



Legislative Fiscal Bureau

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Joint Committee on Finance

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Transfer Consumer Protection Functions (Agriculture, Trade and Consumer Protection and Justice)

[LFB 2001-03 Budget Summary: Page 99, #1 and page 433, #3]

CURRENT LAW

The Department of Justice (DOJ) has concurrent authority with the Department of Agriculture, Trade and Consumer Protection (DATCP) to determine violations of, and initiate prosecutorial proceedings to: (a) restrain by temporary or permanent injunction any fraudulent representation; (b) restrain by temporary or permanent injunction any violation of telecommunication trade practices and enforce forfeitures; and (c) recover a civil forfeiture for violation of a fraudulent representation, fraudulent drug advertising, unfair methods of competition or unfair trade practices injunction. However, DOJ can only commence these proceedings and enforce the above forfeitures in circuit court after consulting with DATCP.

Under current law, DOJ must furnish all legal services required by DATCP relating to the enforcement of the above consumer protection statutory provisions, as well as other consumer protection statutory provisions and chapters, together with any other services necessarily connected to those legal services.

For allegations of unfair methods of competition in business or unfair trade practices in business, DOJ may: (a) initiate administrative proceedings in regards to such allegations with DATCP; (b) appear before DATCP in regards to such proceedings; and (c) appeal DATCP decisions and orders to a court of law. Under current law, DOJ may: (a) accept a written assurance of discontinuance of any act or practice alleged to be a violation of the fraudulent representation laws; (b) bring an action enjoining any corporation, or limited liability company, foreign or domestic, which violates any order regarding unfair methods of competition or unfair trade practices from doing business in this state and revoking or canceling its certificate of authority, incorporation or organization; and (c) join the Federal Communications Commission

and the Federal Trade Commission in bringing actions in federal court under the federal telecommunications act and federal marketing laws. Finally, under current law: (a) forfeitures under the self-service storage facilities law are enforced by DOJ or by the district attorney of the county where the violation occurred; and (b) a representative from DOJ must be a member of the advisory group that DATCP must form before preparing any proposed rule on telecommunication services.

DATCP's consumer protection staff review and respond to consumer inquiries and complaints received through the DATCP toll-free hotline, telephone calls to regional offices, written complaints or referrals from other state agencies. Further, DATCP is authorized significant investigative authority under general agency powers provided by Chapter 93 of the statutes, in addition to specific authority in unfair trade practices and deceptive advertising laws. These include the authority to subpoena documents and testimony, conduct investigative hearings, collect and analyze samples, and inspect and copy business records.

In 2000-01, DATCP's Bureau of Consumer Protection is provided \$4,384,300 in funding and 72.55 staff (\$2,839,100 GPR and 50.6 GPR positions, \$1,178,200 PR and 17.95 PR positions, and \$367,000 SEG and 4.0 SEG positions) for these purposes. The Bureau consists of a director and central administrative staff that includes a consumer information center made up of the consumer hotline and consumer information staff. The Bureau also operates regional offices in Eau Claire, Green Bay, Madison and Wauwatosa.

Under current law, DOJ is provided \$808,700 GPR and 9.3 GPR positions annually for consumer protection functions. These staff include 4.8 attorneys, 2.0 consumer protection investigators, 1.0 legal secretary, 1.0 paralegal and 0.5 legal assistant.

GOVERNOR

Transfer \$808,700 GPR and 9.3 GPR consumer protection positions annually (4.8 attorneys, 2.0 consumer protection investigators, 1.0 legal secretary, 1.0 paralegal and 0.5 legal assistant) from DOJ's Division of Legal Services to DATCP.

Make the following statutory changes concerning consumer protection legal services: (a) eliminate DOJ's concurrent authority to determine violations, initiate prosecutorial proceedings and accept, in lieu of prosecuting, written assurance of discontinuance of alleged violations concerning cases relating to fraudulent representations; (b) eliminate DOJ's concurrent authority to determine violations, initiate prosecutorial proceedings and enforce forfeitures concerning cases relating to telecommunications trade practices; (c) delete the requirement that a representative from DOJ be a member of the advisory group that DATCP must form before preparing any proposed rule on telecommunication services; (d) authorize a district attorney instead of DOJ to file complaints and prosecute actions before DATCP concerning unfair methods of competition in business or unfair trade practices; (e) provide that DATCP would replace DOJ as the state agency that would bring an action in the name of the state to enjoin any

corporation, or limited liability company from doing business in this state and canceling or revoking its certificate of authority, incorporation, or organization for violating any unfair method of competition or unfair trade practices order; (f) eliminate DOJ's concurrent authority to commence actions to recover civil forfeitures on behalf of the state for violations of injunctions involving fraudulent representations, fraudulent drug advertising, unfair methods of competition or unfair trade practices; (g) provide that DATCP would replace DOJ as the state agency, in addition to district attorneys, empowered to enforce forfeitures for violations of the self-service storage facilities laws; (h) remove DOJ as an agency to which a court could award reasonable and necessary expenses of prosecution, including attorney fees, under the Marketing; Trade Practices chapter of the statutes (Chapter 100) and provide that 10% of money awarded under the Chapter for the costs of investigation and the expenses of prosecution, including attorney fees, would no longer be credited to DOJ's investigation and prosecution appropriation; and (i) no longer require DOJ to furnish all legal services to DATCP relating to the enforcement of various consumer protection statutes; instead, authorize DOJ to furnish these legal services upon the request of DATCP.

Provide that: (a) on the effective date of the bill, the assets and liabilities of DOJ primarily related to the provision of consumer protection legal services, as determined by the DOA Secretary, would become assets and liabilities of DATCP; (b) the incumbent employees holding the transferred positions be transferred to DATCP and maintain their employment rights and status; (c) tangible personal property, pending matters, contracts and contract responsibilities relating to the provision of consumer protection legal services be transferred to DATCP; and (d) rules and orders relating to the provision of consumer protection legal services under DOJ would remain in effect until their specified expiration date or until modified or rescinded by DATCP.

DISCUSSION POINTS

1995 Act 27

1. Under 1995 Act 27 (the 1995-97 budget act), \$1,411,900 GPR and 26.6 GPR positions were deleted and transferred from DOJ in 1996-97 to reflect the move of most consumer protection functions from DOJ to DATCP on July 1, 1996. Under the act, 12.8 DOJ positions were eliminated and the remaining 13.8 positions, and the incumbents, were transferred from DOJ to DATCP. After the change, DOJ retained 9.3 legal services staff for consumer protection functions.

2. Under Act 27, the following DOJ responsibilities were transferred to DATCP:

- Fraudulent representations;
- Fraudulent drug advertising;
- Penalties for violations of DATCP rules relating to methods of competition and trade practices;
- Motor vehicle rust proofing warranties;
- Substantiation of energy savings and safety claims;

- Penalties: marketing and trade practices;
- Sale of cleaning agents and water conditioners containing phosphorus;
- Products containing or made with ozone-depleting substances;
- Ticket refunds;
- Cable television subscriber rights;
- Dating service contracts;
- Fitness center and weight reduction contracts;
- Pawnbrokers and secondhand article and jewelry dealers;
- Prize notices;
- Mail-order sales regulated;
- Motor fuel dealerships;
- Future service plans;
- Vehicles-financial responsibility: damage waivers and penalties;
- Self-service storage facilities;
- Time share ownership deposits, escrow requirements remedies and penalties; and
- Prepaid maintenance liens.

3. Act 27 required that DOJ consult with DATCP prior to commencing an action: (a) for violations of the state's fraudulent advertising laws; (b) for violations of telecommunications trade practices; and (c) to recover civil forfeitures for violations of an injunction issued under the state's fraudulent advertising statutes, drug pricing statutes and unfair trade practices.

Consumer Protection in DOJ

4. DOJ retains concurrent authority to determine violations of, and initiate prosecutorial proceedings on, cases relating to fraudulent representation, fraudulent drug advertising, unfair methods of competition, unfair trade practices and telecommunications trade practices. However, DOJ can only commence an action in circuit court after consulting with DATCP. Under current practice, DOJ informs DATCP prior to filing these types of cases, and DATCP has never objected to a DOJ-initiated action. Under current law, DATCP is not given statutory authority to prevent DOJ from initiating these types of actions; after consultation DOJ is permitted to exercise its independent discretion.

5. In addition to its authority to independently bring cases relating to fraudulent representation, fraudulent drug advertising, unfair methods of competition, unfair trade practices and telecommunications trade practices (after consulting with DATCP), DOJ can also represent the state in court on other types of consumer protection cases referred for adjudication by DATCP or other state agencies. DATCP indicates that it generally refers its consumer protection cases to district attorneys or DOJ for court enforcement, not because it lacks court enforcement authority under the consumer protection laws it administers, but rather because it lacks the necessary legal staff to prosecute those cases itself. District attorneys generally prosecute criminal cases at the trial level (rather than DATCP and DOJ). DATCP indicates that the type of case it generally refers to DOJ involves a civil action with multi-county implications.

6. Of the 53 consumer protection cases concluded by DOJ in 1998-99 and 1999-00, DOJ estimates that approximately 23 of these cases were DATCP referrals. (According to DOJ, approximately five of these cases were referred after DOJ had already initiated an enforcement action.) The remaining cases were primarily multi-state actions with other Attorneys General, with a few referrals from sources other than DATCP.

7. Under the federal telecommunications act and the federal marketing laws, the "state officer responsible for enforcement" has authority to bring actions under those acts. DOJ has traditionally exercised this authority without the requirement of consultation with DATCP. DOJ indicates, however, that as a practical matter there are situations under these acts where consultation occurs both formally and informally between DOJ and DATCP. In addition, under current law, only DOJ may initiate administrative proceedings before DATCP in regards to allegations of unfair methods of competition in business or unfair trade practices in business.

8. DOJ indicates that its consumer protection attorneys (assistant attorneys general) spend almost all of their time on consumer protection cases. DOJ assistant attorneys general (AAG) with other areas of expertise, however, are sometimes called in to assist in a consumer protection case if their area of specialization is involved. According to DOJ, an AAG experienced in telecommunications regulation has been used on occasion when a consumer protection case involving telecommunication matters has arisen, and the consumer protection unit has also employed the specialized help out bankruptcy AAGs when a suspected consumer protection violator has filed for bankruptcy protection.

9. DOJ indicates that while attorneys in the legal services division work in designated units that are organized around particular types of practice areas, at any given time attorneys in one unit may be asked to assist another unit due to workload constraints, special case needs or other factors. DOJ indicates that for some large consumer protection cases, other legal services units in DOJ may be asked to contribute attorneys and legal staff to meet the demands of the case. Similarly, consumer protection attorneys may assist attorneys in other units.

10. DOJ attorneys make use of both DOJ investigators and DATCP investigators in consumer protection enforcement actions. In addition, DOJ investigators work with investigators from other attorney general offices in organizing and cataloging evidence that will be used in upcoming multi-state litigation. DOJ works with DATCP investigators from time to time on cases referred by DATCP to DOJ. Whether DOJ or DATCP investigators are employed in a given situation is often a product of availability and judgments about the complexity of work or specialized expertise of a given investigator.

11. While DATCP has independent enforcement authority, DOJ indicates that it has always viewed the relationship it has with DATCP as most similar to the relationship that exists between law enforcement agencies and district attorney offices. Law enforcement officers, like DATCP, are responsible for complaint intake, review, investigation and recommendation for enforcement action. District attorneys, like DOJ, are ultimately responsible for reviewing the investigatory work product, exercising prosecutorial discretion and ultimately enforcing and/or

settling cases. However, DOJ has also exercised its authority to review and investigate consumer protection cases which the agency may also prosecute.

12. In 1998-99 and 1999-00, DOJ's consumer protection unit completed 53 cases. These included 19 telemarketing/telecommunications cases, eight cases involving deceptive credit practices, 10 involving misleading health care claims and 11 deceptive travel promotions. Over the two-year period, the 53 cases resulted in a total recovery, including forfeitures and costs, refunds and restitution and multi-state settlements, of \$8,948,400, including \$3,142,300 in forfeitures and costs, \$1,107,000 in refunds and restitution, and \$4,699,100 in multi-state settlements (the restitution amount does not include restitution and refunds made directly to consumers by the defendant companies). Over this two-year period DOJ received 48 referrals from DATCP.

Governor's Recommendation to Transfer DOJ's Remaining Consumer Protection Responsibilities and Positions to DATCP

13. DATCP's Consumer Protection Bureau relies significantly on its administrative rules. The administrative rules provide detailed, industry-wide standards of conduct related to specific consumer protection issues. In addition, DATCP practices progressive enforcement of the state's consumer protection laws through the use of warning letters, assurances of compliance, special orders and formal prosecutions, when necessary.

14. DATCP uses a program of prevention, education, mediation and enforcement to maintain compliance with DATCP rules. In addition, administrative rules are intended to reduce the possibility of arbitrary or inconsistent state regulation of businesses. Generally, rules have been adopted for those consumer issues for which unfair business activities had, at one time, become common. DATCP adopts new rules and modifies current rules in response to new practices.

15. Under the Governor's recommendation, the remaining DOJ consumer protection responsibilities, independent authority and positions would be transferred to DATCP. DOJ would also no longer be required to furnish all legal services required by DATCP relating to the enforcement of various consumer protection statutes, but DOJ would still be authorized to furnish these legal services upon the request of DATCP. Under the bill, district attorneys, instead of DOJ, would be authorized to file complaints and prosecute actions before DATCP concerning unfair methods of competition in business or unfair trade practices.

16. DOA indicates that the provision to transfer the remaining consumer protection responsibilities and positions from DOJ to DATCP was included in the bill so as to: (a) complete the process that was begun under 1995 Act 27 to shift consumer protection responsibilities from DOJ to DATCP; (b) take advantage of any additional efficiencies that might arise from a further consolidation of consumer protection functions; and (c) place consumer protection in an agency where the focus is on prevention and voluntary compliance. While DOA indicates efficiency would be one reason to consolidate functions, no cost savings would be realized under the bill.

17. In his March 19, 2001, comments before the Joint Committee on Finance, the

Attorney General indicated that, "if you eliminate the role of the Attorney General completely from the enforcement of consumer protection in this state, you will lose one of the most effective and powerful tools we have to enforce our consumer protection laws-the role of the Attorneys General in multi-state litigation." DOJ has significant experience working with other states' Attorneys General in multi-state litigation on behalf of consumers. In 1998-99 and 1999-00 the Attorney General participated in the following multi-state settlements: (a) a settlement with Sears Roebuck and Company over violations of federal bankruptcy law in which Wisconsin received more than \$2 million; (b) a settlement with Knoll Pharmaceutical Company and BASF Corporation over its marketing practices involving the sale of a synthetic thyroid hormone in which Wisconsin received \$1,031,900; (c) a settlement with Walgreens for dispensing partial or short prescriptions in which Wisconsin received \$491,200; (d) a settlement with Nestle USA for failing to comply with state and federal food laws by advertising and selling unsafe candy/toy products; and (e) a settlement with the United States Sales Corporation involving sweepstakes, which provided a fund of \$30.4 million for restitution to consumers nationwide.

18. DATCP has also been responsible for prosecuting consumer protection efforts. All consumer protection-related prosecutions initiated by DATCP resulted in judgments of approximately \$9.4 million in 1999 and 2000. This includes approximately \$4 million in 1999 and \$5.4 million in 2000, through civil forfeitures and penalties. An additional \$4.0 million was returned to Wisconsin consumers in 2000 through court order (\$2.1 million) and DATCP mediation (\$1.9 million).

19. The Bureau of Consumer Protection within DATCP (Bureau) belongs to the National Association of Consumer Agency Administrators. Through this organization and other cooperative arrangements with federal agencies such as the Consumer Product Safety Commission, the Federal Trade Commission and the Federal Communications Commission, the Bureau participates in multi-state investigations.

20. The Bureau states that they also are conducting investigations with consumer protection agencies and Attorneys General in other states. The Bureau is currently working with the Washington and Oregon Attorneys General on a major defective household siding investigation. The three states jointly are conducting discovery, developing research plans and meeting with the siding manufacturer's representatives to discuss a settlement. Further, they jointly have proposed settlement documents and submitted pleadings to the siding manufacturer. Therefore, the Bureau maintains that they have multi-state investigation and litigation experience as well.

21. Consumer protection cases sometimes require legal expertise outside of consumer protection law, such as when a violator of consumer protection laws files for bankruptcy protection. Some might argue that leaving consumer protection litigation functions in DOJ would leave consumer protection in an agency where it could draw on other fields of legal expertise when necessary. Others would counter that the bill would still permit DATCP to draw upon DOJ's other areas of legal expertise if it were needed in a particular case, even if the consumer protection litigation functions were transferred to DATCP. Under the Governor's recommendation, DOJ would still be authorized to furnish legal services upon the request of DATCP. However, DOJ would have

no specific staff or funding to provide such services.

22. It has been the experience of DOJ that it needs the flexibility on occasion of being able to shift attorneys and support staff from one unit to another to help with a major case. Some might argue that taking consumer protection litigation functions out of DOJ would hamper the state's ability to prosecute major consumer protection actions. On the other hand, DATCP could manage such situations by retaining outside counsel as DOJ did with the tobacco litigation, or by making use of the authorization DOJ would still have under the bill to furnish legal services upon the request of DATCP. Further, it could be argued that consolidating all consumer protection staff and resources in one agency could maximize state resources available to undertake a major investigation and prosecution of consumer protection violations. Consolidation could be viewed as reducing the likelihood of two agencies duplicating investigations and ensuring that an agency's investigative priorities also received prosecutorial priority.

23. In his March 19, 2001, comments before the Joint Committee on Finance, the Attorney General indicated that the proposed transfer of consumer protection operations from DOJ to DATCP was unconstitutional. Article VI, Section 3, of the Constitution provides that, "the powers, duties and compensation of the treasurer and attorney general shall be prescribed by law." DOJ maintains, however, that Article VI, Section 3, of the Constitution does not give the Legislature unlimited power to eliminate or transfer the Attorney General's core constitutional powers and duties. DOJ points to the first law prescribing the duties of the Attorney General as indicative of the Constitutional framers' intent as to the powers of the Attorney General. That law provided that, "the attorney general shall appear for the state, and prosecute and defend all suits and proceedings civil or criminal, in the Supreme Court, in which the state shall be interested or a party; and shall also when requested by the Governor or either branch of the legislature, appear for the people of this state, and prosecute or defend in any other court, or before any officer, in any cause or matter, civil or criminal, in which the people of this state may be a party or interested." DOJ maintains that the Legislature's power to prescribe the statutory duties of the office of the Attorney General is constrained by the fact that the state constitution vests in the Attorney General the role of chief legal officer for the state. DOJ officials have indicated that moving the enforcement of consumer protection laws in the courts (the prosecutorial function) from the Attorney General to DATCP could merit litigation.

24. Staff of the Legislative Council was asked to address the Attorney General's comments. The Legislative Council staff indicated that the Wisconsin Supreme Court has consistently interpreted Article VI, Section 3, of the Constitution to mean that the scope of the Attorney General's authority is prescribed in the statutes and is not to be found in other sources such as the common law or any notion of inherent authority. According to the Legislative Council staff, as recently as State v. City of Oak Creek, a legal decision from last year, the Supreme Court held that, "the attorney general's constitutional powers are equivalent to his statutory powers--they are one and the same", that is, the Attorney General's constitutional powers are what the Legislature prescribes by statute.

25. Under the bill, district attorneys (DAs), instead of DOJ, would be authorized to file

complaints and prosecute actions before DATCP concerning unfair methods of competition in business or unfair trade practices in business. DOJ indicates that these types of cases vary from cases having a strictly local impact, to cases with statewide importance.

26. One might expect that when DAs have to weigh where to use prosecutorial resources, they might tend to favor more serious criminal cases and cases of local importance, to cases with a greater statewide impact but less significance for the DA's county. As a result, one might expect statewide cases of unfair methods of competition in business and unfair trade practices in business to receive less attention if the Governor's recommendation was adopted. On the other hand, some might argue that the state would now have the resources of 71 DA offices statewide to apply and give greater attention to such statewide cases.

ALTERNATIVES TO BASE

1. Approve the Governor's recommendation to transfer \$808,700 GPR and 9.3 GPR consumer protection positions annually (4.8 attorneys, 2.0 consumer protection investigators, 1.0 legal secretary, 1.0 paralegal and 0.5 legal assistant) from DOJ's Division of Legal Services to DATCP. In addition, approve the Governor's recommendations for statutory changes concerning consumer protection legal services and the transfer of consumer protection assets, liabilities, incumbent employees, tangible personal property, pending matters, contracts, contract responsibilities and rule making authority from DOJ to DATCP.

2. Maintain current law.

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