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## Consumer Complaints: A Proposed Federal Trade Regulation Rule

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# CONSUMER COMPLAINTS: A PROPOSED FEDERAL TRADE REGULATION RULE

*Howard R. Lurie\**

## I. THE PROBLEM DEFINED

Equality of bargaining power in the marketplace has become a phenomenon of the past. In today's complex society the consumer is seldom able to attain the degree of awareness necessary to protect himself from unfair and deceptive practices. Long-standing legal principles premised upon the consumer's ability to become fully aware of the realities of the marketplace are therefore no longer worthy of judicial and legislative support. Moreover, it has become essential that government initiate positive programs of consumer protection.

Throughout the history of our economic system the consumer has been considered fair game. The law has reflected this attitude by compromising the interests of the consumer. One legal device after another has been created to insulate business from his grievances and claims. For example, our law has tended to categorize businessmen's false and misleading statements as mere "puffing" and "dealer's talk."<sup>1</sup> Businessmen have been allowed to limit their legal liability through contract provisions deceptively termed "guaranty" and "warranty."<sup>2</sup> Only now have we begun to question the legitimacy in consumer transactions of confessions of

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<sup>1</sup> See, e.g., *Vulcan Metals Co. v. Simmons Mfg. Co.*, 248 Fed. 853 (2d Cir. 1918), holding that statements made to the buyer of water-powered vacuum cleaners and materials and machinery for their manufacture were not unlawful misrepresentations but merely seller's "puffing." See also UNIFORM COMMERCIAL CODE § 2-313(2) which provides that "an affirmation merely of the value of the goods or statement purporting to be merely the seller's opinion or commendation of the goods does not create a warranty."

Recently enacted state and city consumer protection laws indicate that the trend may be moving away from governmental sanctioning of "puffing" and "dealer's talk" toward the imposition of civil and criminal penalties for unfair trade practices. See, e.g., MASS. ANN. LAWS ch. 93A, § 4 (Supp. 1970); NEW YORK, N.Y., AD. CODE ch. 64, § 2203d-1.0 to -8.9.

<sup>2</sup> A bill has been introduced in Congress to provide minimum disclosure and content standards for written consumer product warranties against defect or malfunction. The bill also gives the FTC broader powers over consumer activity. Consumer Protection Warranties and Federal Trade Commission Improvements Act of 1971, S. 986, 92d Cong., 1st Sess. (1971).

judgment<sup>3</sup> and the holder in due course doctrine.<sup>4</sup> Only in recent years have law schools begun to emphasize "debtors' rights" as well as "creditors' rights." Nevertheless, businessmen continue to formulate sales techniques and draft contracts and agreements of sale heavily weighted in favor of the seller, yet within the confines of the law.

In those instances where a consumer's claim is supported by the law, the costs incident to seeking an appropriate remedy in the courts are often prohibitive.<sup>5</sup> Even in a small claims court the cost of litigation may exceed the amount in controversy. Businessmen, fully aware of these facts, can therefore ignore consumer complaints with impunity. To the extent that they act on complaints of consumers, it is generally a dispensation which may just as easily be withdrawn when the whim is to do so.

Businessmen have organized themselves in a myriad of ways to further their interests. Chambers of Commerce, trade associations, credit bureaus, and even local Better Business Bureaus<sup>6</sup> all exemplify the degree to which members of the business community have become an integrated force in the marketplace. Unfortunately, consumers have generally failed to do likewise. Nevertheless, that consumers can organize and that such organizations can be effective in some respects has been demonstrated by

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<sup>3</sup> A vast majority of jurisdictions now have limited, to varying degrees, the use of confessions of judgment. Note, *Cognovit Judgments: Some Constitutional Considerations*, 70 COLUM. L. REV. 1118, 1129-30 (1970). See generally Hopson, *Cognovit Judgments: An Ignored Problem of Due Process and Full Faith and Credit*, 29 U. CHI. L. REV. 111 (1961).

The United States Supreme Court recently held that the entry of cognovit judgments was not unconstitutional per se. *D.H. Overmeyer Co., Inc. v. Frick Co.*, 40 U.S.L.W. 4221 (U.S. Feb. 24, 1972). See also *Swarb v. Lennox*, 40 U.S.L.W. 4227 (U.S. Feb. 24, 1972). The lower court opinion in *Swarb* is noted in 49 TEX. L. REV. 169 (1970) and 16 VILL. L. REV. 571 (1971).

<sup>4</sup> There is a growing body of case law, supported by UNIFORM COMMERCIAL CODE §§ 3-302(1)(b) and 3-305(2), denying holder in due course status in those transactions where the assignee finance company is closely connected with the underlying retail sale. See, e.g., *Unico v. Owen*, 50 N.J. 101, 232 A.2d 405 (1967), and cases cited in Gilmore, *The Commercial Doctrine of Good Faith Purchase*, 63 YALE L.J. 1057, 1099, n. 126 (1954).

Recent statutory enactments in New Jersey [Laws of N.J. ch. 3339 (1971)] and in New York [N. Y. PERS. PROP. LAW § 403.6 (McKinney Supp. 1970)] deny holder in due course status to all assignees of consumer paper. For a discussion of subsequent New York legislation enacted in response to business practices designed to avoid the import of denial of holder in due course status, see Legislative Note, *New York Specious Cash Sales Act*, 5 U. MICH. J. L. REF. 145 (1971).

<sup>5</sup> See, e.g., Eckhart, *Consumer Class Actions*, 45 NOTRE DAME LAW. 663 (1970), for a concise discussion of the economic realities facing the consumer who wishes to sue on his own behalf.

<sup>6</sup> Better Business Bureaus are generally formed and funded by local businessmen. P. CROWN, *LEGAL PROTECTION FOR THE CONSUMER* 80-81 (1963). See N.Y. Times, Aug. 9, 1970, at 1, col. 5.

cooperatives and such institutions as Consumers Union and its publication *Consumer Reports*.<sup>7</sup>

It is no secret that most consumers are unable to protect themselves in the marketplace, yet government assistance to the consumer is frequently unavailable. All too often the bureaus of government are interested primarily in controversies of major significance. Minor consumer complaints are viewed as an annoyance that distract and interfere with more important matters.<sup>8</sup> What must be done to protect consumers is to redress the balance of power now heavily weighted in favor of business. To do so requires that government go beyond current concepts of appropriate consumer protection and establish unorthodox remedies. One such remedy is suggested here.

## II. NATURE OF THE PROPOSAL

Very simply, the nature of the proposal made in this article is to put the coercive power of government behind each and every consumer complaint in order to compel the recipient of the complaint to respond. With the increased dependence on computers in sales and billing procedures, business has tended to become more impersonal, and the problems confronted by consumers in obtaining an adequate response to complaints have multiplied. Without governmental coercion businessmen can simply ignore, intentionally or negligently, consumer complaints—even when they are known to be valid and legitimate. Often the consumer, out of fear, frustration, or aggravation gives up in his attempt to seek redress or press a valid claim. In each such case the businessman wins in every respect: he spends nothing by failing to respond; he avoids the expense of acting on those complaints which are legitimate.

The solution to the problem is to devise a fairly simple, largely self-enforcing rule that will make it unprofitable for businessmen to ignore valid and legitimate consumer complaints. Enforcement of the rule must not require the expenditure of government funds out of proportion to the gravity of the complaint. Likewise, the

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<sup>7</sup> CONSUMER REPORTS is published monthly by Consumers Union of United States, Inc., 256 Washington St., Mount Vernon, N.Y. 10550. Consumers Union is a nonprofit organization established in 1936 deriving its income solely from the sale of its publications which carry ratings and product reports for the use of its readers.

<sup>8</sup> W. G. MAGNUSON & J. CARPER, *THE DARK SIDE OF THE MARKETPLACE: THE PLIGHT OF THE AMERICAN CONSUMER* 29-30 (1968). Senator Magnuson forcefully presents the reasons why local, state, and federal governments have been unable to curb deceptive practices and to prevent consumer exploitation. *Id.* at 26-31.

scheme must not unduly burden honest and responsible businessmen.

Hopefully, the proposed trade rule meets these criteria. In essence, the rule would make it an unfair trade practice for any person subject to the jurisdiction of the Federal Trade Commission<sup>9</sup> to refuse or fail to respond to a consumer complaint within thirty days of receiving it. A violation of the rule would constitute a violation of section 5 of the Federal Trade Commission Act<sup>10</sup> and be remedied by the issuance of a cease and desist order. Proof of a violation of the rule would be relatively easy and inexpensive. The civil penalty for violating a final order of the Federal Trade Commission is \$5,000<sup>11</sup> and, therefore, would make it rather unprofitable for any concern to continue to refuse to respond to consumer complaints.

### III. SUBSTANCE OF THE RULE

The proposed rule is set forth in full in the Appendix. It requires the recipient of a consumer complaint to respond to the consumer within thirty days by admitting or denying the validity or legitimacy of the complaint, or, where the information provided by the consumer is inadequate for the recipient to admit or deny, to request additional information.<sup>12</sup> Proof of a failure to respond is proof of a violation,<sup>13</sup> and the Commission need not become involved in the merits of the consumer's dispute with the recipient of the complaint. The threat of a civil penalty for a violation of the rule vests the consumer with considerable power to compel a response to his complaint. The rule merely requires a response; it does not compel the businessman to act on the consumer complaint even when he admits that it is valid and legitimate. However, the businessman's inaction does not go unnoted.

In addition to compelling an acknowledgement of the consumer's complaint, the rule requires the businessman to examine the complaint, render a judgment on its merits, and convey that judgment to the consumer. If he acknowledges the merits of a complaint, he must either act to meet the request of the consumer

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<sup>9</sup> As Senator Magnuson points out, *id.* at 27, the Federal Trade Commission cannot stop the deceptive practices of businesses that limit themselves to intrastate activity. This is why it is important that state and local governments adopt similar rules of consumer protection.

<sup>10</sup> 15 U.S.C. § 45 (1970).

<sup>11</sup> Federal Trade Commission Act § 5(I), 15 U.S.C. § 45(I) (1970).

<sup>12</sup> Proposed Federal Trade Commission Trade Regulation Rule Governing Consumer Complaints Received by Businessmen § 2(d).

<sup>13</sup> *Id.* § 1(a).

or notify the Federal Trade Commission that he has not done so.<sup>14</sup> If he denies the merits of a complaint, he must notify the consumer of the reason for his denial<sup>15</sup> and forward a copy of the complaint and all related correspondence to the Federal Trade Commission.<sup>16</sup> Thus, in those instances where there has been compliance with the rule, the Commission will know when a businessman acknowledges but fails to act upon a complaint. Moreover, by having copies of the complaint and all related correspondence, the Commission is in a position, if necessary, to make its own inquiry into the merits of the dispute or take other appropriate action.

When a businessman determines that the facts set forth in a complaint are insufficient for him to answer properly, he is compelled to request additional information, and his obligation to render a judgment on the merits of the complaint is suspended until receipt of such information.<sup>17</sup> The rule prohibits unnecessary or unreasonable requests for information,<sup>18</sup> and requires the businessman to report to the Federal Trade Commission each instance in which he asks the consumer to provide additional information.<sup>19</sup> In essence, the rule encourages the favorable resolution of bona fide consumer complaints, but in no way forces the businessman to take favorable action on complaints which he considers to be incomplete.

The rule will have little effect on the honest and responsible businessman who receives a consumer complaint. A businessman of this kind generally acts promptly to consider the consumer's point of view, and his action will generally conform to the rule. Although a determination by the businessman that a complaint is unfounded necessitates reporting to the Federal Trade Commission,<sup>20</sup> the burden does not appear to be unreasonable in view of the purpose which it serves.

#### IV. OBJECTIVE OF THE RULE

The objective of the proposed rule is to insure that the business community adequately responds to consumer complaints. Achievement of this objective depends not only upon the threat of a civil penalty or similar Federal Trade Commission action, but

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<sup>14</sup> *Id.* § 1(d).

<sup>15</sup> *Id.* § 1(e).

<sup>16</sup> *Id.* § 1(f).

<sup>17</sup> *Id.* § 2(d).

<sup>18</sup> *Id.* §§ 1(b) and (c).

<sup>19</sup> *Id.* §§ 1(g) and (h).

<sup>20</sup> *Id.* § 1(f).

also upon open and full disclosure of the identity of businessmen who fail to comply with the rule. To effectuate widespread disclosure, it is proposed that in conjunction with the issuance of the rule the Commission establish a Consumer Complaints Register.<sup>21</sup> By thus monitoring the flow of information, the Commission could initiate formal action against any business and with respect to any product when the volume or nature of the complaints received indicates that such action is warranted. By making the Consumer Complaints Register a public document<sup>22</sup> available to individuals and consumer groups alike, the Commission could combat its own lethargy and inaction as well as encourage prompt response by business to consumer complaints. Moreover, by issuing periodic tabulations of the unresolved complaints received,<sup>23</sup> the Commission would promote a healthy competition among businesses to eliminate the causes of consumer complaints against them and their products. Regardless of the extent to which the business community improves as a result of the establishment of the Register, consumers would better know with whom they should deal in order to receive satisfactory merchandise and services.

Regular readers of *Consumer Reports* are aware of the impact upon businessmen of unfavorable comments or ratings of their products. Large and small businesses alike frequently react with astonishing speed to change a product or policy that has been seriously criticised for one reason or another. The proposed rule seeks to take advantage of the tremendous power of publicity that has been demonstrated by *Consumer Reports*.<sup>24</sup>

The effect of the rule and establishment of the Register is to provide every consumer with a means for communicating the fact of his dissatisfaction with a businessman or a product to every other interested consumer. Every businessman would become as vulnerable to the comments of his customers as the corner grocer in a small town. Businessmen have for years used a similar system in determining the credit worthiness of customers, and there is no reason why consumers should not have available a similar system to assist them in determining whether or not they ought to do business with any particular merchant or manufacturer.

If state and local governments would adopt similar rules for local businesses, consumer protection could be further increased.

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<sup>21</sup> *Id.* § 3(b).

<sup>22</sup> *Id.* § 3(a).

<sup>23</sup> *Id.* § 3(c).

<sup>24</sup> See NEWSWEEK, March 15, 1971, at 85, for an extended discussion of the impact of the publication of CONSUMER REPORTS.

The adoption of such rules would not require any government to become involved in deciding the merits of the consumer's dispute with the businessman, but would merely insure that the businessman plays fair. The establishment of local governmental consumer complaint bureaus<sup>25</sup> where tabulations of consumer complaints could be made available would be of immense value to consumers. If an investor can call his local stock broker and obtain information about a corporation in which he is considering an investment, there is little reason why an automobile owner should not be able to call his local consumer bureau and obtain information about a particular repair shop.

## V. CONCLUSION

Promulgation of the proposed rule and establishment of the Consumer Complaints Register is necessary to bridge the gap between consumers' rightful expectations and the realities of the marketplace. Essential to the success of the proposed devices is large scale participation on the part of consumers. Unless consumers are aware of the existence of these devices and are willing to inform the Federal Trade Commission of violations of the rule, the proposals are of little value.<sup>26</sup> Governmental consumer protection of this nature cannot function unless it is fortified by broad programs of consumer education. Thus, if the proposals are to be effective, government as well as consumer groups will have to initiate numerous means of making *all* consumers—especially the poor who stand to lose most when victims of the marketplace—aware of the method by which they can insure appropriate responses to their complaints, as well as inform themselves of the general reputation of those with whom they consider doing business.

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<sup>25</sup> This would be distinct from Better Business Bureaus established by local businessmen themselves. See note 4 *supra*.

<sup>26</sup> It may be necessary for the Federal Trade Commission to require that warranties, guaranties, and advertising matter include a notice informing the consumer of the basic requirement imposed by the rule and advising that violations of the rule should be brought to the attention of the Commission.

## APPENDIX

*Proposed Federal Trade Commission Trade Regulation Rule  
Governing Consumer Complaints Received by Businessmen*

**Sec. 1. The Rule.** It shall be an unfair act or practice within the meaning of section 5 of the Federal Trade Commission Act for any person subject to the jurisdiction of the Federal Trade Commission:

(a) to fail or refuse to respond in writing to a consumer complaint within thirty days of receipt of the complaint;

(b) to assert an inability to admit or deny the validity or legitimacy of a consumer complaint on the basis of the information provided in the complaint, if an admission or denial of the validity or legitimacy of the complaint could reasonably be made on the basis of the information provided;

(c) after asserting an inability to admit or deny the validity or legitimacy of a consumer complaint on the basis of the information provided,

(1) to request information from the consumer that the person knows or has reason to know the consumer cannot provide, or cannot reasonably be expected to be able to provide; or

(2) to request information from the consumer that is not necessary in order to respond;

(d) after admitting the validity or legitimacy of a consumer complaint, to fail or refuse to comply within a reasonable time with the request or demand of the consumer, unless such person within thirty days sends to the Federal Trade Commission

(1) a copy of the complaint;

(2) a copy of the response to the complaint; and

(3) copies of all correspondence between the consumer and the person related to or arising out of the complaint;

(e) to deny the validity or legitimacy of a consumer complaint unless a reason for the denial accompanies the response;

(f) after denying the validity or legitimacy of a consumer complaint, to refuse or fail to send within thirty days to the Federal Trade Commission

(1) a copy of the complaint;

(2) a copy of the response to the complaint; and

(3) a copy of all correspondence between the consumer and the person related to or arising out of the complaint;

(g) after failing to receive information requested from a con-

sumer in order to respond to a complaint, to refuse or fail to send to the Federal Trade Commission within sixty days

- (1) a copy of the complaint;
- (2) a copy of the person's request for further information; and
- (3) a copy of all correspondence between the consumer and the person related to or arising out of the complaint; and

(h) after failing to receive information requested from a consumer in order to respond to a consumer complaint, which in the opinion of the person is inadequate or insufficient to enable the person to admit or deny the validity or legitimacy of the complaint, to refuse or fail to send to the Federal Trade Commission within thirty days

- (1) a copy of the complaint;
- (2) a copy of the person's request for further information;
- (3) a copy of the consumer's response which the person considers inadequate or insufficient;
- (4) a clear and concise statement as to why the consumer's response is deemed inadequate or insufficient; and
- (5) a copy of all correspondence between the consumer and the person related to or arising out of the complaint.

**Sec. 2. Definitions.** As used in this rule:

(a) the term "person" means any natural person, partnership, corporation, association, or other form of business entity;

(b) the term "consumer" means a natural person;

(c) the term "consumer complaint" means any written communication from a consumer with respect to

- (1) any bill or statement of charges received by the consumer or sent to him by the person;
- (2) any refund or credit claimed by the consumer to be due him from the person;
- (3) any warranty or guarantee with respect to goods or services of any kind manufactured, sold, or performed by the person and purchased, ordered, or received by or for the consumer;
- (4) any installation of goods or fixtures manufactured, sold, or installed by the person and for which installation the consumer has paid or has been or will be billed;
- (5) any delivery, failure to deliver, bill or credit for, or

subscription of any magazine or book published, sold, or distributed by the person

which requests, demands, or may reasonably be construed to request or demand action of any kind on the part of the person with respect to the subject matter of the complaint for the benefit of the consumer;

(d) the term "respond" means a written communication to the consumer which acknowledges the complaint and

(1) promises to comply within a reasonable time with the request or demand of the consumer so long as such promise is fulfilled;

(2) admits the validity or legitimacy of the consumer complaint; or

(3) denies the validity or legitimacy of the consumer complaint; or

(4) asserts in good faith an inability to admit or deny the validity or legitimacy of the consumer complaint on the basis of the information provided in the complaint; requests from the consumer such specific information as will enable the person to admit or deny the validity or legitimacy of the complaint; and upon receipt of the information requested admits or denies the validity or legitimacy of the consumer complaint; and

(e) the term "reasonable time" means not more than thirty days unless the person specifies a date which is not more than sixty days from the date from which the time period begins to run.

**Sec. 3. Policy.** (a) It shall be the policy of the Federal Trade Commission to make all documents, reports, letters, communications, or other information received pursuant to this rule a part of the public record.

(b) It shall be the policy of the Federal Trade Commission to establish a "Consumer Complaints Register" for the orderly recordation of the information received pursuant to this rule.

(c) It shall be the policy of the Federal Trade Commission to tabulate on a regular basis the information contained in the "Consumer Complaints Register" and to encourage the widest possible dissemination of that information for the benefit of consumers.