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Recommended Citation
Richard A. Givens, Comment: Roadblocks to Remedy in Consumer Fraud Litigation, 24 Case W. Rsrv. L. Rev. 144 (1972)
Available at: https://scholarlycommons.law.case.edu/caselrev/vol24/iss1/7
COMMENT

Roadblocks to Remedy in Consumer Fraud Litigation

Richard A. Givens*

Although tremendous public attention is paid today to substantive rules governing consumer transactions, present procedures often make effective action to remedy violations of these rules extremely difficult. The resulting lack of enforcement injures both consumers and competitors of those who are allowed to continue their violations.

Some possible methods of altering the rules which govern enforcement of private actions, such as the consumer class action, have received extensive attention elsewhere.1 It is therefore important to focus on the barriers to effective governmental action and to assertion of consumer defenses in collection suits.

I. PUBLIC ENFORCEMENT ACTION

A. Criminal Enforcement

The public enforcement weapon which carries the greatest deterrent effect is criminal prosecution. State criminal laws, however, are rarely used against consumer fraud, in part because of the competing pressure of violent crimes on prosecutorial time and in part because of the limited scope of state statutes, which in general derive from larceny rather than fraud concepts.2 Consequently, the

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2 E.g., N.Y. PENAL LAW § 155.05 (McKinney 1967). This section has been criticized by the Coordinating Committee for Consumer Protection of the Greater New York Metropolitan Area, consisting of 31 state, federal, and local consumer protection agencies, which urged adoption of an approach similar to that of the federal mail fraud statute. See Want it Easier to Convict in Cheat Cases, New York Sunday News, Sept. 26, 1971, at 88. The problems presented in applying a statute based on a larceny con-
federal criminal fraud provisions are primary tools of public enforcement.

The most effective and most used weapon against criminal fraud upon consumers is the federal mail fraud statute. This section makes it a crime, punishable by up to five years' imprisonment and a $1,000 fine, to use the mails to execute or attempt to execute "any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises." 4

The federal mail fraud statute contains a number of prosecutorial advantages. It is not necessary under this section that the defendant have mailed anything personally. It is enough if the action taken would normally have led to a mailing, and one in fact occurred. 5 Nor is it necessary that the mailing contain false or deceptive material. It is sufficient if the mailing serves to further a fraudulent scheme in a significant respect, as through collection of bills on sales obtained through misrepresentation. 6

The statute has the crucial advantage of applying to any form of deliberately practiced fraud, and to most fraudulent schemes of any consequence, since it is usually impossible for such schemes to avoid using the mails. Actual loss is not an element, so that success of the scheme need not be shown; 7 nor is the amount obtained at issue, there being no need to establish that the perpetrator of the

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4 The latter language was added by a 1909 amendment to insure coverage of fraud involving a misrepresentation of intent regarding future conduct (false promises). Act of March 4, 1909, ch. 321, § 215, 35 Stat. 1130.


7 See Adjmi v. United States, 346 F.2d 654 (5th Cir.), cert. denied, 382 U.S. 823 (1965).
fraud gained personally by the act. Further, the statute focuses on the conduct and intent of the defendant rather than on the present status of particular victims; hence prosecution cannot be defeated by a recompensation of victims.

The federal mail fraud statute, however, also contains several defects which limit its effectiveness. There is no provision for injunctions prohibiting violation of section 1341 either prior to trial or as part of a judgment. This absence of adequate remedy contrasts with the authority for preliminary and final injunctive relief under other federal statutes which also provide criminal penalties, such as the Fair Labor Standards Act and the laws against securities fraud.

Lack of ability to obtain injunctive relief may have had a significant negative impact in a recent mail fraud case. Evidence in that case indicated that approximately 30,000 people each year were subjected to a fraudulent scheme in which many received telephone calls offering "free" health services at defendants' clinic. After an initial examination, some patients were shown x-rays by clinic staff members and told that they needed a series of 80 treatments costing six dollars each. Those who contracted for services but failed to pay often received dunning notices that the "U.S. Credit Rating and Reporting Agency" would notify their landlords and employers and that a judge would declare them "GUILTY." Testimony at the trial indicated that the operation continued and even expanded after the indictment was obtained. Though cognizant of evidence indicating that fraud was being perpetrated pendente lite, the trial court nevertheless held that injunctions could not be issued in criminal

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8 See Butler v. United States, 53 F.2d 800 (10th Cir. 1931); Calnay v. United States, 1 F.2d 926 (9th Cir. 1924).
9 The absence of an express statutory provision for injunctive relief is particularly critical because of a judicial reluctance, erroneous or otherwise, to use general equity powers to enjoin criminal acts. Although the Supreme Court in In re Debs, 158 U.S. 584 (1895), sanctioned the use of injunctions against alleged criminal acts where the general welfare of the citizenry had been threatened, equity courts have rarely enjoined criminal acts. See Annot., 91 A.L.R. 315 (1934), and Annot., 40 A.L.R. 1145 (1926).
cases, and that no action could be taken by way of revocation of bail or otherwise until the case had been tried. Furthermore, after conviction, the principal defendant was released on bail pending appeal based on assurances that he would terminate the business, but evidence in connection with a post-conviction motion indicated that he had continued in business while on bail pending appeal.

An additional problem impairing effective public enforcement stems from the fact that federal criminal statutes at present provide little authority for the judge to order restitution as part of a sentence. Hence, victims who are unable to finance a civil suit to recapture lost property often go without relief. Although defendants in criminal cases do occasionally offer to make restitution to their victims, this generally occurs only in exchange for consideration of a more lenient sentence. Thus, in cases where the court is unwilling to impose a more lenient sentence, there is no way to obtain restitution. For example, in the previously mentioned consumer fraud case, a more lenient sentence was sought in return for making restitution to the victims. The Government successfully resisted such a compromise, arguing that an adequate sentence was more important. Adequate sentencing and restitution, however, are not in theory mutually exclusive, and, where both are justified, the courts should not have to choose between the two.

Several changes in criminal laws applicable to consumer fraud are suggested in the proposed Federal Criminal Code prepared by the National Commission on Reform of Federal Criminal Laws.

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13 See Brief for the United States at 7-8, Zovluck v. United States, 448 F.2d 339 (2d Cir. 1971).
14 Zovluck v. United States, 448 F.2d 339, 342 (2d Cir. 1971).
15 Under federal probation statutes a defendant may, however, be required to make restitution to the victim as a prerequisite to probation. See 18 U.S.C. § 3651 (1958).
16 Federal courts and most states recognize that the owner of property or money which has been the subject of a crime may bring a civil action to recover his loss. See, e.g., Rosenberger v. Northwestern Mut. Life Ins., 182 F. Supp. 633, 636 (D. Kan. 1960).
17 Sometimes the idea of restitution as a factor justifying a more lenient sentence is suggested by the defendant through the probation officer. In other cases it may be brought up by the defendant or his attorney in open court at the time of sentencing. It may also be raised after sentence by way of a motion to reduce. In rare cases, the judge will ask the defendant or defense attorney whether the defendant intends to make restitution, with the obvious implication that this might have an effect on sentence. Such bargaining is, of course, helpful to individual victims, but detrimental to the interest of the public in deterring and preventing conduct injurious to the public. See Hearings on Reform of the Federal Criminal Laws Before the Subcomm. on Criminal Laws and Procedures of the Senate Comm. on the Judiciary, 92d Cong., 2d Sess., pt. III (B), at 1555 (1972).
18 The proposed Code has been under study since 1971. See generally, Hearings on
It would replace the mail fraud statute with a federal theft statute, defining schemes to defraud as one type of theft.\textsuperscript{19}

Critics have argued that the Code would eliminate the simplicity of the long judicially construed and succinct language of the mail fraud statute prohibiting any "scheme or artifice to defraud," and that Code sections 1732 and 1741(a) would replace it with a long and complicated definition of fraud as one form of larceny. The latter would specifically exempt "puffing" which would not deceive "ordinary" persons in the group addressed. This exemption might make it more difficult to prosecute schemes specifically designed to deceive the unsophisticated.

A possible alternative to the Code provision is a proposal for legislation which would retain the full thrust of the present mail fraud statute, but which would expand remedies available to the court to include injunctive relief as part of a sentence in appropriate cases, as well as the right to require restitution to victims.\textsuperscript{20}

In spite of these shortcomings, the proposed Code contains several other changes which could represent important improvements in the federal mail fraud statute. Whereas the fine under the mail statute is presently limited to $1,000, the National Commission on Reform of Federal Criminal Laws has recommended that fines be permitted up to twice the amount gained by a defendant or lost by a victim in connection with a crime. The proposed Code also expands the jurisdiction of the mail fraud statute to cover use of any instrumentality of interstate commerce, including the mails. This would alter the present situation where even extensive use of intrastate telephones, which are part of an interstate network, may not be covered. Some fraudulent operators have been known to go to great lengths to avoid use of the mails in order not to be subjected to a statute proscribing schemes to defraud, preferring to be limited only by local larceny laws. Extension of jurisdiction, granting of injunctive powers, and authority to require restitution, as well as the institution of a higher maximum fine level


\textsuperscript{20} Cf. S. 1, 93d Cong., 1st Sess. § 2-8D5 (1973). See also COMM. ON FED. LEGISLATION OF THE NEW YORK COUNTY LAWYERS ASS'N, REPORT ON THE PROPOSED NEW FEDERAL CRIMINAL CODE, 18, 29 (Aug. 17, 1971); HEARINGS ON REFORM OF THE FEDERAL CRIMINAL LAWS, supra note 18.
would go far toward strengthening effectiveness of federal criminal laws against consumer fraud.

In addition to possible changes contained in the proposed Federal Criminal Code, revisions of state statutes could do much to enhance the effectiveness of state consumer protection. For instance, state adoption of anti-fraud provisions comparable to mail fraud, rather than statutes based on larceny concepts,\(^2^1\) would strengthen the ability to control fraud.

The drawbacks stemming from larceny prosecutions are manifold. First, the focus in a larceny prosecution is on loss to an individual. Hence the victims must be named, and, if they can be given refunds, threatened with harsh collection action, or otherwise induced not to testify for the prosecution, the case may be lost.

Second, for the same reason, the scheme must be proved successful for the prosecution to prevail. The amount of money lost by each individual rather than the fraudulent intent of the defendant becomes the focus of the trial. To establish significant amounts, many more witnesses must be located and called, and both the investigation and trial become far more complex and time-consuming. In certain circumstances the prosecution may fail only because the effect of false representations on the monetary value of an item is difficult to prove.

Third, the focus of the entire proceeding and of the jury is on the question of “theft,” which has an entirely different psychological effect than a focus on the true crime involved — a deliberate “scheme to defraud.” When the crime is classified as theft, it is implicitly downgraded in importance in the mind of the prosecutor as well as the jury and the sentencing judge. As a theft, it must compete with other thefts being tried, and will presumably be ranked in importance on the basis of that magic talisman — the monetary amount involved in the crime against each individual. The aggregate monetary impact on the public of a large-scale scheme, which cannot be shown without calling large numbers of otherwise unnecessary witnesses, is likely to be ignored.

Fourth, in the event of conviction, the theft concept tends to direct attention to “paying back the money,” by making restitution to particular victims rather than deterring practices inimical to the public and to legitimate business.\(^2^2\) And finally, some state larceny

\(^{2^1}\) See note 2 supra.

\(^{2^2}\) See text accompanying notes 15-17 supra.
laws contain special requirements imposing a higher degree of proof than is necessary for other crimes.\textsuperscript{23}

Thus, for a number of reasons, including improvements in procedural and evidentiary rules, adoption of the federal approach under state law would enhance the effectiveness of state fraud prosecution.

B. Civil Enforcement

Public enforcement of civil anti-fraud provisions is presently beset with procedural difficulties at both the state and federal levels. First, the failure of many states to provide adequate sanctions for violations of court orders has seriously undermined the effectiveness of injunctive relief. For example, under the New York Judiciary Law, fines for contempt of state court orders entered as a result of injunctive proceedings against consumer fraud are limited to $250 for each violation.\textsuperscript{24} Because this fine proved inadequate to deter violations of state court injunctions, the Taylor Law, establishing a new approach in the field of public employee labor disputes, provided larger penalties for contempt of court violations by striking public employees.\textsuperscript{25} By contrast, under federal law there is no limit on the amount of fines which can be levied for contempt.\textsuperscript{26} There are presently, however, no general federal statutes which specifically authorize injunctive proceedings against consumer fraud.

Not only are the sanctions for violations of injunctive enforcement orders inadequate, but substantial procedural obstacles to the effective federal enforcement of civil anti-fraud provisions also exist. The Federal Trade Commission Act (FTCA), the primary source of federal civil consumer protection, authorizes the Commission to obtain cease and desist orders against unfair or deceptive

\textsuperscript{23} This higher standard sometimes derives from a belief that evidence of intent to defraud must always be circumstantial, and that convictions resting on circumstantial evidence must be held to a higher burden of proof. Such a requirement, however, is not mandated by policy or precedent. Frequently, admissions of a fraudulent seller to his employees or others are admissible as direct evidence. Further, the Supreme Court has held that in Federal cases there is no distinction between the burden of proof in cases depending on circumstantial evidence and in cases involving so-called "direct" evidence. \textit{See} Holland v. United States, 348 U.S. 121, 139-40 (1954); United States v. Woodner, 317 F.2d 649, 651 (2d Cir. 1963).

\textsuperscript{24} N.Y. JUDICIARY LAWS § 753 (McKinney 1968).

\textsuperscript{25} N.Y. CIV. SERV. LAW § 200 (McKinney Supp. 1972).

\textsuperscript{26} Thus, in United States v. United Mine Workers, 330 U.S. 258 (1947), affg and modifying 70 F. Supp. 42 (D.D.C. 1946), a $700,000 fine was levied against the UMW on grounds of refusing to end a walkout in contempt of a federal court order.
acts or practices in commerce.\textsuperscript{27} Procedures required by the Act, however, have often created delays in enforcement. The Commission’s orders, for instance, become effective only after all appeals from the order have been completed, including review by the court of appeals and the denial of a petition for certiorari to the United States Supreme Court.\textsuperscript{28} Moreover, even if a petition for review of the order is not filed, the order will not be final until the expiration of the 60 day period allotted for appeal.\textsuperscript{29} Thus, because an appeal will further protract the date of compliance, the alleged violator is encouraged to use appellate procedures as a delaying tactic.\textsuperscript{30} As an additional procedural shortcoming, the FTCA encourages forum-shopping: a party found to be in violation of the law can appeal to any judicial circuit in which the appellant does business, resides, or allegedly committed the violation. These procedural advantages to respondents in FTC cases contrast sharply with private suits where injunctions are effective immediately, unless a stay is obtained,\textsuperscript{31} and where the losing party cannot select the appellate forum.

Even after a Commission order is final, rapid enforcement is not always possible. Under the Federal Trade Commission Act, FTC cease and desist orders, unlike injunctions, are not punishable by contempt, even when they become final. Rather, a separate civil penalty action must be instituted. This action results in monetary penalties, in an amount no greater than $5000 for each violation, unless a separate injunction based on violations of the Commission’s order is obtained.\textsuperscript{32} This procedure can be quite time-consuming.

In defense of retaining the present approach rather than allowing injunctions, it can be argued that giving Commission orders the effect of an injunction would make it more difficult to obtain con-

\textsuperscript{28} Id. § 45 (g).
\textsuperscript{29} Id.
\textsuperscript{30} The length of some delays has become notorious. See, e.g., Holland Furnace Co., in which the complaint was issued by the Federal Trade Commission in 1954. 55 F.T.C. 91 (1958), \textit{appeal on jurisdictional issues denied sub nom.} Holland Furnace Co. v. F.T.C., 269 F.2d 203 (7th Cir. 1959), \textit{cert. denied,} 361 U.S. 952 (1960), \textit{appeal on merits denied,} 295 F.2d 302 (7th Cir. 1961). Criminal contempt proceedings finally resulted in conviction of the corporation and three officers some 11 years later. \textit{In re} Holland Furnace Company, 341 F.2d 548 (7th Cir. 1965), \textit{cert. denied as to company,} 381 U.S. 924 (1965), \textit{cert. granted as to respondent Cheff sub nom.} Cheff v. Schnackenberg, 382 U.S. 917 (1965), \textit{aff'd,} 384 U.S. 373 (1966).
sent orders in appropriate cases. This problem could be obviated, however, by providing that the Commission may waive the effect of the order as an injunction where it determines that it is in the public interest, and limit the effect of the order to authorizing civil penalties.

Attempts by local jurisdictions to fill gaps in consumer legislation often create further problems. On the one hand, members of the business community complain in many instances of the inconsistencies among many overlapping state and local regulations. On the other hand, state and local spokesmen sometimes oppose national regulation if federal preemption of state and local initiative may result, a consequence which would run directly counter to the national thrust of encouraging greater responsibility at the state and local levels of government. These conflicts might be overcome through an integration of state, local, and federal enforcement by empowering state and local authorities to enforce uniform federal laws.

C. Local Enforcement of Federal Consumer Laws

Experience with consumer deception and fraud, especially in retail sales in the inner city, indicates that effective enforcement will in many cases require action by local authorities, in addition to possible further federal action. To that end, a federal right to enforce in state courts the Federal Trade Commission Act and any regulations33 thereunder could be considered.

In considering the possibility of using state courts to enforce federal legislation, it will be helpful to first review the development of judicial doctrines regarding state enforcement of federal law. An historical review will bring into clearer focus the relatively broad mandate which the Supreme Court has given for enforcement of a federal right in state courts.

The Supreme Court in *Clafin v. Houseman*,34 very early rejected the possible argument that the Constitution, in providing for the establishment of inferior federal courts, was meant to vest exclusive jurisdiction over cases involving federal claims in those courts. In

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33 Cf. S. 1599, 90th Cong., 1st Sess. (1967). Section 6(b) of that bill provided for suit by the United States Attorney General, any United States Attorney, or any prosecuting attorney of any state or its political subdivisions against a seller who violated the Act. Remedies included a maximum fine of $1500 in addition to recovery of the purchase price by the injured buyer. See generally, *Hearings on S. 1599 Before the Consumer Subcomm. of the Senate Comm. on Commerce, 90th Cong., 2d Sess.* (1968).

34 93 U.S. 130 (1876).
that case the Court announced in strong language that the state courts have concurrent jurisdiction with federal courts, and that a citizen may bring an action in a state court even if that action is based entirely on a federal claim.

In a series of cases, the Supreme Court extended and further defined the scope of concurrent jurisdiction. In the *Second Employers' Liability Cases*, for example, the Court declared that where Congress provided for enforcement of a federal claim in any court of otherwise competent jurisdiction, the state courts had a clear constitutional and statutory duty to hear such cases. In subsequent cases the Court maintained and strengthened its position that federal rights cannot be barred or discriminated against in state courts.

Thus it has long been clear that in "remedial" civil actions arising from federal claims, where a state court has jurisdiction over the parties and the general subject matter, the state court is constitutionally required to hear the case in a nondiscriminatory manner. Until *Testa v. Katt*, however, it was often thought that state courts were under no duty to enforce federal "penal" statutes.

In *Testa* the Court rejected the "remedial/penal" distinction. Under the Emergency Price Control Act of World War II, a buyer of products sold at a price above the established ceiling could sue to recover treble or minimum damages in any court of competent jurisdiction.

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35 233 U.S. 1 (1912). There the Court was asked to review lower court rulings on the constitutionality of the Federal Employers Liability Act, which provided for a cause of action for injuries or wrongful death of an employee as a result of the negligence of an employer-railroad engaged in interstate commerce. The Act established a standard of comparative negligence, provided that violation of a health or safety law which resulted in injury or death would be negligence, abolished the "fellow-servant" doctrine, and provided, most importantly, that actions could be brought in any court of otherwise competent jurisdiction. The state courts from which appeals were heard had declined to hear cases under these conditions, and granted summary judgment for the defendant carriers on the ground that these cases were intended to be heard in federal courts and that consequently state courts were free to decline jurisdiction. The Supreme Court rejected these contentions, holding that state courts had both a constitutional and statutory duty to hear such cases.


jurisdiction. There was also a provision for intervention by the Price Administrator in private suits for the purpose of assuring effective national enforcement of the law. The Rhode Island Supreme Court determined that the action brought under the statute was penal rather than remedial, and that one sovereign state was thus under no duty to enforce the penal laws of another. In reversing, the Supreme Court stated broadly:

For the purpose of this case, we assume, without deciding, that § 205(e) is a penal statute in the "public international," "private international," or any other sense. . . . It makes no difference into which of these categories the Rhode Island court chose to place the statute which Congress has passed. For we cannot accept the basic premise on which the Rhode Island Supreme Court held that it has no more obligation to enforce a valid penal law of the United States than it has to enforce a penal law of another state or a foreign country. Such a broad assumption flies in the face of the fact that the States of the Union constitute a nation. It disregards the purpose and effect of Article VI of the Constitution. . . .

The sole qualification of the rule set forth by the Testa Court is that the state courts are only required to exercise whatever jurisdiction they would have over cases of the same general type under state law.

One problem remaining was to what extent state courts, in hearing federal claims, are bound by the same procedural rules as federal courts. Under the FELA, Congress specifically guided the state courts by writing provisions concerning comparative negligence and the abolition of the fellow-servant doctrine. Yet, in other cases, the Supreme Court has been called upon to rule whether a particular wrinkle in the state judicial fabric would deny the remedy which Congress sought to create and protect. The Court, in Minneapolis & St. Louis Ry. v. Bombolis, first announced a rule permitting a state court to apply usual state procedure in enforcing federal claims. In this early case the Court approved a less than unanimous

41 Testa v. Katt, 71 R.I. 472, 47 A.2d 312 (1946).
42 330 U.S. at 389.
43 An interesting question which the Supreme Court has not yet considered is whether Congress can require state courts to hear federal claims where there is no analogous state-created right enforceable in the state courts. C. WRIGHT, HANDBOOK ON THE LAW OF FEDERAL COURTS § 45, at 175 (2d ed. 1970).
45 241 U.S. 211 (1916).
verdict where authorized by state law, despite the fact that this procedure was foreign to the federal courts.

The "substance-procedure" distinction, however, gradually narrowed, and Bombolis no longer appears to live beyond its facts. In Dice v. Akron, Canton & Youngstown R.R., instance, the Court reviewed the judgment of an Ohio court in an FELA case. That court had permitted the trial judge to enter judgment notwithstanding the verdict because Ohio law governed as to issues of fraud and such law provided that the judge, not the jury, should determine if fraud existed. The Supreme Court, in reversing, held that federal law applied as to fraud, and that, in any event, fraud was an issue to be determined by the jury in FELA cases. The Court further held that trial by jury of all issues was an essential part of the federal scheme. Thus it now seems clear that Congress clearly has constitutional power to control the incidents of a state trial of federal claims.

Therefore, a federal law could be enacted which would provide for uniform enforcement of the Federal Trade Commission Act or other federal consumer protection laws in the state courts. Such a statute could be limited to unfair or deceptive acts or practices, exclude unfair methods of competition, and thereby avoid conflict or overlap with the antitrust laws. The Federal Trade Commission Act could be further amended to add a new section permitting the attorneys general of the states, other state and local officials, and Commission counsel to petition or apply for injunctions against violations of the Federal Trade Commission Act in state courts of competent jurisdiction. Such an amendment could create a new right of action, and be substantive as well as procedural.

Federal law and the decisions of the Federal Trade Commission could be made the rules of decision for these state court cases. Federal law would then be followed as under section 301 of the Taft-Hartley Act, and state court decisions could be reviewed by certiorari. Without a rule of decision provision, the state courts might disregard Commission decisions and thus frustrate the policy

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46 See, e.g., Brown v. Western Ry. of Alabama, 338 U.S. 294 (1949), where the state procedure of construing a pleading strictly against the pleader was not permitted to defeat a federal right. For a discussion of the case-by-case diminution of the "substance-procedure" distinction in these reverse Erie cases, see cases cited in C. WRIGHT, supra note 43, § 45 at 174.


48 See generally C. WRIGHT, supra note 43, § 45.

of federal-state coordination. By providing that state courts treat FTC decisions as rules of decision, the proposed provision would encourage uniform enforcement. Furthermore, state limitations on contempt penalties would not apply if federal law were expressly both substantive and procedural in nature.

Federal legislation would go far toward improving the coverage and effectiveness of consumer protection, first by providing for more effective sanctions and second, by granting in explicit terms concurrent power to state and local governments to enforce federal laws, rules, and regulations. Additional federal provisions in that event would not tend to displace local enforcement, which will become more, rather than less, essential.

II. CONSUMER DEFENSE IN PRIVATE SUITS

A. The Existing Procedures

Most litigation involving allegedly abused consumers arises in the form of collection suits against those who do not pay for merchandise or services. Many default because they can no longer afford payments, and some, of course, do not pay because they wish to defraud the seller. However, about a third of those sued in collection cases claim to have been cheated in some way in the transaction.

An investigation of suits against consumers in the Civil Court of the City of New York has indicated that a significant portion of these suits are brought by a very small number of plaintiffs, many of whom sue a very large proportion of their customers. For example, one firm sued approximately one-third of its customers. Most of these suits were brought by inner-city credit furniture, jewelry, and appliance dealers; most of the remaining plaintiff-retailers brought only one or two of the suits covered in the study and sued only a very small percentage of their customers. Almost all resulted in default judgments. Similar findings have been documented by David Caplovitz in a study covering several cities.

The consumer-defendant is usually without legal representation

50 See text accompanying note 24 supra.

51 This investigation was conducted under the aegis of the New York Regional Consumer Protection Council which consists of 31 state, local, and federal enforcement agencies.

52 The results of the preliminary survey were summarized in Hearings on Debt Collection Before the New York Regional Office of the Federal Trade Commission, Sept. 1971.

53 See D. Caplovitz, Debtors in Default (1971).
in collection suits. Because the consumer's claim is frequently too small to provide an attractive contingency fee and because many victimized consumers are poor, few are able to retain attorneys to handle their claims. Yet, legal services staffs frequently lack sufficient personnel to represent all clients within the minimum prescribed income limits, and those limits exclude many who cannot actually afford counsel for consumer cases. Thus, in many instances the consumer defendant is forced to proceed pro se.

A variety of factors militates against the effective assertion of this manner of defense. Hearings conducted by the New York Regional Office of the Federal Trade Commission have indicated that an overwhelming majority of the consumers who are sued do not have a realistic opportunity to obtain a day in court. To begin with, many defendant-consumers never receive notice of the suits against them, including some who are deliberately neglected by process servers who later file false statements that summonses were served (a practice known as "sewer service"). The consumer who does receive a summons frequently does not understand it. Such lack of comprehension is merely a threshold problem, however. To avoid a default judgment, the consumer must initially appear in court to file an answer and must then return for the trial itself or any adjournment. Suits are often brought in distant locations, outside the county where the consumer resides or where the transaction occurred. Even when suit is brought in the county of residence or of occurrence, the courthouse is often difficult to find in major metropolitan areas and far from the location of the consumer's job or home. Furthermore, since court sessions are almost always held during the day, the defendant must take time off from work mere-


57 Small claims courts which do sit at night usually do not hear cases brought by corporations.
ly to say that a trial is desired—something that those who can afford counsel do not have to do. Thus, for many consumers, defending against a suit in court requires the loss of salary. Pre-litigation pressure is sometimes also applied to prevent consumers from contesting debts. Such intimidation may take the form of pressure on consumers' employers, harassment devices such as the use of tough-looking collectors, calls to children, neighbors and others, frequent calls late at night, threats of arrest, and so on.\(^5\)

Thus, despite the fact that the substantive law of most jurisdictions gives consumers a variety of significant rights, numerous procedural impediments often effectively deny aggrieved consumers their day in court.

B. Possible Changes

Apart from measures to overcome abuses in the collection process, two basic steps could greatly improve the procedural posture of consumers desiring to raise defenses of fraud or unconscionability. First, legislation could confirm and clarify the authority of presiding judges of civil courts to set aside default judgments where a pattern of abuse can be shown.\(^6\) Such authority was exercised in the fall of 1971, when Administrative Judge Edward Thompson of the Civil Court of the City of New York issued an order to show cause why a large number of default judgments obtained by Vigilant Protective Systems, Inc., a burglar alarm firm, should not be vacated and enforcement of outstanding judgments enjoined.\(^7\) The theory behind Judge Thompson's action was that the Administrative Judge of the Court had inherent jurisdiction to prevent abuses of its processes.

In 1972, legislation was introduced in the New York State Legislature\(^8\) to clarify and expressly confirm the authority of administrative judges to initiate protective orders setting aside default judgments. The landmark legislation would for the first time expressly recognize the power and duty of the courts to keep their own pro-

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\(^6\) The authority of judges to vacate judgments typically stems from a procedural rule such as 60(b) of the Federal Rules which permits a court "[o]n motion and upon such terms as are just," to vacate a judgment for any reason justifying relief. Fed. R. Civ. P. 60(b).


\(^8\) A. 10668 195th Sess. (1972) introduced by Assemblyman Field; S. 9322 introduced by Senator Langley. The bill was passed by the New York State Senate. No action, however, was taken by the Assembly.
ceedings fair by intervening where a particular litigant obtains a large number of default judgments by improper or illegal means, or where a common defense, such as fraud or unconscionability, would apply to a large number of default judgments. Under the proposed New York legislation, the matter would be referred for final decision to an appropriate judge other than the one initiating the proceedings.

Judge Thompson's action and the proposed legislation seek to eliminate the necessity of relying on the unlikely expectation that each consumer who has been denied due process will come forward. Enjoinder of judgment enforcement permits a remedy at the source of one of the worst evils — abuses of the collection process which deny the consumer his day in court. Such a remedy also acts against violators of existing law without imposing new requirements on legitimate business.

A second step toward the improvement of the consumer's procedural posture has been outlined by a New York Bar group. In an effort to attack the sources of the problems themselves, as distinct from merely supplying individualized remedies, the group has proposed the enactment of legislation which would (1) require, in addition to other methods of service of process required by state law, the mailing of notice to the consumer that suit is being filed; (2) require that the summons contain a tear-off business reply card answer, which the consumer may mail to the clerk of the court to request a trial — in lieu of making a personal appearance at the clerk's office for that purpose; (3) limit the location of suits against consumers to the county where the consumer lives or where the transaction took place; (4) have the court sit on specified nights to accommodate those who work during the day; (5) allow friends of the consumer to accompany him if he does not have counsel; (6) permit adjournments at the request of creditors and discovery proceedings only for good cause; and (7) provide adequate advance notice of the date of trial, perhaps, for example, by mail several days before trial.

Further, more systematic and determined efforts should be made by the Bar to meet its responsibility to provide counsel in these cases. The collective responsibility of the Bar is particularly clear where the legal system imposes itself on the party, the consumer

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62 The Committee on Federal Legislation of the New York County Lawyers Ass'n.
63 Proposals 1-3 were made by the Committee on Federal Legislation of the New York County Lawyers Ass'n during hearings held by the New York Regional Office of the Federal Trade Commission, and in a report on Senate Bill 1602, 92d Cong., 1st Sess. (1971). Proposals 4-7 were made by this group in the report on the Senate Bill only.
being a defendant in a lawsuit. The consumer who is sued obviously has little more choice to participate in the legal proceedings than does a defendant in a criminal case. Absence of the availability of legal assistance under such circumstances may well amount to an effective denial of due process.  

Fair representation of the disadvantaged consumer may require consideration of innovative approaches. Foundation funding, for example, might be obtained for lawyers who would represent indigent consumers.

Other, more drastic measures have been proposed. For example, it has been suggested that legal paraprofessionals, or lay advocates be permitted to advise or represent consumers in such cases. This proposal, however, has a number of readily apparent drawbacks, including: potential mishandling of cases; possible advice based on factors other than the best interests of the individual clients; lack of responsibility to the court by one not an officer of court; and erosion of the position of the Bar as the sole group that can properly conduct litigation. But if paraprofessionals are to be limited to such nonlegal duties as communicating with a creditor on behalf of the debtor's attorney, gathering facts, and so on, then the Bar will have to take further steps to meet its responsibility to provide the full range of legal services. Lawyers as a group cannot take the position that legal representation is the sole responsibility of the Bar and then default on that responsibility.

If there is unresponsiveness to the problems of indigent consumers, other still more undesirable and Draconian possibilities may eventually come about. It has been suggested by some that, regardless of the outcome of the trial, court costs be automatically levied against the plaintiff-creditor in consumer collection cases. The proceeds of these costs would then be used to establish a fund to provide counsel for defendant-consumers who cannot afford representation. This proposal, however, has the serious drawback, perhaps of constitutional dimension, of placing a tax on access to the courts, but it lingers as a possibility if not enough else is done.

Such "solutions" as permitting lay advocates in court or placing what would amount to a tax on access to the courts in certain cases might generate even more serious problems than those they purport

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to solve. But these or other drastic and possibly harmful medicines are likely to be demanded unless less onerous remedies are made to work.

III. Conclusion

Improving the procedural avenues for protection of consumers' rights under existing substantive law would be in the interest of both the consumer and the business community. This is so because consumer fraud injures both business and the public. Indeed, legitimate business suffers as severely as the public, for several reasons. Consumer fraud creates a climate of hostility injurious to the good reputation to which honest business is entitled. It also constitutes unfair competition against an honest business which does not resort to the fraudulent practices. Further, fraudulent practices create a climate in which demands for far more restrictive regulation than would otherwise be necessary are likely to be made.

During the time that a competitor is able to engage in practices found to be illegal because remedies are slow or ineffective, the other firms in the industry must either follow the same practices, with the likelihood of being challenged and subjected to potential liability of one kind or another, or not engage in the practices and be placed at a competitive disadvantage with those who continue the practices.

As much attention should be devoted to strengthening the procedural tools for enforcing the law against consumer fraud as is paid to the formulation of rules governing conduct. Otherwise, we fail to deliver what is promised, with detrimental consequences to the public, to legitimate business which wants to comply with the law but is subjected to unfair competition, and to the faith of all in our legal system.
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