

CONSUMER SALES PRACTICES ACT

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I. INTRODUCTION

There are more than 25 separate consumer protection laws in Ohio (see Appendix A). The Consumer Sales Practices Act, more commonly known as the CSPA, is the State's most encompassing consumer protection law. Violations of most of the other consumer protection statutes are viewed as *per se* violations of the CSPA.

A. The CSPA:

1. Defines "consumer transactions" as well as "sellers" and "suppliers" and "consumers."
2. Establishes mandates for sellers and suppliers engaged in consumer transactions.
3. Defines unfair, deceptive or unconscionable practices.
4. Authorizes the Ohio Attorney General to conduct investigations and impose penalties.
5. Authorizes the Ohio Attorney General to make rules describing unfair, deceptive or unconscionable practices.
6. Permits private litigation, including class actions.

B. Purpose:

1. Originally enacted in 1972 to give consumers remedies where the common law fell short.
2. To protect consumers from "shoddy work, deceptive advertising and one-sided contracts."

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3. To protect customers from suppliers who engage in referral selling, commit deceptive acts or practices, or commit unconscionable acts or practices.
4. To level the playing field between sellers and consumers.
5. To provide remedies to consumers where the common law and contract law fell short.

C. Consumer Transactions:

1. The CSPA covers all consumer transactions

“‘Consumer Transaction’ means a sale, lease, assignment, award by chance or other transfer of an item of goods, a service, a franchise or an intangible to an individual for purposes that are primarily personal, family or household, or solicitation to supply any of these things.” O.R.C. §1345.01(A).

2. It is important to keep in mind that this is a consumer statute. Only goods and services for personal, family or household use are covered. This means that most, if not all, business transactions are exempt from the statute.

D. Exceptions:

1. Certain transactions are expressly excluded from the CSPA. O.R.C. §1345.01(A) They include:
 - a. Physicians, dentists and their patients, CPAs, and attorneys
 - b. Veterinarians with regard to medical treatment, but not ancillary services
 - c. Real estate transactions
 - d. Financial institutions (national banks, federal savings association banks, savings and loan associations, savings banks and other federal or state banking institutions as well as credit unions, and insurance companies)
 - e. Note this does not include non-bank mortgage lenders, mortgage brokers and similar types of entities - they are subject to the CSPA

E. Legislative Intent:

1. State Consumer Protection Acts, including the Ohio CSPA, are often referred to as Unfair and Deceptive Trade Practices Acts.
2. They are drafted with the intent to prohibit all conduct that is “unfair” or “deceptive.”
3. States adopted laws based on similar federal statutes, most specifically the Federal Trade Commission Act (“FTC Act”) in the 1960's and 1970's.
4. Unlike the federal acts, the CSPA provides consumers with a private right of action.
5. All 50 states and the District of Columbia have adopted Consumer Protection Acts. Every state provides consumers with a private right of action in addition to government enforcement except Iowa which only empowers their Attorney General to enforce consumer protection laws.
6. The Ohio CSPA gives certain protective powers and duties to the Attorney General (O.R.C. §1345.05):
 - a. To adopt, amend and repeal procedural rules.
 - b. Utilized to define with reasonable specificity acts and practices which violate the CSPA and otherwise incur the development of fair consumer practices.

F. Private Causes of Action:

1. O.R.C. §1345.09 gives individual citizens the right to bring CSPA claims against a supplier.
2. The violation must be an act or practice declared unfair, deceptive or unconscionable either under the O.R.C., by Rule adopted by the Attorney General or an act or practice determined by a Court of Ohio to violate the CSPA.
3. CSPA specifies remedies and damages available to consumers.
4. Allows the prevailing party to seek attorney fees.
5. An unfair, deceptive consumer sales practice is one that misleads customers about the nature of the product they are receiving.

6. An unconscionable act or practice relates to a supplier manipulating a consumer's understanding of the nature of the transaction at issue.

G. Recent Modifications:

In response to the predatory lending and mortgage fraud that occurred during the recent housing bubble, the CSPA was expanded in 2007 to deal with predatory lending and abusive foreclosure rescue scams. The CSPA does not allow claims against state or federally regulated banks and lenders, but does permit actions against non-regulated mortgage brokers, appraisers, non-bank lenders and non-bank lending loan officers.

1. Mortgage Fraud:

The CSPA has deemed the following acts to be unconscionable:

- a. Arranging for or making a mortgage loan that provides for a higher interest rate after default.
- b. Providing a mortgage without consideration of the consumer's ability to repay the loan in accordance with its terms.
- c. Knowingly replacing, refinancing or consolidating a zero interest rate or other low rate mortgage loan with another loan.
- d. Instructing the consumer to ignore the supplier's written information regarding interest rate and dollar value of points because they would be lower for the consumer transaction.
- e. Recommending or encouraging a consumer to default on a mortgage or any consumer transaction.
- f. Charging multiple late fees on a single late payment.
- g. Engaging in flipping of mortgage loans.
- h. Stripping a homeowner's equity.
- i. Knowingly lending more money than the borrower can afford to repay.
- j. Charging fees for unnecessary or non-existent products or services.

- k. Using false appraisals to sell properties for much more than they are worth.
- l. Encouraging borrowers to lie about their income, expenses or cash available for a down payment in order to get a loan (Liar's Loans).
- m. Pressuring borrowers to accept high risk loans such as balloon payments, interest only payments and steep pre-payment penalties.

2. Damage Caps on Non-Economic Damages:

Recently the Ohio legislature altered the damages available under the CSPA. In particular, non-economic damages are now capped at \$5,000 and are not to be trebled. Economic damages remain uncapped and eligible for trebling under the correct circumstances.

- a. Changes are as a result of *Wittaker v. M. T. Automotive, Inc.*, 111 Ohio St. 3d 117 (2006).
- b. S.B. 117 passed and then vetoed, Supreme Court of Ohio holds veto improper and S.B. 117 goes into effect.

H. Trends:

There is evidence that CSPA claims are on the rise.

- 1. Complaints/inquiries received by Attorney General show increase
 - a. 2010 complaint/inquiries to AG - 31,000
 - b. 2009 complaint/inquiries to AG - 28,000
 - c. 2008 complaint/inquiries to AG - 24,000
- 2. 2010 Top 10 consumer complaints received by the Attorney General by category:
 - a. Motorized vehicles
 - b. Collections, credit reporting or financial services
 - c. Internet or phone
 - d. Household goods or property improvement

- e. Mortgage
- f. Shopping, food or beverages
- g. Professional services
- h. Sweepstakes or prizes
- i. Computers or electronics
- j. Utilities

I. Other Consumer Laws - Overlap:

In addition to the CSPA, Ohio has over 25 other consumer protection laws. (See Appendix A) In many, but not all cases, a violation of one of the other consumer protection laws is a *per se* violation of the CSPA. In some cases, when a plaintiff brings a claim under the CSPA and an additional claim (such as a Home Solicitation Sales Act claim), a choice of remedy must be made. However, it should be noted that the CSPA expressly states that the remedies of the CSPA are in addition to remedies otherwise available for the same conduct under state or local law.

II. WHAT IS A CSPA CLAIM

A CSPA Claims is one that is brought by a consumer against a supplier relating to a consumer transaction involving an alleged unfair, deceptive or unconscionable act/practice. The claim must be brought within two years of alleged unfair, deceptive or unconscionable act or practice O.R.C. §1345.10 (C)

A. Most Active Areas:

- 1. Auto purchase and repair
- 2. Advertising
- 3. Collections, credit reporting and financial services
- 4. Contracts
- 5. Home improvement
- 6. Predatory lending/finance scams/mortgage fraud

7. Warranties and service contracts

B. A CSPA Claim can be Brought:

1. By the Ohio Attorney General
 - a. Declaratory judgment action
 - b. Injunctive relief
 - c. Class action
2. By individual consumers
 - a. Individual cause of action
 - b. Class action
 - c. Can be brought in any Ohio court

C. Unfair, Deceptive, or Unconscionable Act or Practice is Defined:

1. By statute (O.R.C. §1345.02, §1345.03, §1345.031)
2. By Rule adopted by Attorney General (per O.R.C. §1345.05(B)(2))
3. By notice that a particular act has already been determined to be unfair, deceptive or unconscionable by a court.

III. WHAT CONSTITUTES NOTICE THAT A PARTICULAR ACT IS PROHIBITED

A. Notice is Presumed:

1. The O.R.C. provides general guidance regarding acts that are unfair, unconscionable or deceptive.
2. Substantive Rules adopted by the Office of the Attorney General are more specific.
3. Sometimes results of an Attorney General investigation are industry specific, i.e., insulation, motor vehicle rust inhibitors.

4. After a Court decides that a particular act is unfair, deceptive or unconscionable, and that decision has been made available for public inspection in the Ohio Public Inspection File (OPIF).

B. Ohio Public Inspection File:

O.R.C. §1345.05 requires the Attorney General to make available for public inspection all rules and other written statements of policy that specific acts or practices violate the CSPA. This also includes all judgments and supporting opinions of courts that have found a particular act in violation. These rules, policies and court decisions are found in the Ohio Public Inspection File (OPIF). (O.R.C. §1345.05(A)(3)(4).

1. Contains cases involving CSPA violations.
2. Is available online.
3. If a Court holds an action violates the CSPA, the opinion is added to the OPIF.
4. Often very fact specific.
5. Notice is presumed as all prohibited acts are readily ascertainable.

C. Reporting of Consumer Complaints and Prohibited Acts:

The Clerk of Courts is required by statute to send a copy of any consumer complaint filed to the Attorney General.

1. Attorney General is permitted to intervene in any private action or appeal.
2. The Clerk of Courts is required to mail a copy of any judgment finding a violation of the CSPA, including supporting opinions, to the Attorney General for inclusion in the OPIF. It appears this provision is not uniformly followed by all courts.
3. CSPA claims are not always pled with great clarity.
4. Some courts only send final opinions, not complaints, while others do neither on a consistent basis.
5. Clerks have to implement a system to monitor these claims.

- a. This includes all Common Pleas and Municipal Courts, as well as Appellate decisions.

D. Website:

All consumer complaint and prohibit acts cases are added to the Attorney General's website.

1. www.OhioAttorneyGeneral.gov (links to OPIF)
2. Cases and decisions placed on website constitute constructive notice of acts that are deemed unfair, deceptive or unconscionable.

E. Notice:

1. When filing a private action, a specific CSPA violation must be identified. That can be accomplished by identifying the specific O.R.C. Section, the specific substantive rule or a specific case in which the act alleged has been found to be a violation.
2. Problems with notice.
 - a. Defendant does not have to know conduct violated the law.
 - b. The construction notice issue and small businesses.
 - c. Wide range of violations due to case law.
 - d. Requirement to know of a violation as it occurs.
 - e. Sometimes inconsistent case law between counties/jurisdictions.

IV. PRIMA FACIE CASE

A. A Consumer Transaction

1. In the State of Ohio.
2. The supplier must commit an unfair, deceptive or unconscionable act.
 - a. By statute
 - b. By rule

- c. By notice, or
 - d. An act that the plaintiff seeks to be found unfair, deceptive or unconscionable by the court.
- 3. Privity is not a requirement.
 - 4. The CSPA is extra-contractual in nature; warranty disclaimer/provisions are not applicable.
 - 5. The burden is on the plaintiff to prove CSPA claims. However, the O.R.C., the Attorney General Rules, case law and the OPIF give ample examples of *per se* violations of the CSPA, which can make the plaintiff's burden relatively easy.

V. DAMAGES

A. Statutory Damages:

- 1. Generally \$200 violation. O.R.C. §1345.09(B)
- 2. May be greater if also violation of another consumer law.
- 3. CSPA statutory damages are in addition to any other theory of law. O.R.C. §1345.13

B. Economic Damages:

- 1. Defined as damages from direct, incidental or consequential pecuniary losses resulting from a violation of Chapter 1345 of the Revised Code and does not include damages for non-economic losses defined in O.R.C. §2315.18.
- 2. Treble Damages or Rescission
 - a. Must choose remedy prior to trial
 - b. Treble damages at court's discretion
 - c. Must be existing violation
 - d. More often than not awarded

C. Non-Economic Damages:

1. Non-economic loss is defined as: “non-pecuniary harm that results from an injury or loss to person or property that is subject to a tort action, including, but not limited to, pain and suffering, loss of society, consortium, companionship, care, assistance, attention, protection, advice, guidance, counsel, instruction, training or education, disfigurement, mental anguish, and/or other intangible loss.” O.R.C. §2315.18
2. Capped at \$5,000 per violation (SB 117, O.R.C. §1345.09(B))

D. Reasonable Attorney Fees O.R.C. §1345.09(F):

May be awarded to prevailing party when:

1. Plaintiff
 - a. when a “knowing” violation occurs
 - b. “knowing” is knowing that the supplier acted in a particular manner, not that the supplier knew that it violated the CSPA.
2. Defendant
 - a. When plaintiff brings meritless claim or maintains it in bad faith.

VI. CLASS ACTIONS

A. Initiated by Attorney General

B. Are Private Causes of Action

1. Must be previously recognized violation of the CSPA by statute, rule or notice.
2. No Statutory or Treble Damages in Class Actions
3. Class actions are limited to the appropriate relief as under Civil Rule 23 or rescission of the contract, if appropriate.

VII. SPECIFIC ACTS THAT ARE VIOLATIONS

A. The following acts are deemed unfair or deceptive:

1. That the subject of a consumer transaction has sponsorship, approval, performance characteristics, accessories, uses, or benefits that it does not have;
2. That the subject of a consumer transaction is of a particular standard, quality, grade, style, prescription, or model, if it is not;
3. That the subject of a consumer transaction is new, or unused, if it is not;
4. That the subject of a consumer transaction is available to the consumer for a reason that does not exist;
5. That the subject of a consumer transaction has been supplied in accordance with a previous representation, if it has not, except that the act of a supplier in furnishing similar merchandise of equal or greater value as a good faith substitute does not violate this section;
6. That the subject of a consumer transaction will be supplied in greater quantity than the supplier intends;
7. That replacement or repair is needed, if it is not;
8. That a specific price advantage exists, if it does not;
9. That the supplier has a sponsorship, approval, or affiliation that the supplier does not have;
10. That a consumer transaction involves or does not involve a warranty, a disclaimer of warranties or other rights, remedies, or obligations if the representation is false.

B. In determining whether an act or practice is unconscionable, the following circumstances are taken into consideration:

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

2. Whether the supplier knew at the time the consumer transaction was entered into that the price was substantially in excess of the price at which similar property or services were readily obtainable in similar consumer transactions by like consumers;
3. Whether the supplier knew at the time the consumer transaction was entered into of the inability of the consumer to receive a substantial benefit from the subject of the consumer transaction;
4. Whether the supplier knew at the time the consumer transaction was entered into that there was no reasonable probability of payment of the obligation in full by the consumer;
5. Whether the supplier required the consumer to enter into a consumer transaction on terms the supplier knew were substantially one-sided in favor of the supplier;
6. Whether the supplier knowingly made a misleading statement of opinion on which the consumer was likely to rely to the consumer's detriment;
7. Whether the supplier has, without justification, refused to make a refund in cash or by check for a returned item that was purchased with cash or by check, unless the supplier had conspicuously posted in the establishment at the time of the sale a sign stating the supplier's refund policy.

APPENDIX A

OHIO CONSUMER PROTECTION LAWS

The Ohio Attorney General has enforcement authority over more than 25 consumer protection laws, which are listed below.

- Anti-Pyramid Sales Act (starting at R.C. 1333.91)
- Business Opportunity Purchaser's Protection Act (starting at R.C. 1334.01)
- Certificate of Motor Vehicle Title Act (starting at R.C. 4505.181)
- Condominium Sales Act (starting at R.C. 5311.25)
- Consumer Sales Practices Act (starting at R.C. 1345.01) & Substantive Rules (starting at O.A.C. 109:4-3-01)
- Credit Card Recording Act (starting at R.C. 1349.17)
- Credit Card Truncation Act (starting at R.C. 1349.18)
- Credit Freeze Act (starting at R.C. 1349.52)
- Credit Services Organization Act (starting at R.C. 4712.01)
- Debt Adjusters Act (starting at R.C. 4710.01)
- Defective Assistive Devices Act (starting at R.C. 1345.94) (definitions, R.C. 1345.90)
- Gift Card Act (R.C. 1349.61)
- Hearing Aid Returns Act (R.C. 1345.31) (definitions, R.C. 1345.30)
- Homebuyer's Protection Act, also known as the Predatory Lending Law and the Mortgage Brokers Act, (starting at R.C. 1322.01)
- Home Solicitation Sales Act (starting at R.C. 1345.21)
- Lemon Law (Nonconforming New Motor Vehicle Law) (starting at R.C. 1345.71)
- Motor Vehicle Collision Repair Operators Act (starting at R.C. 4775.02)
- Odometer Rollback and Disclosure Act (starting at R.C. 4549.41)

- Prepaid Entertainment Contracts Act (starting at R.C. 1345.41) Updated July 7, 2010
- Public Utilities Commission Act (R.C. 4905.72)
- Retail Installment Sales Layaway Arrangements Act (starting at R.C. 1317.24) (see also R.C. §1317.21)
- Security Breach Notification Act (starting at R.C. 1349.19)
- Short-Term Lender Law, also known as the Payday Lending Law, (R.C. 1321.35)
- Telemarketing Act (R.C. 109.87)
- Telephone Solicitation Sales Act (starting at R.C. §4719.01)
- Title Defect Rescission Act (starting at R.C. §1345.52)
- Title Insurance Act (starting at R.C. §3953.35)