

OPINION NO. 73-089

Syllabus:

Prosecuting attorneys do not have the authority to institute actions under R.C. 1345.07 to enforce the Consumer Sales Practices Act.

To: Stephen M. Gabaiac, Summit County Pros. Atty., Akron, Ohio
By: William J. Brown, Attorney General, September 7, 1973

I have before me your request for my opinion which asks "whether prosecuting attorneys have the ability to institute and prosecute actions for violations of the Consumer Sales Practices Act under Section 1345.07 of the Ohio Revised Code." R.C. 1345.07 authorizes the Attorney General to bring civil actions to enforce the Consumer Sales Practices Act. R.C. 1345.07 provides in pertinent part:

(A) The attorney general may, and in consumer transaction cases referred to him by the director of commerce, shall:

(1) Bring an action to obtain a declaratory judgment that an act or practice violates section 1345.02 or 1345.03 of the Revised Code, or to enjoin a supplier who is violating or threatening to violate such sections. On motion of the attorney general, or on its own motion, the court may impose a penalty of not more than five thousand dollars for each day of violation of a temporary or permanent injunction issued under this section.

(2) Bring a class action under Civil Rule 23, * * *.

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(F) On motion of the attorney general and without bond, in the attorney general's action under this section, the court may make appropriate orders, * * *.

(C) Any moneys or property recovered by the attorney general in an action under this section not paid to consumers shall become unclaimed funds. * * *

(D) No action may be brought by the attorney general under this section to recover for a transaction more than two years after the occurrence of a violation.

(E) If a court determines that provision has been made for reimbursement or other appropriate corrective action, insofar as practicable, with respect to all consumers damaged by a violation, or in any other appropriate case, the attorney general, with court approval, may terminate enforcement proceedings brought by him upon acceptance of an assurance. * * * (Emphasis added.)

In my opinion, analysis of the language of R.C. 1345.07 clearly evidences the intention of the General Assembly to grant only to the Attorney General the authority to bring an action for violation of the Consumer Sales Practices Act.

The statutory scheme for governmental enforcement of the Consumer Sales Practices Act makes reference only to civil actions brought by the Attorney General. Only the Attorney General and the Director of the Department of Commerce are directed by R.C. 1345.03 to bring violations of the Consumer Sales Practices Act to the attention of the agencies having supervisory authority over such suppliers. In addition to the exclusive references to the Attorney General in the governmental enforcement provisions of R.C. 1345.07, the provisions creating private rights of actions in R.C. 1345.09 and 1345.10 refer to governmental enforcement only by the Attorney General.

If the General Assembly had intended that county prosecutors also have the authority to bring civil actions under Section 1345.07 of the Act, then it could very easily have granted this authority expressly. The general rule of statutory construction provides that when a statute directs a thing to be done in a specified manner, it may not be done by other means or in a different manner. See Cincinnati v. Boettinger, 105 Ohio St. 145, 137 N.E. 6 (1922); Heath v. Licking Co. Regional Airport Auth., 16 Ohio Misc. 69, 237 N.E. 2d 173 (C.P. 1967).

Comparison of the Consumer Sales Practices Act with two other statutory schemes for consumer protection indicates that where the General Assembly intends for county prosecutors to institute court actions, such authority has been expressly provided. R.C. 2011.42, dealing with fraudulent advertising, provides:

Whenever a prosecuting attorney believes from evidence satisfactory to him that any person, firm, corporation, or association, or agent or employee thereof, has repeatedly engaged in any act or practice prohibited by section 2911.41 of the Revised Code, he may bring an action in the name and on behalf of the state, against such person, firm, corporation, or association, or agent or employee thereof, to enjoin permanently such person, firm, corporation, or association, or agent or employee thereof, from continuing such acts or practices. In said action, upon a hearing on the merits, an order or a judgment may be entered awarding the relief applied for or so much thereof as the court finds proper. (Emphasis added.)

R.C. 925.59, dealing with prepacking of fruits and vegetables at the retail store level, provides:

The Attorney general, prosecuting attorney or city attorney to whom the director of agriculture reports any violation of section 925.51 to 925.60, inclusive, of the Revised Code, shall cause appropriate proceedings to be instituted in the proper court without delay and to be prosecuted in the manner required by law. Certificates of inspection issued by licensed inspectors of the department of agriculture are prima facie evidence of the facts contained therein in any of said courts. (Emphasis added.)

Comparing R.C. 1345.07 with the enforcement schemes in R.C. 2911.42 and 925.59, it is clear the General Assembly established a centralized procedure for governmental enforcement of the Consumer Sales Practices Act, whereas R.C. 2911.42 and 925.59 established decentralized and multi-level, enforcement schemes.

Analysis of the statutory powers and duties of the prosecuting attorneys and the Attorney General supports by construction of R.C. 1345.07. R.C. 309.08, describing the general powers and duties of the prosecuting attorney, provides:

The prosecuting attorney may inquire into the commission of crimes within the county and shall prosecute, on behalf of the state, all complaints, suits, controversies in which the state is a party and such other suits, matters, and controversies as he is required to prosecute within or outside the county, in the probate court, court of common pleas, and court of appeals. In conjunction with the attorney general, such prosecuting attorney shall prosecute cases arising in his county in the supreme court. In every case of conviction, he shall forthwith cause execution to be issued for the fine and costs, or costs only, as the case may be, and he shall faithfully urge the collection until it is effected or found to be impracticable to collect, and shall forthwith pay to the county treasurer all monies belonging to the state or county which come into his possession.

Thus, R.C. 309.08 authorizes prosecuting attorneys to prosecute criminal actions within their jurisdiction. Nothing in R.C. 309.08 purports to authorize prosecutors to institute civil actions in the name of the state where such authority has been conferred upon some other public official. It has been settled law in Ohio that absent a specific statute authorizing a prosecuting attorney to institute such a civil action, he has no such authority.

In State ex rel. Schwartz v. Turstein, 4 Ohio C.C.2d 260, 2 Ohio C. Dec. 530 (1950), aff'd, 30 O.P.2d 275 (Sup. Ct. 1893), the court held that where money is illegally drawn from the county treasury, the prosecuting attorney was not authorized in the absence of a specific statute authorizing him to do so, to bring a civil action in the name of the State to recover such money. The court further stated that the board of county commissioners, the financial representatives of the county, is the only body which has the authority to sue for and recover all sums of money due the county unless a statute specifically imposes that duty upon, or gives that right to, some other officer or person.

The Turstein court came to this conclusion notwithstanding a specific statutory grant of authority to the county prosecutor to prevent the misapplication of county funds (R.C. 1277), in addition to the prosecutor's general grant of authority in the statutory section defining his duties (R.C. 1273, which is the predecessor R.C. 309.02, quoted above).

The Turstein rationale is applicable to the question that you have posed with regard to authority of county prosecutors to bring civil actions under R.C. 1345.07. The general powers of the county prosecutors under R.C. 309.08 must be read in light of specific statutory authority given to other officials. R.C. 1345.07 gives enforcement authority only to the Attorney General and not the county prosecutor.

In conclusion, upon examination of the above cited sections of the Revised Code and pertinent judicial decisions, I conclude that where specific statutory authority to bring civil actions to enforce a state law is granted solely to the Attorney General, the county prosecutors do not have the power or authority to institute civil actions to enforce such a law.

Therefore, in specific answer to your question, it is my opinion and you are so advised, that prosecuting attorneys do not have the authority to institute actions under R.C. 1345.07 to enforce the Consumer Sales Practices Act.