BEFORE THE PUBLIC SERVICE COMMISSION
STATE OF MISSOURI

An Investigation of the Fiscal and Operational Reliability of Cass County Telephone Company and New Florence Telephone Company, and Related Matters of Illegal Activity.	))))	Case No. TO-2005-0237

Staff's Response to the Motion of Cass County Telephone Company, New Florence Telephone Company and Local Exchange Company, LLC for Order Allowing Them to Participate in Depositions

COMES NOW the Staff of the Public Service Commission and, for its response to the Motion of Cass County Telephone Company, New Florence Telephone Company and Local Exchange Company, LLC for an Order Allowing Them to Participate in Depositions, states:

1. As indicated in the pleading filed Wednesday, July 6, 2005 the Staff is requesting the Commission to issue subpoenas to those individuals who have knowledge regarding activities affecting Cass County Telephone Company and/or New Florence Telephone Company, but who decline to speak to the Staff unless ordered by the Commission to do so.

2. The movants correctly state that the Commission's order which established this case included the following: "That the Commission Staff is hereby authorized to file a complaint(s) on any matters contained within the scope of this order." However, in a subsequent order issued February 10, 2005, the Commission clarified the order establishing the case as follows: "Therefore, the Commission will clarify that the most that can result from this case is the authorization to file a complaint."

3. The Staff disagrees with the movants' wholly unsupported opinion that the movants and their counsel are "critical parties to these depositions." Section 140 of the Administrative Law section of 2 American Jurisprudence 2d provides:

> An administrative investigation is not an adversary proceeding, and does not result in a judgment which determines guilt or legal rights. Accordingly, when only investigative powers of an agency are utilized, due process considerations do not attach. Neither the due process clause of the Fifth Amendment nor the confrontation clause of the Sixth Amendment is offended when a federal administrative agency, ***without notifying a person under investigation***, uses its subpoena power to gather evidence adverse to the person. There is no requirement that the person being investigated be given notice of the charges, the names of informants, a hearing, or the right to confront and cross-examine complainants, even though the investigation may affect reputations, or result in the commencement of other proceedings. ***As long as no legal rights are adversely determined during the investigation, the demands of due process are satisfied if procedural rights are granted in the subsequent proceedings***. However, this rule only applies where the initial proceeding is purely investigatory, and due process rights must be afforded if a proceeding is essentially criminal and the agency makes a finding that a specific individual is guilty. (Citations omitted, emphasis added.)

Further, that there is no constitutional right to counsel in an administrative investigation is stated in section 141 of the Administrative Law section of 2 American Jurisprudence 2d as follows: "Since administrative investigation proceedings are not adjudicatory in nature, a party has no constitutional right to be accompanied by counsel during such proceedings, subject to a possible exception where investigatory administrative proceedings may result in criminal prosecutions." (Citation omitted.)

A copy of the cited portions of 2 American Jurisprudence 2d are attached.

4. Regardless of whether the individuals the Staff is planning to depose have a right to counsel, to facilitate matters the Staff is coordinating the depositions with counsel for those individuals.

5. The Staff was unable to find any reported Missouri court decision where the subject of an administrative investigation was asserting a constitutional right to participate in the deposition of a third party. The cases the Staff found which comes closest to addressing the issue are *Lewandowski v. Danforth*, 547 S.W.2d 470 (Mo. Banc 1977) and *State ex rel. Danforth v. Independence Dodge, Inc.*, 494 S.W.2d 362 (Mo. App. 1973). Both cases involve a Civil Investigative Demand. A Civil Investigative Demand is found in section 407.040, RSMo 2000, as part of the Merchandising Practices Act. It allows the attorney general to obtain testimony and/or documents as part of an investigation of merchandising practices unlawful under the Act. Like 386.470, RSMo 2000, section 407.045, RSMo 2000, confers witness immunity from criminal prosecution if certain criteria are met.

In *Independence Dodge* the Court said, at page 367, that a Civil Investigative Demand is intended solely for the benefit of attorney general, not the defendant and it affords neither any opportunity for an administrative hearing, any opportunity for the defendant to appear and be heard nor for formal findings by the attorney general.

In *Lewandowski* the Missouri Supreme Court said, at page 473-74, the following:

> Appellants allege in a vague and indefinite fashion that the CID procedure denies them due process of law. An examination of § 407.040 and § 407.070 reveals that persons served with a CID are fully afforded the protection of procedural due process. In Fuentes v. Shevin, 407 U.S. 67, 80, 92 S.Ct. 1983, 1994, 32 L.Ed.2d 556 (1972) the Supreme Court said:
>
> > "For more than a century the central meaning of procedural due process has been clear: 'Parties whose rights are to be affected are entitled to be heard; and in order that they may enjoy that right they must first be notified.' Baldwin v. Hale, 1 Wall. 223, 233, 68 U.S. 223, 233, 17 L.Ed. 531, 534. See Windsor v. McVeigh, 93 U.S. 274, 23 L.Ed. 914; Hovey v. Elliot, 167 U.S. 409, 17 S.Ct. 841, 42 L.Ed. 215; Grannis v. Ordean, 234 U.S. 385, 34 S.Ct. 779, 58 L.Ed. 1363. It is equally fundamental that the right to notice and opportunity to be heard 'must be granted at a meaningful time

and in a meaningful manner.' Armstrong v. Manzo, 380 U.S. 545, 552, 85 S.Ct. 1187, 1191, 14 L.Ed.2d 62, 66."

Moreover, due process is not a static or rigid concept. As recognized in Stanley v. Illinois, 405 U.S. 645, 650, 92 S.Ct. 1208, 1212, 31 L.Ed.2d 551 (1972), "due process of law does not require a hearing 'in every conceivable case of government impairment of private interest.' Cafeteria Workers v. McElroy, 367 U.S. 886, 894, 81 S.Ct. 1743, 1748, 6 L.Ed.2d 1230, 1236 (1961). That case explained that '(t)he very nature of due process negates any concept of inflexible procedures universally applicable to every imaginable situation' and firmly established that 'what procedures due process may require under any given set of circumstances 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.' Id., at 895, 81 S.Ct., at 1748 (6 L.Ed.2d at 1236); Goldberg v. Kelly, 397 U.S. 254, 263, 90 S.Ct. 1011, 1018, 25 L.Ed.2d 287, 296 (1970)."

Although in this instance the government function involved, that of investigation of suspect merchandising practices, is one of considerable importance to the general public, the legislature has not bestowed unbridled authority upon the Attorney General to pursue this mission at the expense of any individual's entitlement to procedural due process.

A CID issued by the Attorney General must comport with the requirements of § 407.040 which requires reasonable notice of the conduct under investigation and specific notice of the documents to be produced. See generally, Hyster Co. v. United States, 338 F.2d 183 (9th Cir. 1964); and in Petition of Gold Bond Stamp Co., 221 F.Supp. 391 (D.C.Minn.1963) aff'd 325 F.2d 1018 (8th Cir. 1964).

Regarding the opportunity to be heard, we must conclude procedural due process has been fully incorporated by statute within the CID process and that persons are afforded adequate notice and a meaningful opportunity to be heard. Section 407.070, RSMo Supp.1973, reads as follows:

> "At any time before the return date specified in the demand, or within twenty days after the demand has been served, whichever period is shorter, a petition to extend the return date for, or to modify or set aside the demand, stating good cause, may be filed in the circuit court of the county where the parties reside or in the circuit court of Cole county."

Appellants finally assert they should not be compelled to disclose certain information in response to the CID because such information constitutes trade secrets. The assertion is premature. It may be made at the time the Attorney

> General seeks to present such information before any court. § 407.060, RSMo Supp.1973.

(For the Commissioner's convenience the Staff has included copies of the *Independence Dodge* and *Lewandowski* opinions.)

6. The circumstances here differ from those in *Lewandowski* in, among others, that the information was requested from the principals of the subject of the investigation. The Court's assessment that the issue of disclosure of trade secrets to the attorney general was premature is equally applicable here to any "proprietary" or "highly confidential" information the Staff may elicit in the planned depositions of Local Exchange Company, LLC employees.

7. While the Commission regulates Cass County Telephone Company and New Florence Telephone Company, Staff notes that the Commission, in Case No. TC-2005-0357, granted Local Exchange Company, LLC's motion to dismiss based on claims the Commission lacked of jurisdiction and that any impact of a Commission decision to issue penalties would be indirect to Local Exchange Company, LLC.

8. Staff continues to respectfully remind the Commission that the investigation the Commission ordered in this case is broad and encompasses matters not involved in the pending complaint case against Cass County Telephone Company, Case No. TC-2005-0357. Also, New Florence Telephone Company is not a party to Case No. TC-2005-0357. The purpose of the depositions in this docket is to obtain information for purposes of preparing a report to the Commission, not to gather evidence to present in a complaint case. As the Commission's earlier orders anticipate, Staff's report may result in the Commission authorizing the Staff to file additional complaints, however, evidence supporting any new complaints will have to be adduced and presented in the record of those proceedings.

9. The Staff recommends that, regardless of whether the Commission allows the movants to participate, the Commission issue the subpoenas for depositions of Local Exchange Company, LLC's employees that the Staff has filed, and will file. Further, due to Local Exchange Company, LLC's having no right to do so, the Staff recommends that Local Exchange Company, LLC not be allowed to attend or participate in the planned depositions, with Cass County Telephone Company and New Florence Telephone Company only being permitted to attend but not participate in the depositions. The Staff points out that as entities regulated by the Commission, the interests of Cass County Telephone Company and New Florence Telephone Company are greater than those of Local Exchange Company, LLC. However, if the Commission decides to allow Local Exchange Company, LLC to attend the depositions, the Staff recommends they not be allowed to actively participate in the depositions.

10. Although not challenged in the motion, the Staff points out the Commission's authority to conduct depositions of Local Exchange Company, LLC employees flows from sections 386.420.2 and 386.440.1, RSMo 2000 which, in pertinent part, provide, respectively:

> The commission or any commissioner or any party may, in any investigation or hearing before the commission, cause the deposition of witnesses residing within or without the state to be taken in the manner prescribed by law for like depositions in civil actions in the circuit courts of this state and to that end may compel the attendance of witnesses and the production of books, waybills, documents, papers, memoranda and accounts.

and

> All subpoenas shall be signed and issued by a commissioner or by the secretary of the commission, and shall extend to all parts of the state, and may be served by any person authorized to serve process of courts of record or by any person of full age designated for that purpose by the commission or by a commissioner.

WHEREFORE, the Staff recommends, in response to the motion and in order of preference, (1) that the Commission deny the Motion of Local Exchange Company, LLC for an

Order allowing it to participate in depositions; and limit the participation of Cass County Telephone Company and New Florence Telephone Company to attending the depositions; alternatively, (2) that the Commission allow all three entities to participate only by attending the depositions; alternatively, (3) that the Commission deny the motion as to Local Exchange Company and allow Cass County Telephone Company and New Florence Telephone Company to fully participate in the depositions.

Respectfully submitted,

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Certificate of Service

I hereby certify that copies of the foregoing have been mailed, hand-delivered, transmitted by facsimile or electronically mailed to all counsel of record and the Cass County, Missouri prosecutor this 12th day of July 2005.

/s/ Nathan Williams
Nathan Williams

that the subject produce documents, the subject must identify which documents contain information which may tend to incriminate the subject.[62]

§ 139. —Effect of grant of immunity

A legislature is empowered to deprive a witness of the constitutional privilege against self-incrimination by according such witness complete immunity from prosecution for the offense to which the testimony relates.[63] The general federal immunity statute provides that whenever a witness refuses to comply with an order to testify or provide other information on the basis of the privilege against self-incrimination in a proceeding before or ancillary to an agency, the witness may not refuse to comply with the order on the basis of the privilege.[64] However, no testimony or other information compelled under the order, or any information directly or indirectly derived from such testimony or other information, may be used against the witness in any criminal case, except a prosecution for perjury, giving a false statement, or otherwise failing to comply with the order.[65] In addition, an administrative agency conducting an investigation may, with the approval of the Attorney General, issue an order requiring an individual to give testimony or provide other information, and grant immunity, if, in the judgment of the agency: (1) the testimony or other information may be necessary to the public interest; and (2) such individual has refused or is likely to refuse to testify or provide information on the basis of the privilege against self-incrimination.[66] However, the grant of immunity is restricted by the rule that a Fifth Amendment privilege does not apply to records which must be kept by law, meaning that documents which must be revealed under this rule may be used in a subsequent prosecution.[67]

§ 140. Due process and confrontation clause rights

An administrative investigation is not an adversary proceeding, and does not result in a judgment which determines guilt or legal rights.[68] Accordingly, when only investigative powers of an agency are utilized, due process considerations do not attach.[69] Neither the due process clause of the Fifth Amendment nor the confrontation clause of the Sixth Amendment is offended when a federal administrative agency, without notifying a person under investigation, uses its subpoena power to gather evidence adverse to the person.[70] There is no requirement that the person being investigated be given notice of charges,[71]

62. Interstate Commerce Com. v Gould (CA3 Pa) 629 F2d 847, cert den 449 US 1077, 66 L Ed 2d 800, 101 S Ct 856.

63. 81 Am Jur 2d, Witnesses § 142.

64. 18 USCS § 6002.

65. 18 USCS § 6002.

66. 18 USCS § 6004.

67. Shapiro v United States, 335 US 1, 92 L Ed 1787, 68 S Ct 1375, reh den 335 US 836, 93 L Ed 388, 69 S Ct 9.

As to "required records" rule, see § 138.

68. § 122.

69. Francis v Accardo (La App 1st Cir) 602 So 2d 1066.

As to due process of law, generally, see 16A Am Jur 2d, Constitutional Law §§ 804 et seq.

70. SEC v Jerry T. O'Brien, Inc., 467 US 735, 81 L Ed 2d 615, 104 S Ct 2720, CCH Fed Secur L Rep ¶ 91515, on remand (CA9) 773 F2d 1070, CCH Fed Secur L Rep ¶ 92362.

71. Hannah v Larche, 363 US 420, 4 L Ed 2d 1307, 80 S Ct 1502, reh den 364 US 855, 5 L Ed 2d 79, 81 S Ct 33; Isbrandtsen-Moller Co. v United States, 300 US 139, 81 L Ed 562, 57 S Ct 407.

But see People v Lamb (Colo) 732 P2d 1216, holding that the process that is due a customer of a bank whose records are sought by administrative subpoena includes notice in advance of execution of the subpoena.

the names of informants,[72] a hearing,[73] or the right to confront and cross-examine complainants,[74] even though the investigation may affect reputations[75] or result in the commencement of other proceedings.[76] As long as no legal rights are adversely determined during the investigation, the demands of due process are satisfied if procedural rights are granted in the subsequent proceedings.[77] However, this rule only applies where the initial proceeding is purely investigatory, and due process rights must be afforded if a proceeding is essentially criminal and the agency makes a finding that a specific individual is guilty.[78]

§ 141. Right to counsel

Since administrative investigative proceedings are not adjudicatory in nature,[79] a party has no constitutional right to be accompanied by counsel during such proceedings,[80] subject to a possible exception where investigatory administrative proceedings may result in criminal prosecutions.[81] However, it has been held that no constitutional right is violated by the denial of the assistance of counsel in purely investigatory preliminary proceedings, even though information obtained at the proceedings might provide the basis for subsequent criminal charges.[82]

§ 142. —Statutory right; federal Administrative Procedure Act

Despite the fact that the right to counsel is not a constitutional right in investigations, statutes may grant the right to assistance of counsel. Persons

72. Hannah v Larche, 363 US 420, 4 L Ed 2d 1307, 80 S Ct 1502, reh den 364 US 855, 5 L Ed 2d 79, 81 S Ct 33.

73. Isbrandtsen-Moller Co. v United States, 300 US 139, 81 L Ed 562, 57 S Ct 407.

74. Hannah v Larche, 363 US 420, 4 L Ed 2d 1307, 80 S Ct 1502, reh den 364 US 855, 5 L Ed 2d 79, 81 S Ct 33.

75. Hannah v Larche, 363 US 420, 4 L Ed 2d 1307, 80 S Ct 1502, reh den 364 US 855, 5 L Ed 2d 79, 81 S Ct 33.

76. Anonymous Nos. 6 & 7 v Baker, 360 US 287, 3 L Ed 2d 1234, 79 S Ct 1157.

77. Opp Cotton Mills, Inc. v Administrator of Wage & Hour Div., 312 US 126, 85 L Ed 624, 61 S Ct 524, 3 CCH LC ¶ 51109.

78. Jenkins v McKeithen, 395 US 411, 23 L Ed 2d 404, 89 S Ct 1843, 71 BNA LRRM 2385, 60 CCH LC ¶ 52094, reh den 396 US 869, 24 L Ed 2d 123, 90 S Ct 35.

79. § 122.

80. Anonymous Nos. 6 & 7 v Baker, 360 US 287, 3 L Ed 2d 1234, 79 S Ct 1157; Wasson v Trowbridge (CA2 NY) 382 F2d 807, on remand (ED NY) 285 F Supp 936; United States v Steel (SD NY) 238 F Supp 575; Smith v United States (DC NJ) 250 F Supp 803, 66-1 USTC ¶ 9406, 17 AFTR 2d 910, app dismd (CA3 NJ) 377 F2d 739, 67-2 USTC ¶ 9485; Haines v Askew (MD Fla) 368 F Supp 369, affd 417 US 901, 41 L Ed 2d 208, 94 S Ct 2596; Finance Com. of Boston v Mayor of Boston, 370 Mass 693, 351 NE2d 517 (no constitutional right to assistance of counsel for witness in investigation of political fund raising); Haaland v Pomush, 263 Minn 506, 117 NW2d 194, 45 CCH LC ¶ 50626; Brougham v Normandy (Mo App) 812 SW2d 919.

As to right to counsel in criminal proceedings, see 21A Am Jur 2d, Criminal Law §§ 732-763, 967-992.

Annotations: Comment Note.—Right to assistance by counsel in administrative proceedings, 33 ALR3d 229.

81. Mathis v United States, 391 US 1, 20 L Ed 2d 381, 88 S Ct 1503, 68-1 USTC ¶ 9357, 21 AFTR 2d 1251 (criticized on other grounds by Illinois v Perkins, 496 US 292, 110 L Ed 2d 243, 110 S Ct 2394) as stated in People v Alls (NY) 1993 NY LEXIS 4361.

But see Popper v Board of Regents (3d Dept) 26 App Div 2d 871, 274 NYS2d 49, holding that the presence of counsel is not a mandatory requirement in an administrative proceeding such as an interview on possible professional misconduct charges despite the fact that the information elicited might provide the basis for subsequent criminal charges.

82. Ronayne v Lombard, 92 Misc 2d 538, 400 NYS2d 693.

494 S.W.2d 362, State ex rel. Danforth v. Independence Dodge, Inc., (Mo.App. 1973)

Missouri Court of Appeals, Kansas City District.

STATE of Missouri ex rel. John C. DANFORTH, Attorney General, Plaintiff-Respondent,

v.

INDEPENDENCE DODGE, INC., a corporation, Defendant-Appellant.

No. KCD26024.
April 2, 1973.

Motion for Rehearing and/or Transfer Denied May 7, 1973.

Action by Attorney General to enjoin automobile dealer from acts alleged to be unlawful under the Merchandising Practices Act. The Circuit Court, Jackson County, Richard C. Jensen, J., granted an injunction and dealer appealed. The Court of Appeals, Wasserstrom, J., held that evidence that automobile was represented to customer as having been driven only by dealer's general manager and as being a new car in every respect except that it had been driven a little over 3,000 miles, when in fact the automobile had been acquired by dealer at an auction, had been in a wreck, and had previously been leased to a rental company, supported finding of unlawful merchandising practices. The Court also held that provisions of injunction prohibiting defendant from representing that any automobile is a new automobile if it has been owned or leased by a third party and enjoining dealer from engaging in deception, fraud, misrepresentation or concealment or omission of material facts with intent that others rely thereon in connection with sale of automobiles were overly broad.

Judgment modified and affirmed.

West Headnotes

[1] Consumer Protection k15

92H ----
92HI In General
92Hk13 Administrative Regulation
92Hk15 Investigations; Subpoenas.

(Formerly 382k864)

Purpose of the civil investigative demand procedure is to provide a form of pretrial discovery for the benefit of the Attorney General. Sections 407.040, 407.040, subd. 4, 407.050, 407.100 RSMo 1969, V.A.M.S.; Antitrust Civil Process Act, s 3, 15 U.S.C.A. s 1312.

[2] Consumer Protection k15

92H ----
92HI In General
92Hk13 Administrative Regulation
92Hk15 Investigations; Subpoenas.

(Formerly 382k864)

Attorney General's failure to pursue any civil investigative demand in suit for injunction against automobile dealer under the Merchandising Practices Act did not deprive circuit court of any power to proceed on theory that the demand was necessary so that prospective defendant could have opportunity to know that litigation was contemplated. Sections 407.040, 407.040, subd. 4 RSMo 1969, V.A.M.S.; V.A.M.R. Civil Rule 84.04(d).

[3] Consumer Protection k15

92H ----
92HI In General
92Hk13 Administrative Regulation
92Hk15 Investigations; Subpoenas.

(Formerly 382k864)

A civil investigative demand in proceeding under the Merchandising Practices Act does not afford opportunity for defendant to appear and be heard and provides no formal findings by the Attorney General as a result of his investigation. Sections 407.040, 407.040, subd. 4 RSMo 1969, V.A.M.S.; V.A.M.R. Civil Rule 84.04.

[4] Consumer Protection k15

92H ----
92HI In General
92Hk13 Administrative Regulation
92Hk15 Investigations; Subpoenas.

(Formerly 382k864)

The civil investigative demand procedure is intended solely for the benefit of the Attorney General, not for the benefit of the defendant in proceeding under the Merchandising Practices Act. Sections 407.010 et seq., 407.040, 407.050 RSMo 1969, V.A.M.S.

[5] Appeal and Error k758.1

30 ----
30XII Briefs
30k758 Specification of Errors
30k758.1 In General.

Contentions not specified in points relied on would not be considered on appeal. V.A.M.R. Civil Rule 84.04(d).

[6] Consumer Protection k38

92H ----
92HII Remedies of Consumer
92Hk36 Actions
92Hk38 Pleading.

(Formerly 382k864)

Defendant's filing answer in proceeding by Attorney General to enjoin acts alleged to be unlawful under the Merchandising Practices Act, without making objection that the three-day notice was not sufficiently specific and that the manner of service of that notice did not comply with any of the four methods authorized by statute, was a waiver of the objections. Sections 407.040, 407.040, subd. 4 RSMo 1969, V.A.M.S.; V.A.M.R. Civil Rule 84.04(d).

[7] Appeal and Error k1011.1(8.1)

30 ----
30XVI Review
30XVI(I) Questions of Fact, Verdicts, and Findings
30XVI(I)3 Findings of Court

30k1011 On Conflicting Evidence
30k1011.1 In General
30k1011.1(8) Particular Cases or Questions
30k1011.1(8.1) In General.

(Formerly 30k1011.1(8), 30k1(8))

In light of trial court's opportunity to personally observe the contradictory witnesses, reviewing court would defer to findings of trial court that defendant automobile dealer engaged in unlawful merchandising practices. Section 407.020 RSMo 1969, V.A.M.S.; V.A.M.R. Civil Rule 73.01(d).

[8] Consumer Protection k9

92H ----
92HI In General
92Hk9 Motor Vehicle Sales, Service, and Rental.

(Formerly 382k861)

Automobile dealer's conduct in representing to customer that automobile had been driven only by dealer's general manager and was a new car in every respect except that it had been driven a little over 3,000 miles, when in fact the car had been purchased at an automobile auction the day before it was sold to customer and the car had been in a wreck and had been previously leased to a rental company fell within statutory prohibition of unlawful merchandising practices. Section 407.020 RSMo 1969, V.A.M.S.; V.A.M.R. Civil Rule 73.01(d).

[9] Consumer Protection k3

92H ----
92HI In General
92Hk2 Constitutional and Statutory Provisions
92Hk3 Purpose, Intent, and Construction in General.

(Formerly 382k861)

Purpose of the Merchandising Practices Act is to supplement the definitions of common-law fraud in an attempt to preserve fundamental honesty, fair play and late dealings in public transactions. Sections 407.010 et seq., 407.040, 407.050 RSMo 1969, V.A.M.S.

[10] Fraud k16

184 ----
184I Deception Constituting Fraud, and Liability Therefor
184k15 Fraudulent Concealment
184k16 In General.

Failure of automobile dealer to disclose to customer that automobile has been in a serious wreck could be held to be fraudulent under common-law principles. Sections 407.010 et seq., 407.040, 407.050 RSMo 1969, V.A.M.S.

[11] Consumer Protection k9

92H ----
92HI In General
92Hk9 Motor Vehicle Sales, Service, and Rental.

(Formerly 382k861)

Even if defendant automobile dealer's salesmen did not have specific knowledge that automobile, represented to customer as having been driven only by dealer's general manager and as being a new car in every respect except that it had been driven a little over 3,000 miles, in fact had been purchased at an automobile auction the day before it was sold to customer and had been in a wreck, salesmen were guilty of fraudulent conduct in making affirmative statements while conscious that they were actually without

knowledge as to the truth or falsity of the statements so *362 made. Sections 407.010 et seq., 407.040, 407.050 RSMo 1969, V.A.M.S.

[12] Consumer Protection k9

92H ----
92HI In General
92Hk9 Motor Vehicle Sales, Service, and Rental.

(Formerly 382k861)

Automobile dealer was guilty of deception and fraud where salesman represented to customer that car was "a demonstrator" and that it was "just as good as new" where the automobile had been in a wreck so serious that the salesman could not drive it and had to be given a replacement. Sections 407.010 et seq., 407.040, 407.050 RSMo 1969, V.A.M.S.

[13] Consumer Protection k9

92H ----
92HI In General
92Hk9 Motor Vehicle Sales, Service, and Rental.

(Formerly 382k861)

Automobile dealer's purposeful and intentional failure to perform undercoating on car, on the assumption that customer who had received promise that dealer would supply an undercoat "would probably never know the difference" was fraud of an aggravated

character. Sections 407.010 et seq., 407.040, 407.050 RSMo 1969, V.A.M.S.

[14] Consumer Protection k9

92H ----
92HI In General
92Hk9 Motor Vehicle Sales, Service, and Rental.

(Formerly 382k861)

Automobile dealer's sale of car showing mileage of 31,000 miles on the odometer, when at time former owner traded it to dealer the mileage was around 50,000 miles, constituted fraud within prohibition of Merchandising Practices Act. Sections 407.010 et seq., 407.040, 407.050 RSMo 1969, V.A.M.S.

[15] Consumer Protection k39

92H ----
92HII Remedies of Consumer
92Hk36 Actions
92Hk39 Evidence.

(Formerly 382k864)

Evidence supported finding of general odometer tampering by automobile dealer against which Attorney General instituted proceeding under the Merchandising Practices Act. Sections 407.010 et seq., 407.040, 407.050 RSMo 1969, V.A.M.S.

[16] Consumer Protection k41

92H ----
92HII Remedies of Consumer
92Hk36 Actions
92Hk41 Injunction.

(Formerly 382k864)

Legislative authorization of issuance of injunction where consumer fraud is found is sufficient authorization without more for the propriety of an injunction in case under Merchandising Practices Act, without showing of lack of adequate legal remedy or threat of irreparable injury. Sections 407.010 et seq., 407.040, 407.050 RSMo 1969, V.A.M.S.

[17] Consumer Protection k41

92H ----
92HII Remedies of Consumer
92Hk36 Actions
92Hk41 Injunction.

(Formerly 382k864)

Provision in injunction against automobile dealer found to have committed unlawful merchandising practices enjoining dealer from representing that any automobile was a new automobile if dealer knew or had reason to know that it had been owned or leased by a third party, had been previously titled, or had been driven as a demonstrator, and enjoining dealer from engaging in deception, fraud, misrepresentation or concealment or omission of material facts with intent that others rely thereon in connection with sale of automobiles, services, parts and accessories, were overly broad. Sections 407.010 et seq., 407.040, 407.050 RSMo 1969, V.A.M.S.

[18] Injunction k204

212 ----

212VI Writ, Order, or Decree
212k202 Writ or Order
212k204 Form and Requisites.

Injunction must clearly and specifically describe the acts and things enjoined.

[19] States k215

360 ----

360VI Actions
360k215 Costs.

Even though automobile dealer was successful in obtaining some relief from overly broad injunction issued under the Merchandising Practices Act, no division of cost was permissible in absence of statutory authority for assessment of costs against the State. Sections 407.100, 407.130 RSMo 1969, V.A.M.S.

[20] States k215

360 ----
360VI Actions
360k215 Costs.

Statute providing for assessment of costs against defendant in suit brought under the Merchandising Practices Act does not authorize assessment of costs against the Attorney General. Sections 407.100, 407.130 RSMo 1969, V.A.M.S.

*365 Cedric Siegfried, Independence, for defendant-appellant.

Hohn C. Danforth, Atty. Gen., Jefferson City, Harold L. Lowenstein, Asst. Atty. Gen., Kansas City, for plaintiff-respondent.

Before DIXON, P.J., and SWOFFORD and WASSERSTROM, JJ.

WASSERSTROM, Judge.

The attorney general instituted this proceeding to enjoin defendant from acts alleged to be unlawful under the Merchandising Practices Act, Chap. 407, R.S.Mo., 1969, V.A.M.S. The trial court granted an injunction from which defendant now appeals. This appears to be the first case to reach any appellate court under this new statute, and therefore the questions here are of first impression.

The appeal presents four points upon which defendant seeks a reversal. The first assignment is that the court below had no jurisdiction because the attorney general did not make a Civil Investigation Demand. The second assignment challenges the Findings of Fact and the third assignment challenges the Conclusions of Law made by the trial court; these two assignments will be considered together. The final assignment of error is that the injunction relief granted was improper and unconstitutional.

I

Defendant's procedural argument is based upon its construction of s 407.100, and the interrelationship of that section with ss 407.040 and 407.050. The first of those sections grants authority for the filing of this type of proceeding and provides:

'Whenever it appears to the attorney general that a person has engaged in or is engaging in any practice declared to be unlawful

by sections 407.010 to 407.130 he may, after notice to such person, if such notice can be given in the manner provided in section 407.040, seek and obtain in an action in a circuit court an injunction prohibiting such person from continuing such practices or engaging therein or doing any acts in furtherance thereof. Such notice shall state generally the relief sought and be served in accordance with section 407.050 at least three days prior to the institution of such action.'

Under those provisions it is mandatory that a three-day notice be given to the proposed defendant before court action is actually commenced. The manner in which that notice is to be given is specified by reference to the provisions in s 407.040 relating to 'Civil Investigative Demands'. Although the notice required by s 407.100 is different from the Civil Investigative Demand authorized by s 407.040, the method of service is thus made identical for both. (FN1)

*366 The attorney general here did give a three-day notice prior to filing suit, but he did not attempt to pursue any Civil Investigative Demand. Defendant contends the latter failure deprived the Circuit Court of any power to proceed. It argues that the legislature intended by referring in s 407.100 to the provisions of s 407.040, to require a Civil Investigative Demand under the latter section as a jurisdictional prerequisite to the filing of an injunction suit. We cannot agree. s 407.100 makes no such express requirement, and there is no reason to import such a requirement by implication.

[1] The purpose of the Civil Investigative Demand procedure is to provide a form of pretrial discovery for the benefit of the attorney general. A comparison of the provisions of s 407.040, which creates this new procedure, with the Federal Antitrust Civil Process Act, 15 U.S.C.A. s 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 s 407.040 is also similar to the pretrial discovery opportunities given to the Missouri Attorney General in antitrust cases under s 416.300, R.S.Mo.1969, V.A.M.S.

Under neither of those older Federal or Missouri provisions has it ever been intimated that the pretrial discovery had to be pursued as a necessary prerequisite to the filing of suit for coercive relief. On the contrary, it has always been considered that these provisions were intended for the benefit of the attorney general if he chose to use them, but that he is under no compulsion

to do so. See Annotation 'Validity, Construction, and Application of Antitrust Civil Process Act', 10 A.L.R.Fed. 677. The same must be true of the procedure afforded to the attorney general under s 407.040. This section provides him with another tool in his litigative kit, similar to the various discovery methods traditionally available after suit is filed. The pretrial discovery can be used or not at the option of the State, and non-use by the State cannot give rise to any legitimate complaint by the defendant.

[2] Defendant argues, however, that the construction sought by it is necessary so that a prospective defendant may have an opportunity to know that litigation is contemplated and to present to the attorney general his version of the dispute before adverse and possibly unjustified publicity has been incurred. The legislature has made provision to cover this contingency, without the necessity of the forced construction urged by the defendant. The whole purpose of s 407.010 is to provide three-day notice to a prospective defendant before the suit is filed, and during this three-day period he does have the opportunity to approach the attorney general and negotiate for either a dropping of the proceeding or the substitution of an assurance of voluntary compliance in accordance with the terms of s 407.030. Thus every prospective injunction defendant will have the opportunity for private discussion with the attorney general, without any necessity of a Civil Investigative Demand.

[3][4] Moreover, defendant's argument proceeds on the assumption that a Civil Investigative Demand affords some sort of an opportunity for administrative hearing Not so. s 407.040 does not require the attorney general to hold a hearing of any kind, if affords no opportunity for the defendant to appear and be heard, and it provides for no formal findings by the attorney general as a result of his investigtion. As already stated, the Civil Investigative Demand procedure is entirely unilateral, and is intended solely for the benefit of the *367 attorney general, not for the benefit of the defendant.

[5][6] There flickers fitfully in defendant's argumentation two further fleeting contentions: (1) that the three-day notice was not sufficiently specific, and (2) that the manner of service of that notice did not comply with any of the four methods authorized by paragraph 4 of s 407.040. These contentions will not be considered because neither is specified in defendant's Points Relied On, as required by Rule 84.04(d), V.A.M.R. Furthermore, and more fundamentally, each of those complaints was waived by defendant's filing of answer without making either of those objections. (FN2) This disposition of these points should not, however, be taken as an approval of the State's singularly uninformative three-day notice, which purports to state the charge against defendant and the relief sought by merely repeating the words of the statute; nor should this ruling be construed as approving the manner in which that notice purported to be served, by mailing it to defendant's registered statutory agent in St. Louis, whereas defendant's place of business was in Independence, Missouri.

II

Defendant's second and third assignments of error attack the trial court's Findings of Fact and Conclusions of Law to the effect that defendant committed unlawful merchandising practices in violation of s 407.020. (FN3) Those findings and conclusions relate to three separate sale transactions and also to an alleged general practice by defendant of turning back odometers.

Defendant's brief contains a detailed analysis and attack upon virtually every one of the findings and conclusions made by the trial court. It is neither necessary nor in order for us to pursue this approach. The precise correctness of those findings and conclusions are of relatively minor importance, since under Rule 73.01(d), this Court makes its own findings and reaches its own conclusions, giving due regard to the opportunity of the trial court to judge the credibility of witnesses. In keeping with that scope of review, we now turn to the evidence as to each of the violations alleged.

A. The Cox transaction. The first transaction as to which defendant is charged with fraudulent practices was the purchase by Mr. David E. Cox of a Dodge automobile in August, 1969. He called at the defendant's place of business in response to a newspaper advertisement and was shown a 1969 Monaco Dodge which, according to 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 3,000 miles. In reliance upon those assurances, Cox stated he bought the automobile. He immediately had difficulty. The car shimmied, got hot and the radiator boiled over; the air-conditioner did not work well; the driver's door did not close right; the speedometer would not operate; and the transmission leaked fluid out of both the front and rear seals. Cox then took in the car for repair. He also consulted an attorney who made demand upon defendant for indemnification.

Defendant then caused the car to be inspected by a Chrysler representative, and the inspection showed defects in the automobile which had apparently been caused by the car having been in a wreck. Visual inspection *368 of the underside of the car showed the following written on the muffler and exhaust pipe: "69 Dodge Monaco, 9--50, do not sell'.

Contrary to the statements Cox testified were made to him by the defendant's salesmen, the actual facts were that defendant's used car manager Schweer had purchased this Monaco Dodge from a used car dealer Evans at an automobile auction the day before it was sold to Cox, after Evans had been unable to get a bid at the auction. Evans testified that Schweer's inspection of the car disclosed to him that it had been in a wreck, and in response to Schweer's inquiries Evans told him the nature of the repairs. He also told Schweer that this car had previously been leased to Avis Rental Company.

[7][8][9] Many of the facts detailed above were denied by defendant's witnesses. However, the trial court chose to believe Cox

and Evans, and we defer to those findings, in light of the trial court's opportunity to personally observe the contradictory witnesses. Under the testimony accepted by the trial court, defendant's conduct falls within the prohibition of s 407.020.

Statutes of this type for the protection of consumers have been adopted by at least 36 states. Lovett 'State Deceptive Trade Practice Legislation',46 Tul.L.Rev. 724. 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 . . .' Commerce Clearing House, Poverty Law Rep., Vol. 1, 3200, leaving it to the court in each particular instance to declare whether fair dealing has been violated.

[10][11] However, even were we to be confined to the established common law principles, the acts committed in the Cox transaction would qualify as fraud and deceit. Under credible evidence which the trial court was entitled to believe, defendant's manager Schweer was fully aware when he purchased the Monaco Dodge in question that it had been in a serious wreck and Evans had told him directly the nature and extent of the repairs which had been made. If there were no more involved here than mere silence, the failure of defendant to disclose these facts in face of knowledge of their existence could be held to be fraudulent. Miller v. Higgins, 452 S.W.2d 121 (Mo.1970); Ackmann v. Keeney-Toelle Real Estate Co., 401 S.W.2d 483 (Mo. banc 1966). But here, mere silence does not stand alone. In addition, defendant's salesmen Veatch and Scott affirmatively represented, according to evidence accepted by the trial court, that the car being sold to the Coxes had been driven only by the defendant's general manager and that the Monaco Dodge 'was a new car in every respect' except that it had been driven for approximately 3,000 miles. Even if Veatch and Scott did not have the specific knowledge which had been gained by Schweer, nevertheless Veatch and Scott were guilty of fraudulent conduct in making affirmative statements while conscious that they were actually without knowledge as to the truth or falsity of the statements so made. Ackmann v. Keeney-Toelle Real Estate Co., supra.

[12] B. The LaHue Transaction. In August, 1970, Mrs. Mary Edith LaHue came to defendant's place of business, looking for a dependable car. Akins, one of defendant's salesmen, showed her a 1970 Coronet Dodge. Mrs. LaHue testified that Akin represented to her that the car was 'a demonstrator' and that it was 'just as good as new'. Relying on those representations Mrs. LaHue purchased the automobile, receiving a promise that defendant would supply an undercoat.

*369 After the car was delivered, Mrs. LaHue began to have trouble. The seat belt stuck, the trunk did not close, the molding was broken on the back window, there was noise in the steering column, and the speedometer light and radio did not work. The car 'wouldn't track' and when she got to freeway speeds it shook and shimmied. She complained to defendant and some of the minor items were corrected, but even after the attempt at repair the car still shimmied, it didn't track right, the accelerator stuck and the air-conditioning and fan did not work right.

After the attorney general gave notice to defendant of the proposed injuction suit to be brought by the State, defendant's sales

manager Phillips called Mrs. LaHue to advise her that the undercoating had never been done and that she should bring the car in for that purpose.

The salesman Akins, who no longer worked fo defendant at the time of trial, testified for the State. He testified that the automobile sold to Mrs. LaHue had previously been used by him as a demonstrator when he first came to work for defendant, but that it performed so badly that he could not use it and insisted that he be given a different demonstrator. After the car had been sold, the sales manager Phillips, according to Akins, told him to have Mrs. LaHue bring the car in for an inspection. Akins' testimony was that Phillips told him at that time that 'the car had been wrecked and he didn't want anything to happen to the deal'. Also after the sale Akins says he mentioned to Phillips that the car had been sold with a promise of undercoating and that no undercoating had been done, to which Phillips responded that Akins should 'let it go' because 'she would probably never know the difference anyway'.

The testimony by Akins was contradicted by defendant's employees Phillips, Fett and Bindi. Here again, the trial court was faced with a square contradiction between opposing witnesses and it was peculiarly within his province to resolve the question of credibility. We defer to his judgment with respect to this conflicting evidence, which he resolved against the defendant.

[13] On this testimony accepted by the trial court, defendant was plainly guilty of deception and fraud in the LaHue transaction. The car was obviously other than a mere demonstrator, as represented, since it had been in a wreck so serious that Akins could not drive it and had to be given a replacement. See Beshears v. S-H-S Motor Sales Corp., 433 S.W.2d 66 (Mo.App.1968). Moreover, the silence by defendant's employees in the face of knowledge of the fact of the wreck constitutes fraud. Miller v. Higgins; Ackmann v. Keeney-Toelle Real Estate Co., supra. In addition, the purposeful and intentional failure to perform the undercoating on this car on the assumption that Mrs. LaHue 'would probably never know the difference' is fraud of an aggravated character.

[14] C. The Phelps Transaction. On August, 1970 Mr. Richard Phelps came to defendant's place of business asking for a car having low mileage with some factory warranty still remaining. He noticed at that time a big billboard behind defendant's lot advertising 'Chrysler 50,000 miles or five year warranty on all drive-train components'. Defendant's salesman showed him a Coronet Dodge on which the odometer showed a mileage of 31,000 miles and in response to Phelps' inquiry, assured him as to the correctness of that reading. Relying upon that assurance, Phelps bought the car.

At the time the car was sold, it had purportedly been previously inspected and approved on August 12, 1970. About a month after the purchase, Phelps took the car into a service station for another inspection, and at that time the car did not pass reinspection because of excessive steering play and a defective idler arm. Other problems that Phelps had with this car were terrible

overheating, water leaks inside the car, the driver's door window would not roll up, the tail light lens filled with water, on a hard *370 stop the car pulled to one side, and the lock on the rear door was broken. According to Phelps the car was unsafe to drive. He attempted to obtain from defendant the name of the previous owner but was unable to secure this information.

That former owner was, however, called as a witness for the State. He testified that he had driven this car from 1968 until 1970 and that at the time he traded it to defendant the mileage was around 50,000 miles. This testimony by the former owner Stewart stands uncontradicted, and leaves the inescapable inference that the odometer had been turned back very substantially in the interim between defendant's purchase from Stewart and the resale by defendant to Phelps. This practice has been previously held by the courts of this State to constitute fraud. Williams v. Miller Pontiac Co., 409 S.W.2d 275 (Mo.App.1966); Jones v. West Side Buick Auto. Co., 231 Mo.App. 187, 93 S.W.2d 1083 (1936).

[15] D. General Odometer Tampering. Defendant's former salesman Akins testified that there was a man who came around to the defendant's place of business 'that would do the 'speedo' work, turn the speedometers back'. He described this man as heavy set and usually wearing khakis. Akins further testified that after his use of the Coronet eventually sold to Mrs. LaHue, he was given a 1970 blue Charger as a demonstrator. This latter automobile had between 11,000 and 12,000 miles on the odometer. One day in mid-morning the car manager Fett asked Akins for the keys to this Charger 'to remove some mileage from my car'. Akins says that when he went to get his car after lunch, the car had approximately 3,000 miles on it.

This testimony by Akins was contradicted by Fett, Phelps and Schillereff. Here again, it was within the special province of the trial court to resolve the conflict in evidence and we defer to his resolution against the defendant.

III

[16] Defendant object 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 proved 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 market place has made retail relationships less amenable to the traditional disciplines of consumer good will and the amenities of mutual acquaintanceship. Lovett 'State Deceptive Trade Practice Legislation' 46 Tul.L.Rev. 724. 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 deterination constitutes sufficient authorization without more for the propriety of an injunction

in a case under this statute.

Defendant also attacks the injunction here on the ground that the injunction deprives it of constitutional rights. That contention can be disposed of summarily. The question presented is not one of construing the constitution but only a determination of whether defendant's conduct contravenes the statute. The constitutional contention is purely colorable. See Smith v. Smith, 485 S.W.2d 143, l.c. 146 (Mo.App.1972).

*371. [17] Valid criticism does lie against the injunction issued, however, because of the overly broad prohibitions which it imposes upon the defendant. Most of the prohibitions contained in the injunction are specific in nature and relate to practices either found to have been committed by defendant or which can be considered persuasively connected with those violations. On the other hand, two of the prohibitions do not meet that test. The first of these is paragraph (c) which enjoins defendant from representing that any automobile is a new automobile, if it knows or has reason to know that it had been owned or leased by a third party, had been previously titled, or had been driven as a demonstrator. The second of these prohibitions is paragraph (h) which enjoins defendant from 'engaging in deception, fraud, misrepresentation or concealment or omission of material facts with the intent that others rely thereon in connection with the sale of automobiles, services, parts and accessories'.

[18] The law of this State has long been that an injunction must clearly and specifically describe the acts and things enjoined. National Rejectors, Inc. v. Trieman, 409 S.W.2d 1, l.c. 18 (Mo. banc 1966); Commission Row Club v. Lambert, 161 S.W.2d 732, l.c. 736 (Mo.App., 1942); Magel v. Gruetli Benev. Soc. of St. Louis, 203 Mo.App. 335, 218 S.W. 704 (1920). The reason for this rule is well stated in the Lambert case as follows:

'The remedy of injunction is of such drastic and dictatorial nature that it should never be called in force except the decree name and describe the acts and things enjoined,--not just generally so as to be subject to misunderstanding and confusion by those against whom it is directed,--but clearly and specifically so that both the complainant and the defendants may know their rights.'

See also in support: National Labor Relations Board v. Express Pub. Co., 312 U.S. 426, l.c. 433--436, 61 S.Ct. 693, 85 L.Ed. 930; Federal Trade Commission v. Morton Salt Co., 334 U.S. 37, l.c. 51, 68 S.Ct. 822, 92 L.Ed. 1196; Federal Trade Commission v. Henry Broch and Co., 368 U.S. 360, l.c. 367--368, 82 S.Ct. 431, 7 L.Ed.2d 353. The Merchandising Practices Act itself reinforces this requirement of a sharp focus in the injunctional order, by the provision of s 407.100 that if a person is engaged in any unlawful practices the attorney general may obtain an injunction 'prohibiting such person from continuing such practices or engaging therein or doing any acts in furtherance thereof.' (Emphasis added).

Paragraph (c) of the injunction against representations concernig 'new automobiles' cannot stand because there is no sufficient

evidence to support a finding that defendant has ever made any false representation to this effect. Paragraph (h) of the

injunction cannot stand because it undertakes to enjoin defendant from all acts which are illegal under the statute, wholly unspecified, and without regard to any particular charge or evidence of previous violation.

[19][20] The judgment is therefore modified by striking out paragraphs (c) and (h). As so modified, the judgment is affirmed. Even though appellant has been successful in obtaining some relief on this appeal, which might normally call for a division of costs between the parties, no division is permissible here since there is no statutory authority for assessment of costs against the State. Automagic Vendors, Inc. v. Morris, 386 S.W.2d 897, l.c. 900 (Mo. banc 1965); Murphy v. Limpp, 347 Mo. 249, 147 S.W.2d 420 (1940). This rule is not changed by s 407.130 R.S.Mo.1969, V.A.M.S., since that section provides only for assessment of costs against a defendant in a suit brought under the Merchandising Practices Act, but does not authorize assessment of costs against the attorney general.

All concur.

(FN1.) It will be noted that s 407.100 also contains a provision that the three day notice be served 'in accordance with the provisions of s 407.050'. This reference to s 407.050 is obviously an inadvertent error, since s 407.050 contains no provision whatever relating to service. We conclude that this reference was a clerical mistake and that the legislative intention was to make reference to the manner of service set forth in s 407.040, subparagraph 4. The legislative history supports this conclusion and shows that the error crept into the Senate Committee Substitute for House Committee Substitute for House Bill No. 19. In that Senate Committee Substitute, there appeared two erroneous references to 'section 5 (now s 407.050 R.S.Mo.1969) of this act.' The truly agreed version corrected the first of these two errors but the second reference was not corrected, apparently by oversight.

(FN2.) The defendant raised these objections for the first time (and even then in only oblique, unsatisfactory fashion) by motion to dismiss the petition, filed August 16, 1971. This motion was almost exactly eight months after defendant had already filed its answer.

*371_ (FN3.) 's 407.020. Unlawful practices, exceptions

'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 upon such concealment, suppression or omission, in connection with the sale or advertisement of any merchandise, is declared to be an unlawful practice * * *'

547 S.W.2d 470, Lewandowski v. Danforth, (Mo. 1977)

Supreme Court of Missouri, en banc.

Helen LEWANDOWSKI et al., Appellants,
v.
John C. DANFORTH, Attorney General, State of Missouri, Respondent.

No. 59509.
March 14, 1977.

Organization filed petition to set aside civil investigative demand which was issued by Attorney General and which called for production of certain information relating to organization which had allegedly engaged in fraud, deception or misrepresentation, and the Attorney General moved to dismiss. The Circuit Court, Jackson County, Donald B. Clark, J., dismissed the petition, and organization appealed. The Supreme Court, Donnelly, J., held that procedures under civil investigative demand statute afforded organization protection of procedural due process; and that assertion that organization should not be compelled to disclose certain information in response to civil investigative demand because such information constituted trade secrets was premature in that such assertion could be made if and when Attorney General sought to present such information before any court.

Affirmed.

West Headnotes

[1] Constitutional Law k254(1)

92 ----
92XII Due Process of Law
92k254 Application to Governmental or Private Action
92k254(1) In General.

(Formerly 92k254)

Persons served with a civil investigative demand are fully afforded protection of procedural due process, in view of statutory provisions requiring reasonable notice of conduct under investigation and specific notice of documents to be produced and in view of statutory provision affording such persons adequate notice and meaningful opportunity to be heard. Sections 407.040, 407.060, 407.070 RSMo 1973 Supp., V.A.M.S.

[2] Constitutional Law k251.1

92 ----
92XII Due Process of Law
92k251.1 Flexibility; Balancing Interests.

(Formerly 92k251)

Due process is not a static or rigid concept.

[3] Constitutional Law k251.6

92 ----
92XII Due Process of Law
92k251.6 Notice and Hearing.

(Formerly 92k251)

Due process of law does not require a hearing in every conceivable case of government impairment of private interest.

[4] Constitutional Law k254(1)

92 ----
92XII Due Process of Law

92k254 Application to Governmental or Private Action
92k254(1) In General.

(Formerly 92k254)

What procedures due process may require under any given set of circumstances must begin with a determination of the precise nature of the government function involved as well as of the private interest which has been affected by the governmental action.

[5] Consumer Protection k15

92H ----
92HI In General
92Hk13 Administrative Regulation
92Hk15 Investigations; Subpoenas.

(Formerly 382k864)

In proceeding to set aside civil investigative demand issued by Attorney General calling for production by organization of certain information relating to sale and advertisement of certain goods and services, assertion that organization should not be compelled to disclose certain information in response to civil investigative demand because such information constituted trade secrets was premature, as such assertion could be made if and when Attorney General sought to present such information before any court. Section 407.060 RSMo 1973 Supp., V.A.M.S.

Charles C. Shafer, Jr., Kansas City, for appellants.

Harvey M. Tettlebaum, Asst. Atty. Gen., Jefferson City, for respondent.

DONNELLY, Judge.

In this cause, the constitutionality of s 407.040, RSMo Supp.1973, is questioned. It reads as follows:

"1. When it appears to the attorney general that a person has engaged in or is engaging in any act or practice declared to be unlawful by sections 407.010 to 407.130 or when he believes it to be in the public interest that an investigation should be made to ascertain whether a person in fact has engaged in or is engaging in any such act or practice, he may execute in writing and cause to be served upon any person who is believed to have information, documentary *471 material, or physical evidence relevant to the alleged or suspected violation, an investigative demand requiring such person to appear and testify, or to produce relevant documentary material or physical evidence for examination, at such reasonable time and place as may be stated in the investigative demand, concerning the advertisement, sale or offering for sale of any goods or services or the conduct of any trade or commerce that is the subject matter of the investigation; except that, this section shall not be applicable to criminal proceedings.

"2. Each civil investigative demand shall

"(1) State the statute and section thereof, the alleged violation of which is under investigation, and the general subject matter of the investigation;

"(2) Describe the class or classes of information, documentary material, or physical evidence to be produced thereunder with reasonable specificity so as fairly to indicate the material demanded;

"(3) Prescribe a return date within which the information, documentary material, or physical evidence is to be produced; and

"(4) Identify the members of the attorney general's staff to whom such information, documentary material, or physical evidence is to be made available.

"3. No civil investigative demand shall:

"(1) Contain any requirement which would be unreasonable or improper if contained in a subpoena duces tecum issued by a court of this state; or

"(2) Require the disclosure of any documentary material which would be privileged, or which for any other reason would not be required by a subpoena duces tecum issued by a court of this state.

"4. Service of any civil investigative demand, notice, or subpoena may be made by:

"(1) Delivering a duly executed copy thereof to the person to be served or to a partner or to any officer or agent authorized by appointment or by law to receive service of process on behalf of such person;

"(2) Delivering a duly executed copy thereof to the principal place of business in this state of the person to be served; or

"(3) Mailing by registered or certified mail a duly executed copy thereof addressed to the person to be served at the principal place of business in this state or, if said person has no place of business in this state, to his principal office or place of business;

"(4) The mailing thereof by registered mail, requesting a return receipt signed by the addressee only, to the last known place of business, residence or abode within or without this state of such person for whom the same is intended."

Appellants, the principals of Pen Pals International (PPI), instituted this proceeding by filing in the Circuit Court of Jackson County a Petition to Set Aside the Civil Investigative Demand (CID) issued by Respondent, the Attorney General of Missouri. The CID called for production by appellants of:

1. the actual number of solicitations mailed by PPI to Missourians since January 1, 1975;

2. the number of State residents who enrolled with PPI under the "half price discount offer";

3. the names of members across the nation who are known by PPI to have formed "strong and romantic attachments" and "marriages" that resulted from associations formed through PPI;

4. a gross income and cost statement, including the salaries, wages and profits of all employees and owners;

5. a list of names, addresses and phone numbers of all Missourians who have joined PPI since January 1, 1975;

6. a list of the names and addresses of all employees, past or present, of PPI since January 1, 1975.

The information sought by Respondent was demanded under the authority of s 407.040, supra. Respondent claimed to believe appellants have used "fraud, deception *472 or misrepresentation in connection with the sale and advertisement of the above goods and services including, but not limited to misrepresentation of the enterprise as a non-profit organization, and misrepresentation of the possibility of forming 'strong and romantic' attachments through referrals by Pen Pals International."

In response to appellants' petition, Respondent filed a motion to dismiss on the grounds of improper venue and because the petition failed to state a cause of action. The circuit court agreed that no cause of action was stated in the petition, and the case was dismissed without prejudice and with 20 days leave granted appellants to file an amended petition. Appellants filed a

Motion to Set Aside the Court's Order which was overruled. Appeal was perfected to this Court.

Before considering the challenges to s 407.040, supra, which authorizes the Attorney General of this State to issue a CID, we note the similarity of s 407.040 to procedures in the Federal Antitrust Civil Process Act found codified at 15 U.S.C.A. s 1312. Since the Missouri CID statute has received virtually no judicial attention, the best available authority on the subject consists of federal decisions which have construed and applied the provisions of the Federal Antitrust Civil Process Act. (In State ex rel. Danforth v. Independence Dodge, Inc., 494 S.W.2d 362, 363 (Mo.App.1973), Judge Wasserstrom noted the parallel between the federal and state laws but did not find it necessary to rule on the authority and scope of a CID). See generally, Annot. 10 A.L.R. Fed. 677; von Kalinowski, Antitrust Laws and Trade Regulations, Vol. 16L, s 93 (1976).

[1] Appellants allege in a vague and indefinite fashion that the CID procedure denies them due process of law. An examination of s 407.040 and s 407.070 reveals that persons served with a CID are fully afforded the protection of procedural due process. In Fuentes v. Shevin, 407 U.S. 67, 80, 92 S.Ct. 1983, 1994, 32 L.Ed.2d 556 (1972) the Supreme Court said:

"For more than a century the central meaning of procedural due process has been clear: 'Parties whose rights are to be affected are entitled to be heard; and in order that they may enjoy that right they must first be notified.' Baldwin v. Hale, 1 Wall. 223, 233, 68 U.S. 223, 233, 17 L.Ed. 531, 534. See Windsor v. McVeigh, 93 U.S. 274, 23 L.Ed. 914; Hovey v. Elliot, 167 U.S. 409, 17 S.Ct. 841, 42 L.Ed. 215; Grannis v. Ordean, 234 U.S. 385, 34 S.Ct. 779, 58 L.Ed. 1363. It is equally fundamental that the right to notice and opportunity to be heard 'must be granted at a meaningful time and in a meaningful manner.' Armstrong v. Manzo, 380 U.S. 545, 552, 85 S.Ct. 1187, 1191, 14 L.Ed.2d 62, 66."

[2][3][4] Moreover, due process is not a static or rigid concept. As recognized in Stanley v. Illinois, 405 U.S. 645, 650, 92 S.Ct. 1208, 1212, 31 L.Ed.2d 551 (1972), "due process of law does not require a hearing 'in every conceivable case of government impairment of private interest.' Cafeteria Workers v. McElroy, 367 U.S. 886, 894, 81 S.Ct. 1743, 1748, 6 L.Ed.2d 1230, 1236 (1961). That case explained that '(t)he very nature of due process negates any concept of inflexible procedures universally applicable to every imaginable situation' and firmly established that 'what procedures due process may require under any given set of circumstances 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.' Id., at 895, 81 S.Ct., at 1748 (6 L.Ed.2d at 1236); Goldberg v. Kelly, 397 U.S. 254, 263, 90 S.Ct. 1011, 1018, 25 L.Ed.2d 287, 296 (1970)."

Although in this instance the government function involved, that of investigation of suspect merchandising practices, is one of considerable importance to the general public, the legislature has not bestowed unbridled authority upon the Attorney General to

pursue this mission at the expense of any individual's entitlement to procedural due process.

*473. A CID issued by the Attorney General must comport with the requirements of s 407.040 which requires reasonable notice of the conduct under investigation and specific notice of the documents to be produced. See generally, Hyster Co. v. United States, 338 F.2d 183 (9th Cir. 1964); and in Petition of Gold Bond Stamp Co., 221 F.Supp. 391 (D.C.Minn.1963) aff'd 325 F.2d 1018 (8th Cir. 1964).

Regarding the opportunity to be heard, we must conclude procedural due process has been fully incorporated by statute within the CID process and that persons are afforded adequate notice and a meaningful opportunity to be heard. Section 407.070, RSMo Supp.1973, reads as follows:

"At any time before the return date specified in the demand, or within twenty days after the demand has been served, whichever period is shorter, a petition to extend the return date for, or to modify or set aside the demand, stating good cause, may be filed in the circuit court of the county where the parties reside or in the circuit court of Cole county."

[5] Appellants finally assert they should not be compelled to disclose certain information in response to the CID because such information constitutes trade secrets. The assertion is premature. It may be made at the time the Attorney General seeks to present such information before any court. s 407.060, RSMo Supp.1973.

The judgment is affirmed.

All concur.