

## OAJ Consumer Law Section Article April 2014

### Embracing the “Private Attorney General” role in Consumer Litigation

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From a historical perspective, when consumer protection statutes were enacted across the country, it was recognized that private enforcement of the law was equally as important as government enforcement. Accordingly, the private remedy sections of consumer statutes were known as the “private attorney general” provisions, entitling private citizens to take action, not only to seek recompense for themselves, but to help improve the marketplace for all citizens of their state. In Ohio, this is accomplished by the statutory authority in the Ohio Consumer Sales Practices Act (CSPA. R.C. 1345.09 enables consumers to hire counsel by giving consumers the right to seek recovery of their attorney fees. This section also allows consumers to seek penalties in the form of treble damages, which replaces the common law role of punitive damages- to punish the defendant for the wrongs it committed against the marketplace. But if you embrace the concept of acting as a private attorney general, the statute should support more remedial action- at least the same type of remedies pursued and obtained by the government enforcement agencies.

As recognized by William Batchelder, our current Speaker of the House, when he was a 9<sup>th</sup> District Court of Appeals judge,

The CSPA creates the right to proceed as a “private attorney general”... The purpose behind most of these types of statutory fee authorizations is to “[encourage] attorneys to represent indigent clients and to act as private attorneys general in vindicating congressional policies...”<sup>2</sup>

So what is the private bar doing to meet this demand to “vindicate” rights and correct public wrongs? Perhaps we need to ask what we can do, with our right to act as a private attorney general! To answer this question let’s take a look at remedies and actions that have successfully been advanced in public actions, which could also be pursued in private actions by an aggressively minded consumer advocate:

- 1) **Freeze Assets with a TRO.** The federal government is quite adept at seeking TRO’S, not only to stop deceptive practices, but also to preserve the assets for the judgment they will likely obtain for pursuant to an order of restitution and/ or statutory penalties. Remember that a TRO to enforce a statute is presumed to be in the public interest, and proving a likelihood of success on the merits is easy with a technical violation like the

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<sup>2</sup> Eagle v. Fred Martin Motor Company, 157 Ohio App. 3d 150, 2004-Ohio-829.

failure to give a deposit receipt, or the failure to provide notice of the right to an estimate.<sup>3</sup>

- 2) **Disgorgement of profits** (Require deposit of funds with Clerk of Courts). After successfully obtaining a TRO, you are then in a good bargaining position to release the freeze on their bank accounts by agreement to allow them to escrow funds with the Clerk of Courts. By acting on behalf of the public good, it is not a huge leap to argue that an appropriate remedy is to mandate a disgorgement of profits, which is “not a punishment but a mechanism to rid the offender of ill-gotten gains”.<sup>4</sup> What happens to those funds will be decided later, but early action is necessary to simply “hold” those funds for reimbursement to victims later.
  
- 3) **Place a lien on tangible assets and future assets such as tax returns.** In situations where bank accounts are already empty or cleverly hidden or out of reach of the court’s jurisdiction, you can look for other tangible assets. Even the small home improvement contractor has a truck, and a court can order BMV to record the lien on the truck’s title. A court order can also be sent to the IRS directing that tax returns be forwarded to the Clerk of Courts to be held in escrow. If you have joined the owners of a business as individual defendants, then adding a lien to their personal residence is a good way to get their undivided attention. Look for pending or recent divorce records to locate assets and ask a court to issue a stay of the action to preserve assets before they are transferred or sold. Having the Court appoint a receiver to control the assets allows the judge to control someone he or she trusts to act reasonably.<sup>5</sup>
  
- 4) **Require notice and/or training to all employees and affiliates.** This remedy will help you keep focused and make everyone believe that you are truly interested in seeking remedies for the public good because you want to make sure that their practices change and that other consumers are not similarly deceived. It also helps establish grounds for a contempt action (see #15 below), when you find that another consumer has a similar complaint.<sup>6</sup>

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<sup>3</sup> <http://www.ftc.gov/system/files/documents/cases/140313unitedcheckmemo.pdf>  
<http://www.ftc.gov/sites/default/files/documents/cases/2012/03/120328preciousmetalstro.pdf>

<sup>4</sup> <http://www.ftc.gov/sites/default/files/documents/cases/2007/10/071022opinion.pdf>

<sup>5</sup> <http://www.ftc.gov/sites/default/files/documents/cases/2003/08/030804preini0123096.pdf>

<sup>6</sup> <http://www.ftc.gov/system/files/documents/cases/140228cpatankorder.pdf>

- 5) **Require “compliance reporting”** to the Court or AG if any change in ownership or business structure, and to verify compliance with specific terms such as #4, above. This is especially helpful if you agree to a payment plan and need to keep track of who should be making payments and also for valid notice to the new owners when it’s time to proceed with that subsequent contempt action.<sup>7</sup>
- 6) **Require insurance:** When seeking remedies for the public good, injunctive relief can be more than a prohibition to stop deceptive practices. The final injunctive relief should also build in ways to protect other members of the public who will engage in transactions with the supplier. Mandating insurance coverage for both the business and its principals to cover malfeasance or professional torts may help to cover actions based on fraud.<sup>8</sup>
- 7) **Require proper safeguard and disposal of consumer records.** Standing up for privacy is a universally accepted theme. There are easy to find of statistics on identity theft that will support your request for injunctive relief that prevents the supplier from sharing personal information of any consumer and mandating the proper disposal of records.<sup>9</sup>
- 8) **Require removal of adverse information from credit reports.** This is particularly important if the supplier has utilized a debt collection agency or the debt collector is the target of your action. It also helps set the framework for a more holistic resolution for everyone. You want to not only stop the deception but also clean up the aftereffects, and consumers cannot be made whole until their credit standing is restored.<sup>10</sup>
- 9) **Seek discovery on their entire financial picture.** Include language in the settlement agreement that the compromise is expressly premised on truthfulness of their financial statements and any misrepresentation will trigger a judgment for a suspended amount.<sup>11</sup> Remember that treble damages are a substitute for civil penalties. To avoid the fight over release of financial records, be ready to allow the information to be submitted in

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<sup>7</sup> <http://www.ftc.gov/system/files/documents/cases/140307wsnorder.pdf>  
<http://www.ftc.gov/sites/default/files/documents/cases/140108harrisonconsentdecree.pdf>

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<sup>9</sup> <http://www.ftc.gov/system/files/documents/cases/130205pinnaclepspi.pdf> (form provided in attachment)  
<http://www.ftc.gov/sites/default/files/documents/cases/2010/01/100120navonestip.pdf>  
<http://www.ftc.gov/system/files/documents/cases/140320onlineentrepreneuorder.pdf>

<sup>10</sup> <http://www.ftc.gov/sites/default/files/documents/cases/2002/07/dcsconsent.pdf>

<sup>11</sup> <http://www.ftc.gov/system/files/documents/cases/140205jasoncruzstip.pdf>

camera for the sole purpose of establishing appropriate penalties, or to the mediator for help with a mediated resolution.

- 10) **Seek cy pres Awards.** Negotiate that a portion of the judgment or settlement (or unclaimed funds) will be given to a non-profit such as the Ohio Council on Economic Education for improving financial literacy. Authority for the court to authorize “cy pres” awards and designate the payment of punitive damages to support the public good is well established, but rarely pursued or accomplished. It doesn’t have to be huge, even a \$500 award to a local school is probably enough to start a “Lifesmarts” or “Jump\$tart” competition.<sup>12</sup>
- 11) **Preserve the Public Record.** Insist that at least some terms of any settlement agreement be filed as a judgment entry and included in the Ohio Public Inspection file.<sup>13</sup> Monetary awards could be settled privately with a reservation of the injunctive relief to remain a public record. This also serves to establish case law that a specific practice is an unfair or deceptive act, constituting a per se violation of CSPA and to enjoin future violations, allowing the court to retain jurisdiction over the injunctive relief.
- 12) **Protect against Bankruptcy discharge.** Include factual findings in any final order or settlement agreement to protect against a claim for dischargability in bankruptcy. However, taking your claim to bankruptcy court could result in a bigger victory. Remember it was a Bankruptcy Judge who issued a three million dollar sanction against a bank for a single wrongful foreclosure!<sup>14</sup>
- 13) **Seek personal liability.** Consider dismissing the claim on the condition that all terms of the judgment are timely paid, financial statements are truthful, and complete cooperation for any post-judgment proceedings including recordkeeping and compliance monitoring.<sup>15</sup>
- 14) **Seek to suspend the defendant’s license(s).** Simply forwarding a copy of the complaint to the licensing board should trigger an investigation and will impact any license renewal. Let the licensing boards do their job to weed bad actors out of the marketplace.<sup>16</sup>

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<sup>12</sup> <http://www.lifesmarts.org/> or <http://www.jumpstart.org/>,

<sup>13</sup> [opif.ag.state.oh.us/](http://opif.ag.state.oh.us/)

<sup>14</sup> <http://www.ftc.gov/system/files/documents/cases/140219shoppersystemsselectstip.pdf>

[Jones v. Wells Fargo Home Mortg., Inc. \(In re Jones\), 2012 Bankr. LEXIS 1450 \(Bankr. E.D. La. Apr. 5, 2012\)](#)

<sup>15</sup> <http://www.ftc.gov/system/files/documents/cases/140320onlineentrepreneurorder.pdf>

<sup>16</sup> <http://www.supremecourt.ohio.gov/rod/docs/pdf/2/2014/2014-ohio-951.pdf>

15) **Pursue contempt charges:** Even judges who are reluctant to grant attorney fees under a CSPA action, will like to exercise their contempt power to punish a supplier for failing to comply with a court order. Case law supports recovery of attorney fees as the key sanction .<sup>17</sup>

16) **Join the Attorney General to your case.** Joinder of the AG as a necessary party can be pursued on the basis that the AG has a statutory obligation to participate in declaratory judgment actions under R.C. 2721.12. You may also ask the AG to file an amicus brief. Remember that the Attorney General can represent every citizen without the necessity of obtaining class action status. You can also petition the Attorney General to begin rulemaking proceedings to adopt a new rule to define with more specificity what is considered an unfair or deceptive practice. Pursuant to OAC 109:4-1-08, the Attorney General must respond in sixty days, either stating the reason for a denial or initiating public hearings on the issue. At a minimum, make it a practice to pursue a public records request to obtain a copy of every consumer complaint on file against your target, including the supporting documentation and all records of how the complaint was handled by the AG.

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<sup>17</sup> <http://www.ftc.gov/system/files/documents/cases/140131suntasiaorder.pdf> (civil)  
<http://www.ftc.gov/system/files/documents/cases/140312vmsorder.pdf> (criminal)  
<http://www.ftc.gov/system/files/documents/cases/140220cashgrantorder.pdf>