerated “unlawful practices” are now deemed to be class D felonies.

In 1986, the legislature vested within the Attorney General massive new enforcement devices. First, he was granted “original concurrent jurisdiction” with local prosecutors to criminally prosecute, as class D felonies, intentional violations of the Act. Secondly, he was statutorily conferred authority to issue, extrajudicially, cease and desist orders against such violators. Finally, he was vested with rulemaking authority to assist in the “administration and enforcement” of the Act.

In addition to the creation of these broad new enforcement powers, in 1986 the legislature enacted a new “mini-act” to regulate charitable solicitations and provide for effective enforcement techniques and deterrents for charitable fraud. The “Charitable Organizations and Solicitations Laws,” as the sections comprising this “mini-act” are known, was drafted so as not to burden or hinder the collection efforts of bona fide charities, while at the same time providing the necessary legal means to detect and prosecute “charitable fraud.” Missouri’s Merchandising Practices Act, as it now exists, constitutes one of the most comprehensive “consumer protection” statutes in the United States. The scope of the basic Act is sufficiently broad to encompass and regulate the most novel schemes springing from the ever fertile minds of con men, while the “mini-acts” provide effective regulation in specialized areas such as “time-shares” and “charitable fraud” with their unique problems. The Act now contains a broad range of remedies and enforcement methods including cease and desist orders, civil penalties and injunctions, and criminal penalties for intentional violations.