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agreement provided a number of ways for C & S to protect itself against nonpayment of chargebacks by Hamilton. Finally, the court stated that if C & S could demonstrate that remaining a party to the contract with Hamilton would place it at unreasonable risk, then the bankruptcy court could protect C & S from future defaults.

The court based its conclusions on public policy considerations and noted that this type of credit card merchant agreement was very common among all types of retail businesses. Therefore, if these agreements could not be assumed by a trustee in bankruptcy, it would be virtually impossible for a struggling retail store to financially rehabilitate itself. The court thus held that the credit card merchant agreement was not a contract to extend financial accommodations and therefore was not one which the bank could terminate upon a bankruptcy filing. ♦

— *Thomas Melody*

## State Consumer Protection Agency May Regulate Correspondence from Out-of-State Solicitors

In *Consumer Protection Div. v. Outdoor World Corp.*, 603 A.2d 1376 (Md. Ct. Spec. App. 1992), the Maryland Court of Special Appeals held that the Maryland Consumer Protection Agency could regulate communications sent to state residents that violated the Consumer Protection Act ("Act"). The court held that the Maryland Consumer Protection Agency could not limit or control high pressure sales practices that occurred entirely outside its borders.

### *Vague Prize Notices and High Pressure Sales Tactics*

Outdoor World Corporation

("OWC"), a Pennsylvania Corporation, sold memberships in campgrounds it owned in Pennsylvania and Virginia. Through the mailing of notices to Maryland residents, OWC solicited sales of campground membership. OWC began soliciting Maryland residents in 1984, and in the ten month period from November 1988 to September 1989, mailed approximately six million notices. The notices, however, contained alias corporate names and never mentioned OWC or the campsites. Instead, the notices stated that the recipient had definitely won at least one prize from those listed in the notice and alluded that the recipient could win or already had won a very valuable prize. However, in order to claim the prize, the "winner" had to appear at a particular location, invariably an OWC campground.

When the "winners" arrived at the campgrounds, OWC required them to take a campground tour before receiving the prize. Furthermore, throughout the visit, the OWC salesmen subjected the consumers to a lengthy and aggressive sales pitch designed to induce them to purchase a campground membership. The tour and sales pitch lasted almost a full day. Additionally, when OWC finally awarded the prizes, they were generally of little value and often required payment of a redemption fee.

Approximately 43,000 Marylanders visited OWC sites since 1986 and about 5,000 of them purchased campsite memberships, garnering OWC about \$60,000,000.

### *State Agency Charges Seller*

In May 1989, Maryland's Consumer Protection Division ("Division") charged OWC with false and misleading solicitations, and unfair and deceptive sales tactics in violation of the Act. MD. CODE ANN., COM. LAW §13-301 et. seq. (1991).

The first charge concerned the content of the notice sent to Maryland residents. The Division alleged that OWC failed to mention the tour requirement, the redemption fees, the

value of the prizes, the odds of winning, and the membership scheme. Furthermore, the Division stated that the use of aliases gave the false impression that OWC had particular sponsors or affiliations.

The second charge concerned OWC's conduct at the campsites. The Division asserted that OWC's statements regarding campground facilities, membership price, and membership contracts were misleading and deceptive. The Division also contended that the length of the tour violated the Act.

The Chief of the Division adopted the hearing officer's conclusion that OWC committed all the violations for which it was charged and entered a final administrative order. The injunctive portion of the order placed restrictions on the tours and high pressure sales tactics exercised at the campgrounds. It also provided that those who paid a redemption fee would get a full refund and that those who had received a redemption certificate, but had not yet paid, were entitled to collect their prizes without payment. Under the order, OWC would provide lists and funding for the Division to notify the consumers of their respective rights and refund the required amounts. Furthermore, the injunctive order required that future correspondence sent to Maryland residents must comply with the Act.

The restitution portion of the order allowed any Maryland resident who purchased a membership after 1984 to rescind the contract and receive a refund. However, to qualify for the refund, the Maryland consumer must have visited a campground in response to a mail solicitation and gone on a tour or listened to a sales presentation to obtain a prize.

OWC appealed the order to the Circuit Court for Baltimore. The circuit court held that the final order exceeded the Division's jurisdiction because the conduct it sought to regulate occurred entirely out-of-state. Despite acknowledging that the notices were mislead-

ing, the circuit court concluded that the high-pressure sales tactics, rather than the notices themselves, caused the residents to purchase memberships. The court vacated the entire order. The Division appealed the circuit court ruling to the Court of Special Appeals of Maryland.

### *Illegal Solicitations Subject to Regulation*

The appellate court found the notices misleading and consequently analyzed whether the Division could regulate them. Since most of the false and misleading conduct transpired outside Maryland, the court questioned the state's ability to control the notices. The court also considered to what extent the Division could regulate the out-of-state conduct that made the solicitations defective.

OWC argued that the regulations were invalid if they affected out-of-state conduct because Maryland lacked the power to control conduct occurring within other states. The court disagreed, holding that the Division could regulate any notices sent to Maryland residents which violated the Act, even if those notices originated out-of-state. After finding the notices misleading, the court held that the Division could regulate them.

Although the Division could regulate the communications sent into Maryland, the court opined that any attempt to control the sales promotion efforts or the redemption scheme, both of which occurred entirely outside of Maryland, was an impermissible intrusion on out-of-state conduct.

### *Restitution Allowed to Extent Consumer Relied on Notice*

The Division argued that the Act allowed restitution for consumers' damages which occurred "in connection with" a violation of the Act, and that OWC's sales activities were "in connection with" such illegal solicitations. Therefore, the Division wanted the court to order OWC to pay restitution for the entire transaction in each case.

The court, however, rejected this argument. The court relied on *Consumer Protection v. Consumer Publishing*, 501 A.2d 48 (Md. 1985), which held that while proof of actual reliance was not necessary to justify a general restitution provision, actual restitution could be ordered only for consumers who stated that they were deceived by and relied on the offending communications.

The appellate court stated that since the notice here made no mention of campsites or memberships there was a very remote possibility that a Maryland resident purchased a campsite membership in reliance on the solicitation. The court thus concluded that the sales tactics were not sufficiently "in connection with" the notices and consequently precluded restitution for the purchases.

However, despite refusing to order restitution for the membership purchases, the court determined that some relief could be ordered. The court held that the Division could require OWC to refund an amount equal to the cost of the trip to Marylanders who claimed that, without ultimately purchasing a membership, they visited OWC campgrounds in reliance on a notice which violated the Act. Marylanders who did purchase a campground membership, however, would not be eligible for this refund. The court also held that the Division could order OWC: (1) to refund all redemption fees charged to obtain the prizes, or (2) to pay the value of prizes to those persons currently holding certificates of redemption who OWC also misled into thinking the prizes would be awarded unconditionally upon their arrival at the campsites.

### *Lower Court Order too Far-reaching*

The appellate court thus held that the lower court erred in striking the Division's entire administrative order because Maryland could regulate communications, such as OWC notices, which violated the Act. However, the court upheld the earlier dismissal of the order attempting to regulate practices

that occurred completely outside Maryland. Finally, the court concluded that OWC could be ordered to refund travel costs and redemption fees to those residents who relied on the notices in travelling but who did not purchase campground memberships. ♦

— Peter McNamara

## Attorneys Must Disclose Potential Conflicts of Interest in Multi-Party Representation

In *Eriks v. Denver*, 824 P.2d 1207 (Wash. 1992), the Washington Supreme Court held that attorneys must disclose potential conflicts of interest between clients they represent to avoid violating the Code of Professional Responsibility ("Code"). The court also found that a breach of professional responsibility may require an attorney to reimburse clients for fees paid, plus prejudgment interest.

### *Attorney Represents Both Investors and Promoters*

In 1977, Cliff Johnson, Percy Goodwin, and others ("promoters") sold tax shelter investments in master sound recordings. By 1981, the Internal Revenue Service ("IRS") challenged various tax credits and deductions taken by the investors of the tax shelters. These challenges to the tax shelter caused the promoters to create the Master Recording Trust Fund ("Fund"), a joint legal defense fund for promoters and investors who contributed to the fund. The promoters then hired attorney William Denver ("Denver") to represent all the members of the fund.

Prior to undertaking the joint representation of the Fund contributors, Denver knew that the IRS might disallow the investors' tax credits and deductions. Furthermore, he realized that if