New York City Consumer Protection Law of 1969

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LEGISLATIVE NOTES

NEW YORK CITY CONSUMER PROTECTION LAW OF 1969

I. Introduction

In recent years there has been growing concern over the lack of legal protection afforded the American consumer. Comprehensive consumer protection legislation has been introduced at all levels of government,¹ and several significant proposals have been enacted into law.² One such enactment at the municipal level is the New York City Consumer Protection Law of 1969,³ which

¹ A sampling of consumer protection measures introduced in recent months is set forth in BUSINESS WEEK, Jan. 31, 1970, at 51.
³ NEW YORK, N.Y., AD. CODE ch. 64, § 2203d-1.0 to -8.9 (hereinafter referred to as Consumer Protection Law of 1969). Passed by the New York City Council on December 11, 1969, and approved by the Mayor on December 29, 1969, the substantive provisions ordinance reads as follows:

§ 2203d-1.0 Unfair trade practices prohibited. — No person shall engage in any deceptive or unconscionable trade practice in the sale, lease, rental or loan or in the offering for sale, lease, rental, or loan of any consumer goods or services, or in the collection of consumer debts.

§ 2203d-2.0 Definitions. — a. Deceptive trade practice. Any false, falsely disparaging, or misleading oral or written statement, visual description or other representation of any kind made in connection with the sale, lease, rental, or loan in connection with the offering for sale, lease, rental, or loan of consumer goods or services, or in the extension of consumer credit or in the collection of consumer debts, which has the capacity, tendency or effect of deceiving or misleading consumers. Deceptive trade practices include but are not limited to: (1) representations that goods or services have sponsorship, approval, accessories, characteristics, ingredients, uses, benefits, or quantities that they do not have; the supplier has a sponsorship, approval, status, affiliation, or connection that he does not have; goods are original or new if they are deteriorated, altered, reconditioned, reclaimed, or second-hand; or, goods or services are of particular standard, quality, grade, style or model, if they are of another; (2) the use, in any oral or written representation, of exaggeration, innuendo or ambiguity as to a material fact or failure to state a material fact if such use deceives or tends to deceive; (3) disparaging the goods, services, or business of another by false or misleading representations of material facts; (4) offering goods or services with intent not to sell them as offered; (5) offering goods or services with intent not to supply reasonably expectable public demand, unless the offer discloses to limitation of quantity; (6) making false or misleading representations of fact concerning the reasons for, existence of, or amounts of price reductions or price comparison to prices of competitors or one's own price at a past or future time; (7) stating that a consumer transaction involves consumer rights, remedies or obligations that it does not involve; (8) stating that services, replacements or repairs are needed if they are not; and (9) falsely stating the reasons for offering or supplying goods or services at sale discount prices.

b. Unconscionable trade practice. Any act or practice in connection with the sale, lease, rental, or loan or in connection with the offering for sale, lease, rental, or loan of any consumer goods or services, or in the extension of consumer credit, or in the collection on consumer debts which unfairly
takes advantage of the lack of knowledge, ability, experience or capacity of a consumer; or results in a gross disparity between the value received by a consumer and the price paid, to the consumer's detriment; provided that no act or practice shall be deemed unconscionable under this title unless declared unconscionable and described with reasonable particularity in a local law, or in a rule or regulation promulgated by the commissioner. In promulgating such rules and regulations the commissioner shall consider among other factors: (1) knowledge by merchants engaging in the act or practice of the inability of consumers to receive properly anticipated benefits from the goods or services involved; (2) gross disparity between the price of goods or services and their value measured by the price at which similar goods or services are readily obtained by other consumers; (3) the fact that the acts or practices may enable merchants to take advantage of the inability of consumers reasonably to protect their interests by reason of physical or mental infirmities, illiteracy or inability to understand the language of the agreement, ignorance or lack of education, or similar factors; (4) the degree to which terms of the transaction require consumers to waive legal rights; (5) the degree to which terms of the transaction require consumers to jeopardize money or property beyond the money or property immediately at issue in the transaction; and (6) definitions of unconscionability in statutes, regulations, rulings and decisions of legislative or judicial bodies in this state or elsewhere.

c. Consumer goods, services, credit and debts. As used in §§ 2203d-1.0, 2203-2.0(a) and 2203d-2.0(b) of this title, goods, services, credit and debts which are primarily for personal, household or family purposes.

d. Consumer. A purchaser or lessee or prospective purchaser or lessee of the consumer goods or services or consumer credit, including a co-obligor or surety.

e. Merchant. A seller, lessor, creditor or any other person who makes available either directly or indirectly, goods, services or credit, to consumers. "Merchant" shall include manufacturers, wholesalers and others who are responsible for any act or practice prohibited by this title.

f. Commissioner. Shall mean the commissioner of consumer affairs.

§ 2203d-3.0 Regulations.—The commissioner may adopt such rules and regulations as may be necessary to effectuate the purposes of this title, including regulations defining specific deceptive or unconscionable trade practices.

Such rules and regulations may supplement but shall not be inconsistent with the rules, regulations and decisions of the Federal Trade Commission and the Federal courts in interpreting the provisions of Section 5 (a) (1), of the Federal Trade Commission Act, 15 U.S.C. 45 (a) (1), or the decisions of the courts interpreting General Business Law §350 and Uniform Commercial Code § 2-302.

§ 2203d-4.0 Enforcement.—a. The violation of any provision of this title or of any rule or regulation promulgated thereunder, shall be punishable upon proof thereof, by the payment of a civil penalty in the sum of fifty dollars to three hundred and fifty dollars, to be recovered in a civil action.

b. The knowing violation of any provision of this title or of any rule or regulation promulgated thereunder, shall be punishable upon conviction thereof, by the payment of a civil penalty in the sum of five hundred dollars, or as a violation for which a fine in the sum of five hundred dollars shall be imposed, or both.

c. Upon a finding by the commissioner of repeated, multiple or persistent violation of any provision of this title or of any rule or regulation promulgated thereunder, the city may except as hereinafter provided, bring an action to compel the defendant or defendants in such action to pay in court all monies, property or other things, or proceeds thereof, received as a result of such violations; to direct that the amount of money or the property or other things recovered be paid into an account established pursuant to section two thousand six hundred one of the civil practice law and rules from which shall be paid over to any and all persons who purchased the goods or services during the period of violation such sum as was paid by them in a transaction involving the prohibited acts or practices,
plus any costs incurred by such claimants in making and pursuing their complaints; provided that if such claims exceed the sum recovered into the account, the awards to consumers shall be prorated according to the value of each claim proved; to direct the defendant or defendants, upon conviction, pay to the city the costs and disbursements of the action and pay to the city for the use of the commissioner the costs of his investigation leading to the judgment; or if not recovered from defendants, such costs are to be deducted by the city from the grand recovery before distribution to the consumers; and to direct that any money, property, or other things in the account and unclaimed by any persons with such claims within one year from creation of the account, be paid to the city, to be used by the commissioner for further consumer law enforcement activities. Consumers making claims against an account established pursuant to this subsection shall prove their claims to the commissioner in a manner and subject to procedures established by the commissioner for that purpose. The procedures established in each case for proving claims shall not be employed until approved by the court, which shall also establish by order the minimum means by which the commissioner shall notify potential claimants of the creation of the account. Restitution pursuant to a judgment in an action under this subdivision shall bar, pro tanto, the recovery of any damages in any other action against the same defendant or defendants on account of the same acts or practices which were the basis for such judgment, up to the time of the judgment, by any person to whom such restitution is made. Restitution under this subsection shall not apply to transactions entered into more than five years prior to commencement of an action by the commissioner. Before instituting an action under this subsection, the commissioner shall give the prospective defendant written notice of the possible action, and an opportunity to demonstrate in writing within five days, that no repeated, multiple, or persistent violations have occurred.

d. Whenever any person has engaged in any acts or practices which constitute violations of any provision of this title or of any rule or regulation promulgated thereunder, the city may make application to the supreme court for an order enjoining such acts or practices and for an order granting a temporary or permanent injunction, restraining order, or other order enjoining such acts or practices.

e. To establish a cause of action under this section it need not be shown that consumers are being or were actually injured.

§ 2203d-5.0 Settlements. — a. In lieu of instituting or continuing an action pursuant to this title, the commissioner may accept written assurance of discontinuance of any act or practice in violation of this title from the person or persons who have engaged in such acts or practices. Such assurance may include a stipulation for voluntary payment by the violator of the costs of investigation by the commissioner and may also include a stipulation for the restitution by the violator to consumers, of money, property or other things received from them in connection with a violation of this title, including money necessarily expended in the course of making and pursuing a complaint to the commissioner. All settlements shall be made a matter of public record.

If such stipulation applies to consumers who have been affected by the violator’s practices but have not yet complained to the commissioner, the assurance must be approved by the court, which shall direct the minimum means by which potential claimants shall be notified of the stipulation. A consumer need not accept restitution pursuant to such stipulation; his acceptance shall bar recovery of any other damages in any action by him against the defendant or defendants on account of the same acts or practices.

b. Violation of an assurance entered into pursuant to this section shall be treated as a violation of this title, and shall be subject to all the penalties provided therefor.

§ 2203d-6.0 Persons excluded from this title. — Nothing in this title shall apply to any television or radio broadcasting station or to any publisher or printer of a newspaper, magazine, or other form of printed advertising, who broadcasts, publishes, or prints such advertisement, except insofar as said
establishes a framework for a broad ban against unfair trade practices and vests the city's Commissioner of Consumer Affairs with extensive powers of enforcement. In this note, the New York City ordinance will be analyzed and evaluated against the general background of existing consumer protection legislation in the United States.

II. BACKGROUND

Numerous enactments are to be found at the federal, state and municipal level which may be loosely categorized as consumer protection laws. Such laws are typically narrow in scope and seldom provide for centralized administration and enforcement. Furthermore, many governmental entities which have established protective measures have done so in a piecemeal manner and have failed to integrate these measures into a single, comprehensive statutory provision.

One of the serious inadequacies of much of existing legislation is that the only remedies established are public in nature and do not provide a means by which individual consumers who have been injured by unfair trade practices may obtain compensatory relief. Typical laws create public remedies in the form of civil and criminal penalties, and injunctive relief which at best will deter or prevent only future unfair trade practices. The proceeds arising from court imposed penalties are paid to the government and are not available to individual consumers injured by the unfair trade practice which was the basis for the penalty.

Furthermore, most laws do nothing to remove the obstacles which hinder utilization of the traditional compensatory private remedies. For example, although an individual consumer who has been victimized in the marketplace may institute an action for

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5 See Rice, supra note 4, at 596-97; Consumer Protection in Michigan: Current Methods and Some Proposals for Reform, supra note 4, at 927.

6 Rice, supra note 4, at 583-95, discusses the nature of existing consumer protection remedies and "new horizons" for establishing, within the scope of these remedies, a means to provide injured consumers with compensatory relief.


8 Rice, supra note 4, at 567-83, discusses the nature of private remedies for consumers injured by unfair trade practices. See generally Hester, Deceptive Sales Practices and Form Contracts-Does the Consumer Have a Private Remedy?, 1968 Duke L.J. 831.
restitution or damages, the cost of such litigation normally renders it impractical.\(^9\) Aggrieved consumers could theoretically reduce the individual cost of litigation by seeking recovery in a single class action; however, it has proven extremely difficult to get such an action into the courts.\(^10\)

At the federal level several obstacles confront the consumer class action. Although Rule 23 of the Federal Rules of Civil Procedure arguably provides a basis for this type of action, the jurisdictional requirements of the federal judiciary seem to present a formidable obstacle. Generally, there must be either a federal question involved in the dispute\(^{11}\) or complete diversity of citizenship between the adverse parties.\(^{12}\) Since most such actions would be likely to stem from state law, there is rarely federal question jurisdiction. Likewise, the requisite complete diversity of citizenship is often difficult to obtain. Moreover, any action which does satisfy the federal question or diversity provision must meet the additional jurisdictional requirement that the amount in controversy exceed ten thousand dollars.\(^{13}\) In view of the recent Supreme Court decision\(^{14}\) that plaintiffs having separate and distinct claims against a common defendant cannot aggregate their claims in an effort to attain the ten thousand dollar minimum, the possibility of bringing consumer class actions in the federal courts has been drastically diminished.

At the state level, courts have traditionally interpreted rules of civil procedure authorizing class actions in such a manner as to exclude the bulk of consumer class actions.\(^{15}\) It is significant to

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\(^9\) See Eckhardt, *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.


\(^{12}\) Id. § 1332.

\(^{13}\) Id. §§ 1331, 1332. Note, however, that a number of specific statutes confer jurisdiction, without regard to the amount in controversy, in almost all areas that would otherwise fall under the federal question statute. C. WRIGHT, *LAW OF FEDERAL COURTS*, 108 (2d ed. 1970). For our discussion this is of little import since federal jurisdiction in consumer actions is sought most exclusively on diversity of citizenship grounds.

\(^{14}\) Snyder v. Harris, 394 U.S. 332 (1969). In *Snyder*, the Court dealt with two cases and in each held that the claims were separate and distinct and could not be aggregated. The first was a corporate shareholder action against members of the company's board of directors seeking proper distribution to all shareholders of the proceeds from the sale of certain securities. The second was a consumer action against a gas utilities company seeking the refund of amounts allegedly improperly billed and collected.

\(^{15}\) For a discussion of the various types of state class action rules and the manner in which they have been applied to consumer class actions, see Travers & Landers, *supra* note 10, at 817–19.
note that while recent decisions in several states evidence what may be a trend away from this traditional position, equally recent decisions in other states are clearly contra. For example, in early 1970, the New York Court of Appeals had the opportunity to reexamine its long line of decisions giving a narrow interpretation to that state’s class action rule as applied to consumer litigation. In *Hall v. Coburn Corp. of America*, the New York court refused to alter its previous position and held that suits brought against a finance company to recover a statutory penalty imposed for the use of extremely small print in sales contracts could not be maintained as a class action. Even though the contracts had been prepared by the company and were assigned to the company immediately following each sale, the court determined that the question was not one of common or general interest and therefore could not be the basis for a class action. Thus, while the status of the consumer class action is uncertain in most states, the status of such action in the State of New York has been made abundantly clear.

The increasing awareness of the lack of effective legislative protection for the consumer has prompted a number of proposals for change. In several states, legislation has recently been

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16 See, e.g., Darr v. Yellow Cab Co., 67 Cal. 2d 695, 433 P.2d 732, 63 Cal. Rptr. 724 (1967), in which the California Supreme Court held an action by a taxicab customer, in his own behalf and for all others similarly situated, against a taxicab company to recover excessive charges made by the company over a four-year period could properly be brought as a class action; Holstein v. Montgomery Ward & Co., 2 CCH *POVERTY L. REP.* 9652 (Ill. Cir. Ct. Cook Co. 1969), in which an Illinois court held that an action by a charge account customer, individually and on behalf of all others similarly situated, seeking relief from the defendant company’s practice of making certain insurance changes without prior authorization of the charge account customer could be maintained as a class action.  
17 See, e.g., Society Milton Athena, Inc. v. National Bank of Greece, 281 N.Y. 282, 22 N.E.2d 374, 3 N.Y.S.2d 677 (1939); and Onofrio v. Playboy Club of New York, Inc., 15 N.Y.2d 740, 205 N.E.2d 308, 257 N.Y.S.2d 171 (1965). In *Society Milton Athena*, the court held that an action brought by depositors against defendant banks for fraud allegedly committed through a joint office could not be maintained as a class action even though the causes of action arose out of the same transaction or series of transactions and involved common questions of law and fact. In *Onofrio*, five out of an estimated fifty thousand contributors of twenty-five dollars each to finance a private club commenced a class action to impress a constructive trust and to obtain damages for breach of contract. The N.Y. Court of Appeals held that a representative action could not be maintained for contract damages and reinstated the lower appellate court dissenting opinion [20 App. Div. 3, 7, 244 N.Y.S.2d 485, 489 (1963)] which stated that "common wrongs do not necessarily confer common rights or authorize a single common action."  
18 N.Y. CIV. PRAC. § 1005(a) (McKinney 1963). Where the question is one of a common or general interest of many persons or where the persons who might be made parties are very numerous and it may be impracticable to bring them all before the court, one or more may sue or defend for the benefit of all.  
20 E.g., model consumer protection acts for states have been prepared by the Federal Trade Commission [*FTC, UNIFORM TRADE PRACTICES AND CONSUMER PROTECTION LAW, reprinted in FTC, REPORT ON DISTRICT OF COLUMBIA CONSUMER PROTECTION PROGRAM 3 (1969)*], the Council of State Governments [*COUNCIL OF STATE GOVERNMENTS, SUGGESTED STATE LEGISLATION, CONSUMER PROTECTION ACT (1970 DRAFT)*].
enacted providing for stronger prohibitions against an ever growing number of allegedly unfair trade practices. Moving in the direction of comprehensive consumer protection laws, these states seek to narrow the gaps which existed when protection was provided by means of numerous unrelated statutes, each narrow in scope. Moreover, state commissions are being created to further coordinate consumer protection efforts, and to provide for centralized administration of consumer law. The increased awareness of consumer affairs has prompted some legislatures to vest state attorneys general with unprecedented powers of enforcement including authorization to solicit assurances from merchants who have violated the laws that they will desist from future illegal acts, and, in at least one state, to negotiate monetary settlement agreements, the proceeds of which are to be distributed to injured consumers. The authorization for the solicitation of these assurances and settlements is particularly significant in that it allows the attorney general, by moral suasion or otherwise, to utilize a means of enforcement other than through formal proceedings.

A few states have enacted legislation empowering the attorney general to commence mass restitution actions on behalf of injured consumers; a single action may be brought by the state to obtain compensatory relief for a large number of consumers who have been injured by an unfair trade practice. This type of public remedy, if used, is particularly important in states like New York, where class actions brought by consumers to obtain compensatory relief in the form of restitution have been barred from

and the National Conference of Commissioners on Uniform State Laws [NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAW, UNIFORM CONSUMER SALES PRACTICE ACT (Third Draft)]. For an analysis of the provisions of these acts in relation to consumer protection in the State of Michigan, see Consumer Protection in Michigan: Current Methods and Some Proposals for Reform, supra note 4, at 971–84. Other model acts have been prepared by the Harvard Journal of Legislation [An Act to Prohibit Unfair and Deceptive Trade Practices, 7 HARV. J. LEGIS. 122 (1969)] and the National Consumer Law Center [OFFICE OF LEGAL SERVICES, OFFICE OF ECONOMIC OPPORTUNITY, NATIONAL CONSUMER ACT, A MODEL ACT FOR CONSUMER PROTECTION (1970)].

21 See, e.g., HAWAII REV. LAWS § 205A–1 to –22 (Supp. 1965); MASS. ANN. LAWS ch. 93A, §§ 1–10 (Supp. 1969); N.J. STAT. ANN. § 56:8–1 to –12 (1964), as amended, § 56:8–12 to –14 (Supp. 1970). Each of these statutes establishes a ban against a broad range of unfair trade practices.

22 See, e.g., N.Y. EXEC. LAW §§ 550–53 (McKinney Supp. 1970), establishing a state consumer protection board and authorizing the appointment of an executive director thereof. The board is empowered, among other things, to coordinate the activities of all state agencies performing consumer protection functions.


the courts. Although the legislation authorizing actions of this type is still quite new, a possibly significant shortcoming is the failure to provide means of promoting utilization of the power. If the decision of the attorney general to institute these actions is not guided by definite standards, and therefore not amenable to objective appraisal, it is quite possible that the legislation would do relatively little to provide a meaningful public remedy for the consumer victimized by unfair trade practices.

At the federal level, several proposals have been made for better administration and increased enforcement of existing consumer protection statutes. A comprehensive reorganization of the Federal Trade Commission with increased emphasis on safeguarding the individual consumer has been recommended by both the past and present chairmen of the Commission.26 In December of 1969, a bill was introduced in the Senate which proposed such a change in the scope of FTC activity.27 A measure introduced in early 1970 would significantly increase the aggrieved consumer's access to the courts by allowing a private individual or class of individuals to institute an action and recover damages incurred as a result of a violation of existing federal law prohibiting unfair and anti-competitive trade practices.28 Yet another bill would grant the federal district courts jurisdiction over class actions brought by one or more consumers on behalf of all consumers similarly situated regardless of the amount in controversy or the citizenship of the parties, thereby effectively eliminating the jurisdictional obstacles facing consumer class actions in the federal courts.29 Moreover, it would provide for the payment of attorney's fees if a class of consumers prevails in such action.

Despite growing support for increased consumer protection—as evidenced by the amount of proposed and newly enacted legislation at all levels of government—opposition to change is widespread and manifests itself in many forms. For example, members of the judiciary have expressed fear that increased consumer remedies will overburden the courts with consumer litigation,30 and merchants argue that Better Business Bureaus, formed

26 See N.Y. Times, June 9, 1970, at 1, col. 2, for a report of the announcement by C. W. Weinberger, then chairman of the FTC, of the internal reorganization of the FTC and the need for further changes in the Commission. See also N.Y. Times, Aug. 12, 1970, at 1, col. 5, for a report of the appointment of Miles K. Kirkpatrick as new chairman of the FTC and discussion of the recommendations of an American Bar Association study committee on the FTC headed by Kirkpatrick prior to his appointment.
30 See, e.g., N.Y. Times, Aug. 11, 1970, at 1, col. 5, which reports Mr. Chief Justice Burger's criticisms of proposed federal legislation authorizing consumer class actions in the federal courts; and N.Y. Times, Sept. 13, 1970, at 39, col. 1, which reports similar
and funded by local merchants themselves, are sufficient to police the marketplace.\textsuperscript{31} In view of this opposition, the possibilities of enacting substantial reforms at present are rather limited. Consequently, the consumer is left with little more than his own wariness as a weapon against unfair and deceptive trade practices.

This, then, is the general background against which the New York City ordinance was enacted and against which it must be analyzed and evaluated.

III. Analysis of the New York City Law

A. Administration

Responsibility for the administration of the provisions of the New York City Consumer Protection Law of 1969 has been placed in the Commissioner of Consumer Affairs,\textsuperscript{32} who is further empowered to coordinate the consumer protection activities of all other city agencies.\textsuperscript{33} Serving the commissioner in an advisory capacity is the city's Consumer Council. Consisting of twelve members who are to represent a cross section of consumer interests, the council is appointed by the Mayor.\textsuperscript{34} It is important to note that the council has no administrative responsibilities. By vesting all such responsibilities in the commissioner alone, the city has avoided the problems inherent in "administration by committee" and has thus expedited administration of consumer protection.

The manner in which the city has provided for administration of consumer protection is far superior to the establishment of several uncoordinated agencies whose functions are limited to specific areas of concern. It is generally agreed that such diversified administration often results in duplication of effort, dilution of resources and lack of uniform enforcement.\textsuperscript{35}

B. Prohibitory Provisions

The provisions of the New York City Consumer Protection Law of 1969, aside from those dealing with administration, can be grouped into three categories: prohibitions, regulations, and en-

\textsuperscript{31} N.Y. Times, Aug. 9, 1970, at 1, col. 5.
\textsuperscript{32} In general, the ordinance vests the commissioner with responsibility for issuing rules and regulations setting forth particular trade practices prohibited, Consumer Protection Law of 1969, §§ 2203d-2.0(b), 2203d-3.0, and for coordinating enforcement of the prohibitory provisions, id. §§ 2203d-4.0(c), 2203d-5.0(a).
\textsuperscript{33} NEW YORK, N.Y., AD. CODE, ch. 64, § 2203a.
\textsuperscript{34} Id. § 2204.
\textsuperscript{35} See Rice, supra note 4, at 595-604, for a general discussion of the advantages and disadvantages of integrated administration of consumer protection legislation.
forcement. First, the ordinance sets forth a general statement as to the nature of unfair trade practices prohibited:

No person shall engage in any *deceptive* or *unconscionable* trade practice in the sale, lease, rental, or loan of any consumer goods or services, or in the collection of consumer debts. (Emphasis added).\(^{36}\)

Trade practices relating to consumer services as well as those relating to consumer goods fall within the scope of the ordinance.

1. **Deceptive Trade Practices**—The ordinance's definition of "deceptive" practices includes representations of any kind which have the "capacity, tendency, or effect of deceiving or misleading consumers" (emphasis added).\(^{37}\) This provision is extremely broad—it does not focus on the merchant's intent, nor does it stipulate that a consumer must actually be deceived or misled.\(^{38}\) If a trade practice has the capacity or tendency to deceive or mislead, then it is prohibited regardless of whether a buyer was, in fact, deceived. Conversely, if a practice does in fact deceive or mislead a consumer (ignorant though he may be), then it is prohibited whether or not it is generally considered to have the capacity or tendency to do so.

Moreover, the language of the provision seems to clearly prohibit ordinary puffing and exaggeration\(^{39}\) which traditionally have been permissible under the law of the State of New York.\(^{40}\) Although such statements may at times be understood as nothing more than a merchant's opinion or commendation of his product—incapable of creating a warranty—they certainly have the capacity, if not the tendency and effect, to deceive or mislead consumers. This complete prohibition, although radically different from the common law dogma of nearly every jurisdiction, does not appear to be logically untenable. Exaggeration, regardless of how minor, is by definition contrary to fact. The effect of this ordinance is simply to require a person who gains by the sale of a product to assume the risk of any inaccuracies in the representation he makes in its behalf. Indeed the basic premise of the

\(^{36}\) Consumer Protection Law of 1969, § 2203d- 1.0.

\(^{37}\) Id. § 2203d- 2.0(a).

\(^{38}\) Id. § 2203d- 4.0(e), specifically provides that to establish a cause of action under the ordinance it need not be shown that consumers are being or were actually injured.

\(^{39}\) Id. § 2203d- 2.0(a)(2).

\(^{40}\) Uniform Commercial Code § 2-313(2) (McKinney 1964), provides that "an affirmation merely of the value of the goods or a statement purporting to be merely the seller's opinion or commendation of the goods does not create a warranty." For a pre-code case setting forth a similar rule, see Maggiros v. Edson Bros., 164 N.Y.S. 377 (Sup. Ct. 1917). See generally 51 N.Y. Jur. Sales § 164 (1966).
common law that it is possible for a representation to be both reasonable and false at the same time is less than logically compelling. The emphasis which the ordinance places on accuracy and truth in the marketplace is long overdue.

The ordinance labels eight specific practices "deceptive," but asserts that these are not intended to exclude other acts from the prohibited category of deceptive trade practices.41 This specificity, coupled with the open-endedness of the provision should provide an effective weapon against unscrupulous merchants. In short, this provision of the ordinance, if fully enforced, replaces the doctrine of caveat emptor with what might be termed caveat venditor.

2. Unconscionable Trade Practices—An "unconscionable" practice is defined as any act which unfairly takes advantage of the lack of knowledge, ability, experience, or capacity of a consumer; or results in a gross disparity, to the consumer's detriment, between the value received by a consumer and the price paid.42 The ordinance provides, however, that no practice shall be deemed unconscionable unless declared so, and described with reasonable particularity in a local law or in a rule or regulation issued by the city's Commissioner of Consumer Affairs.43 Thus the ordinance, in and of itself, does not prohibit any unconscionable trade practices. A provision, similar to the one proscribing deceptive trade practices, prohibiting certain specified unconscionable practices in addition to those set forth in a separate law, ruling or regulation would have strengthened the ordinance considerably.44

Guidelines for the issuance of rules and regulations are set forth as follows:

In promulgating such rules and regulations the commissioner shall consider among other factors: (1) knowledge by merchants engaging in the act or practice of the inability of consumers to receive properly anticipated benefits from the goods or services involved; (2) gross disparity between the price of goods or services and their value measured by the price at which similar goods or services are readily obtained by other consumers; (3) the fact that the acts or practices may enable merchants to take advantage of the inability of

42 Id. § 2203d-2.0(b).
43 Id.
44 The need for such a provision is supported by the fact that only one of the twelve regulations issued by the commissioner as of February 27, 1971, defines a specific trade practice as unconscionable and thus prohibited by the ordinance. This regulation, regarding creditor's pre-judgment communications to employers of alleged debtors, appeared in its final form in the New York City Record of October 13, 1970, and became effective November 12, 1970.
consumers reasonably to protect their interests by reason of physical or mental infirmities, illiteracy or inability to understand the language of the agreement, ignorance or lack of education, or similar factors; (4) the degree to which terms of the transaction require consumers to waive legal rights; (5) the degree to which terms of the transaction require consumers to jeopardize money or property beyond the money or property immediately at issue in the transaction; and (6) definitions of unconscionability in statutes, regulations, rulings and decisions of legislative or judicial bodies in this state or elsewhere.\textsuperscript{45}

These guidelines suggest that the ordinance is intended to create a quite broad definition of "unconscionable." However, some phrases (e.g., "unfair advantage") used to define "unconscionable" tend to inject a subjective element which, to a certain extent, is necessarily vague and may be difficult to apply on other than an ad hoc basis. The only use of the term "unconscionable" in the statutes of the State of New York is in section 2-302 of the Uniform Commercial Code, which authorizes a court to refuse enforcement of a sales contract, or a portion thereof, found to be "unconscionable." The official Comment to this provision of the Code states that "[t]he principle is one of prevention of oppression and unfair surprise and not disturbance of allocation of risks because of superior bargaining power."\textsuperscript{46} It then sets forth several "illustrative" cases which do little to clarify the distinction.\textsuperscript{47} Although the New York courts have, in the past, echoed the language of the Comment,\textsuperscript{48} their applications of the unconscionability doctrine are indicative of a more expansive interpretation of the term than that suggested in the Comment.\textsuperscript{49}

\textsuperscript{45} Consumer Protection Law of 1969, § 2203d–2.0(b).
\textsuperscript{46} See \textit{Uniform Commercial Code} § 2–302, Comment 1 (McKinney 1964).
\textsuperscript{47} See \textit{Leff, Unconscionability and the Code—The Emperor’s New Clause}, 115 U. PA. L. REV. 485, 501–08, 516–28 (1967), for a general discussion of the failure of the official Comment cases to add any definitional clarity to the unconscionability provision of the UCC.
\textsuperscript{49} See, e.g., Frostifresh Corp. v. Reynesco, 52 Misc. 2d 26, 274 N.Y.S.2d 757 (Dist. Ct. 1966), rev’d (as to damages), 54 Misc. 2d 119, 281 N.Y.S.2d 964 (Sup. Ct. 1966), holding unconscionable that portion of a contract providing for unreasonable profit (cash sales price of $900 plus a service charge of $245 for an appliance with an admitted cost of $358) when the contract had been negotiated in Spanish, but the contract actually signed was in English and had not been read or explained to the purchasers; Jones v. Star Credit Corp., 59 Misc. 2d 189, 298 N.Y.S.2d 264 (Sup. Ct. 1969), holding that to sell for $900 ($1,439 including credit charges and sales tax) a freezer unit having an actual value of $300 was unconscionable as a matter of law; Jefferson Credit Corp. v. Marano, 60 Misc. 2d 138, 302 N.Y.S.2d 390 (N.Y. City Ct. 1969), holding a contract unconscionable wherein an
Particularly noteworthy in this regard are two recent New York decisions holding a contract unconscionable, and emphasizing the lack of equity between the bargaining parties—a consideration which the Comment expressly states is beyond the scope of the unconscionability provision of the Code. Thus there can be little doubt that the intended usage of “unconscionable” in the New York City ordinance is not limited to the restricted interpretation of the term enunciated in the Comment to section 2-302 and should be liberally construed along the lines currently espoused by the New York courts.

It is possible that merchants will challenge as unconstitutionally vague this section of the ordinance prohibiting unconscionable trade practices. The due process clause of the New York Constitution as well as that of the fourteenth amendment to the United States Constitution has been interpreted to require that a legislative enactment be precise if it is to be valid. New York courts have recognized this requirement as especially important in its application to a penal provision, for the citizen must certainly be given the opportunity to apprise himself of the acts prohibited. It has been said that this principle is nothing more than a manifestation of “our ordinary sense of fair play.”

If a constitutional challenge does arise the question before the court will necessarily be one of degree. Although the Consumer Protection Act defines “unconscionable” in rather vague and subjective terms, any due process challenge will have to contend not only with the provision of the ordinance which renders unconscionable only those practices set forth in a separate law, rule or regulation, but also with the relatively clear specificity of the guidelines for the issuance of such rules and regulations.

Even if a court were to consider just the basic definition of “unconscionable,” focusing upon such phrases as “unfair advan-

51 N.Y. Const. art 1, § 6.
52 See, e.g., Keyishian v. Board of Regents of the University of New York, 385 U.S. 589 (1967), wherein the Supreme Court found a New York statute to be unconstitutionally vague and indefinite under the fourteenth amendment due process clause. A New York Court of Appeals decision invalidating a statute on the ground that it was vague and indefinite under the New York Constitution is Trio Distributor Corp. v. City of Albany, 2 N.Y.2d 690, 143 N.E.2d 329, 163 N.Y.S.2d 585 (1957).
tage” and “gross disparity,” it would be surprising if the provision were to be held invalid. By setting forth even these arguably vague definitional standards, the drafters of the New York ordinance have given the term “unconscionable” more statutory definition than the provision in the UCC.\(^{56}\) Indeed, the unconscionability section of the UCC and the official Comments thereto have been criticized for the scarcity of definitional guidance.\(^{57}\)

3. Persons Excluded—The ordinance specifically excludes from its coverage the acts of publishers and broadcasters except in so far as they are guilty in the sale or offering for sale of their own services.\(^{58}\) Advertising agencies are also excluded provided they are acting on the basis of information given to them by their clients.\(^{59}\) It should be noted that the acts of these parties are excluded even when the copy which they broadcast, publish or prepare for public dissemination is arguably deceptive on its face. This apparently represents a policy decision on the part of the city to avoid the compounding of disputes and to concentrate entirely on the party who initiates the trade practice. Of greater significance is the fact that publishers and broadcasters are relieved of the necessity to determine the truth or falsity of the advertisements they print or broadcast.

C. Regulations

The ordinance specifically authorizes the issuance of rules and regulations “as may be necessary to effectuate the purposes of this title, including regulations defining specific deceptive or unconscionable trade practices.”\(^{60}\) This provision is of particular importance in that it provides a means for the adaptation of the law to continually changing business methods by allowing the commissioner to proscribe new unfair trade practices as merchants devise them. In addition, merchants are continually made aware of those particular practices which have been declared to be prohibited by the law.

A question immediately arises as to the validity of the delegation of power to the Commissioner of Consumer Affairs to define specific unfair trade practices prohibited by the ordinance. The power of a local legislative body to adopt legislation originates in the state constitution,\(^{61}\) and the New York courts have tradi-

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\(^{56}\) *Uniform Commercial Code* § 2–302 (McKinney 1964).

\(^{57}\) See, e.g., Leff, *supra* note 47, 485–559.


\(^{59}\) *Id.*

\(^{60}\) *Id.* § 2203d–3.0.

\(^{61}\) The Constitution of the State of New York provides that every local government shall have a legislative body and shall have the power to enact local legislation. *N.Y. Const.* art. IX, §§ 1(a), 2(b)(1).
tionally held that such power may not be delegated to administrative agencies or officers.\textsuperscript{62} In determining the validity of the delegation of rule-making power to administrative officials, the courts have generally looked to the nature of the power conferred\textsuperscript{63} and to the standards and limitations\textsuperscript{64} established to guide the official in the exercise of his discretion.

Although the ordinance confers extensive powers on the commissioner and allows him a wide range of discretion, it appears to be within constitutional boundaries. The underlying prohibitive provision\textsuperscript{65} which sets forth the general definition of deceptive and unconscionable trade practices is arguably complete, leaving nothing to the Commissioner of Consumer Affairs which is strictly within the legislative function. That provision includes examples of practices deemed to be deceptive\textsuperscript{66} as well as a listing of guidelines\textsuperscript{67} to be considered by the commissioner in determining those trade practices which are unconscionable under the ordinance. Following the delegation of the rule-making power, a provision is set forth which states that a rule or regulation promulgated under the ordinance

may supplement but shall not be inconsistent with . . .

decisions of the Federal Trade Commission and the Federal

\textsuperscript{62}See, e.g., Packer Collegiate Institute v. University of New York, 298 N.Y. 184, 81 N.E.2d 80 (1948), wherein a \textit{state statute} prohibiting the establishment of certain private schools unless registered under regulations promulgated by the state Board of Regents was held to be an unconstitutional delegation of legislative power. In Little v. Young, 274 App. Div. 1005, 85 N.Y.S.2d 41 (1948), \textit{aff'd}, 299 N.Y. 699, 87 N.E.2d 74 (1948), the court invalidated a \textit{town zoning ordinance} forbidding construction of a place for amusement in the town's business district unless especially permitted by a board of appeals. The court ruled that the ordinance constituted a delegation to an administrative body of legislative power vested in the town board without prescribing any standard by which action of that administrative body would be governed.

\textsuperscript{63}See, e.g., Darweger v. Staats, 267 N.Y. 290, 305, 196 N.E. 61, 65-66 (1935), where the court of appeals held unconstitutional a \textit{state statute} punishing violations of codes promulgated by the President of the United States under the National Industrial Recovery Act, and recognized that while a legislative body may not confer upon an administrative agency or officer the power to make a law, it is well established that the legislature may delegate the discretionary power to execute and administer the laws. The opinion suggests that in the final analysis the question is one of degree.


\textsuperscript{64}See, e.g., Packer Collegiate Institute v. University of New York, 298 N.Y. 184, 189, 81 N.E.2d 80, 82 (1948), where the court discusses the standards and limitations which must be placed on a delegation of rule-making power by a legislative body. The court suggests that the subject matter of rules and regulations, as well as the activities to be governed thereby, must be set forth in at least general terms, and that there must be a clearly delimited field of action with rules and principles to serve as guidance for action therein.

\textsuperscript{65}Consumer Protection Law of 1969, § 2203d-2.0(a), (b).

\textsuperscript{66}Id. § 2203d-2.0 (a)(1)-(9).

\textsuperscript{67}Id. § 2203d-2.0 (b)(1)-(6).
courts in interpreting the provisions of Section 5(a)(1) of the Federal Trade Commission Act, 15 U.S.C. 45(a)(1), or the decisions of the courts interpreting General Business Law § 350 and the Uniform Commercial Code § 2-302.68

This final limitation on the commissioner's rule-making power provides some insight into the extent of his authority, but it is not altogether clear whether it will prove to be a very significant restriction. The nature of this limitation is particularly evident in the requirement that no rule or regulation be issued which is inconsistent with the decisions of the courts interpreting section 2-302, the unconscionability provision, of the UCC. It would appear that every New York court case where an assertion of unconscionability has failed would diminish the authority of the commissioner. Nevertheless, it would not be unreasonable to conclude that any rule or regulation issued—unless prohibiting as unconscionable a fact situation identical to one which the New York courts have held not to be so—supplements, and is not inconsistent with the decisions of the New York courts. Thus, assuming some differences in fact situations, the stipulation as to the nature of rules and regulations which may be issued should not unduly limit the capacity of the commissioner to declare certain trade practices to be unconscionable and within the prohibitory provisions of the ordinance. This is especially so in view of the expansive interpretation given the unconscionability section of the UCC by the New York courts.69

In any event, the underlying definitions, the specific guidelines, and the rather broad general requirement of consistency with relevant federal and state law would seem to establish sufficient standards to guide the commissioner in the exercise of his discretion and to provide adequate limitations upon his power.70 Discussing the general problem of legislative delegation, the New York Court of Appeals, in an early case,71 set forth the following dictum:

In this day when the demands upon the state Legislatures for necessary and important laws are increasing every year we must not be rigid in our construction of legislative power. More and more must the laws be general in form, leaving to commissions, boards, or other administrative bodies the es-

68 Id. § 2203d-3.0.
69 See note 49 and text accompanying note 50 supra.
70 The constitutionality of the ordinance is supported by People v. Malmud, 4 App. Div. 2d 86, 164 N.Y.S.2d 204 (1957), which upheld a state statute delegating to the Triborough Bridge and Tunnel Authority the power to enact traffic regulations, the violation of which would constitute a misdemeanor.
tablishment of rules and regulations and the determination of the facts to which the general law will apply. To make the violation of any such adopted rule or regulation a crime is not a delegation of legislative power.\textsuperscript{72}

Today the non-delegation doctrine has little practical force at the federal level of government\textsuperscript{73} and public policy considerations such as those set forth in the above quote suggest that the force of the doctrine should be similarly limited at the state and local level.

\textbf{D. Enforcement}

1. \textit{Formal Procedures}—The ordinance sets forth both formal and informal means by which its prohibitory provisions may be enforced. Formal enforcement is achieved through court action instituted by the city against parties believed to have violated the ordinance.\textsuperscript{74} If a court determines that a violation has in fact occurred, the city may recover a civil penalty not to exceed $350.\textsuperscript{75} In the case of a \textit{knowing} violation, the city may recover a civil penalty not to exceed $500, a fine (\textit{i.e.}, a criminal penalty) not to exceed $500, or both.\textsuperscript{76}

Upon a finding by the commissioner of "repeated, multiple, or persistent" violations, the ordinance empowers the city to initiate a mass restitution action to compel the payment into court of all monies unlawfully received as a result of such violations.\textsuperscript{77} Amounts recovered are to be made available to the injured con-

\textsuperscript{72} \textit{Id.} at 316, 196 N.E. at 66.

\textsuperscript{73} In only two cases have congressional delegations to public authorities been held invalid. Panama Refining Co. \textit{v.} Ryan, 293 U.S. 388 (1935); A.L.A. Schecter Poultry Corp. \textit{v.} United States, 295 U.S. 495 (1935). For extended discussion of these cases, see 1 \textsc{K. Davis, Administrative Law Treatise} \textsection 2.06 (1958). Davis submits that the present status of the law is in accord with the following 1940 statement of the Supreme Court: "Delegation by Congress has long been recognized as necessary in order that the exertion of legislative power does not become a futility." \textit{Sunshine Anthracite Coal Co. v. Adkins, 310 U.S. 381, 388 (1940).}

\textsuperscript{74} Consumer Protection Law of 1969, \textsection 2203d-4.0. Implicit in this section is that all legal action to enforce the ordinance will be instituted by the city, \textit{i.e.}, the city legal department. Not only are remedies established but the means to coordinate the seeking of such remedies is vested in the Commissioner of Consumer Affairs. Since the enactment of the ordinance, the commissioner has employed a "consumer advocate" whose responsibility it is to work directly with the city legal department in instituting court actions as provided for in the ordinance. Hiring of the consumer advocate, attorney Philip Schrag, was reported in the \textit{N.Y. Times}, May 18, 1970, at 47, col. 3. In a Jan. 7, 1971, telephone conversation with Mr. Schrag, he indicated that one of the primary responsibilities of his position is to work in conjunction with the Director of the Penalties Division of the City Legal Department to insure prompt and appropriate legal action as authorized by the Consumer Protection Law of 1969.

\textsuperscript{75} Consumer Protection Law of 1969, \textsection 2203d-4.0(a).

\textsuperscript{76} \textit{Id.} \textsection 2203d-4.0(b). A civil penalty is a monetary penalty, authorized by statute, levied in a \textit{civil action} based on a violation of a statute; whereas a criminal penalty is a fine, authorized by statute, levied in a \textit{criminal action} for violation of a statute. For a discussion of the relative merits of each, see \textit{Rice, supra} note 4, 583-85.

\textsuperscript{77} Consumer Protection Law of 1969, \textsection 2203d-4.0(c).
sumers for a period of one year at the end of which time any
undistributed amounts become the property of the city for use in
further consumer law enforcement activity.\textsuperscript{78} If an injured con-
sumer elects to share in the proceeds of a mass restitution action,
he forfeits his right to institute his own private action against the
violator—\textit{i.e.}, the opportunity to obtain double recovery is fore-
closed.\textsuperscript{79}

Although the monetary penalties provided for in the ordinance
would appear to be insignificant when levied against large mer-
chants, the city—by attempting to establish a compensatory pub-
lic remedy in the form of mass restitution actions—has evidenced
an intent to foreclose any opportunity which might exist for a
merchant to pay the specified penalty but in effect derive a profit
from repeated, multiple, or persistent violations. In view of the
narrow interpretation which the New York courts have given the
state's procedural rule authorizing class actions,\textsuperscript{80} and thus the
inability of consumers to seek compensatory relief through the
class action device, the mass restitution remedy represents a
major step in the direction of providing a means of monetary
recovery for consumers who have been injured by unfair trade
practices. There is a major question, however, as to the power
and standing of the city to institute such action.

The powers of a local government, other than those established
in the state constitution, originate in statutory law. There is no
state constitutional provision\textsuperscript{81} nor is there an express statutory
provision\textsuperscript{82} authorizing a local government to institute legal action
to seek compensatory relief for city inhabitants injured by civil
wrongs. Arguably, however, such authorization may be inferred
from the fact that local governments do have the power to enact
d and enforce ordinances and may exercise all other powers neces-
sary and proper to execute the powers expressly granted.\textsuperscript{83}

\textsuperscript{78} \textit{Id.}
\textsuperscript{79} \textit{Id.}
\textsuperscript{80} \textit{See} notes 17-19 supra and accompanying text. For discussion of the status of the class
action in New York, see Casey, \textit{Public and Private Consumer Remedies in New
\textsuperscript{81} The constitutional rights and powers of local governments are set forth in \textit{N.Y.
CONST.} art. IX, §§ 1-3.
\textsuperscript{82} The legislative grant of specific powers to cities is set forth in \textit{N.Y. GEN. CITY
LAW} § 20 (McKinney 1968).
\textsuperscript{83} In \textit{N.Y. GEN. CITY LAW} § 20(22) (McKinney 1968), the state legislature authorizes
cities to enact and enforce ordinances. The authorization to exercise other necessary and
proper powers is set forth in \textit{N.Y. GEN. CITY LAW} § 20(23) (McKinney 1968).

For a discussion of the various legal theories which may be used to infer the existence of
statutory power at the \textit{state} level to institute mass restitution actions, see Wade &
Kamenshine, \textit{Restitution for Defrauded Consumers: Making the Remedy Effective
Such reasoning would seem applicable at the \textit{local} government level as well.
A more fundamental question arises as to the power of the state to institute actions of this nature, for it would seem apparent that the state cannot constitutionally authorize a local government to exercise a power which the state itself does not possess. The New York Court of Appeals recognized in an early decision that a suit instituted by the state must involve a distinct public interest and that the state has no general power to sue to redress any civil wrong suffered by one or more citizens at the hand of another.

In early 1970, the New York legislature purported to empower the state Attorney General to institute mass restitution actions on behalf of aggrieved consumers. Implicit in this enactment was the legislative determination that a distinct public interest is involved in the maintenance of such representative actions. Although the wisdom of a determination of this nature is subject to dispute, there is authority which suggests that it is conclusive and that it is not within the scope of the judicial power of a court to rule otherwise. However, even if this determination is open to judicial review, it is supported by federal court decisions which manifest a broad view of "public interest" and are indicative of an increased willingness on the part of the courts to give governmental entities standing to institute legal actions on behalf of private citizens. Particularly noteworthy is United States v.

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87 It might be argued, for example, that by instituting a mass restitution action, the state is simply representing the interests of private plaintiffs (consumers) in a civil action and that by doing so it ignores the interests of the defendant (a merchant) who is also a citizen of the state and whose interests must be considered in determining the "public interest."

88 In reference to determinations of the public interest, the United States Supreme Court has stated that “[s]ubject to specific constitutional limitations, when the legislature has spoken, the public interest has been declared in terms well-nigh conclusive. In such cases the legislature, not the judiciary, is the main guardian of the public needs to be served by social legislation, whether it be Congress legislating concerning the District of Columbia ... or the States legislating concerning local affairs.” Berman v. Parker, 348 U.S. 26, 32 (1954).

89 The starting point in this regard is In re Debs, 158 U.S. 564 (1895), wherein the Supreme Court recognized the standing of the United States to obtain an injunction against continuation of a strike and boycott affecting twenty-two railroads (presumably capable of mounting their own lawsuits). The Court held that the strike activities were a burden on interstate commerce and thus of sufficient public interest to support government legal action. More recently, the Court has followed similar reasoning in United Steelworkers v. United States, 361 U.S. 39 (1959), giving the United States standing to enjoin an industry-wide steel strike; and in United States v. Raines, 362 U.S. 17 (1960), upholding the constitutionality of a provision of the Civil Rights Act of 1957, 42 U.S.C. § 1971, authorizing the Attorney General to bring suit in the federal courts to enjoin interference on racial grounds with the voting right of citizens. But see Consolidated Edison Co. v. DiNapoli, 39 U.S.L.W. 2239 (S.D.N.Y. 1970), holding that New York City’s status as vindicator of utility consumers' interest it too tangential and remote to warrant intervention in an electric company’s completely litigated price fixing suit against construction firms.
Brand Jewelers, Inc., wherein a federal district court sustained the standing of the United States, in the absence of any legislative authorization, to bring an action on behalf of injured consumers against a retail jewelry company with respect to its practice of obtaining default judgments without proper service of process. The court determined that such a business practice was a burden on interstate commerce and thus a matter of public interest. Viewing local unfair trade practices as a burden on intrastate commerce, analogous reasoning could be used to sustain the standing of a state to institute legal action on behalf of injured consumers. These considerations arguably provide a basis for the proposition that the State of New York does in fact have the power to institute mass restitution actions.

It would appear, then, that if the provision of the New York City ordinance authorizing mass restitution actions is challenged in the courts, the city will have to establish not only that the state has empowered it to maintain these actions, but also that the state itself has the power to do so, i.e., that such actions are in the public interest. Neither of these points is easily established.

As a final means of enforcement, the city is authorized to make application to the state supreme court (New York trial courts) for an order enjoining any trade practice which falls within the scope of the ordinance's prohibitory provisions. In order to establish a cause of action under the above enforcement provisions, the ordinance specifically provides that the city need not show that consumers are being or were actually injured by the alleged violation. Although, as a practical matter, it would seem unlikely that legal action would be taken without an individual having complained of some injury, this provision is a rather broad grant of power which might possibly subject a merchant to the enforcement machinery of the act without having done anything which

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An analogy may be drawn between government intervention and government-instituted suits because both involve the nature and extent of the government's interest (see Fed. R. Civ. P. 24(a)), however, there are several factors which may serve to distinguish the two types of government action. For example, as suggested in the Consolidated Edison opinion, practical obstacles—e.g., additional parties take additional time—exist in an intervention situation which are not involved in government-instituted suits.

90 318 F. Supp. 1293 (S.D.N.Y. 1970). In his opinion, Judge Frankel traces the evolution of precedents for governmental standing to institute legal action on behalf of private individuals.

91 In the alternative, the court determined that such a business practice constituted deprivation of property through state action without due process of law, and thus a matter of public interest. This reasoning would not seem to support the standing of New York City to institute mass restitution actions, for it is doubtful whether deceptive trade practices, in general, may be viewed as state action.

92 Consumer Protection Law of 1969, § 2203d-4.0(d).

93 Id. § 2203d-4.0(e).
would prompt a consumer to complain. On the other hand, this provision would enable the commissioner to proceed against a merchant who would attempt to avoid the enforcement provisions of the act by compensating a single consumer who, knowing of the unfair trade practices of the merchant, threatens to make a formal complaint.

2. Informal Procedures—As an alternative to instituting or continuing court action as a means of enforcing the ordinance, the commissioner may employ a more informal method of enforcement by accepting from violators written “assurances of discontinuance” of illegal trade practices, which may or may not provide for voluntary payment of investigative costs and restitution to consumers.94 If such an assurance provides for monetary restitution, an injured consumer who elects to share in the proceeds, as in the case of a mass restitution action, must forego any private action he may otherwise have brought against the merchant. A breach of any such assurance constitutes a violation of the ordinance and subjects the violator to the more formal enforcement procedures, discussed above.95

This voluntary assurance procedure may serve as a useful means to obtain compensatory relief for injured consumers. However, its effectiveness will be severely limited if the courts hold that the city has no standing to institute formal restitution proceedings. Moral suasion, without the threat of legal action to seek restitution, would undoubtedly prove an ineffective method of securing voluntary monetary settlements.

In considering the enforcement procedures established by the Consumer Protection Law, it is important to note that the city has vested the Commissioner of Consumer Affairs with broad investigative powers. He is authorized to hold public and private hearings, administer oaths, take testimony, serve subpoenas, and receive evidence.96 These powers would appear to be essential to meaningful enforcement of any consumer protection legislation.

3. Private Remedies—No provision is made in the New York City ordinance for private remedies. This could serve to undermine the effectiveness of the law as a means of providing injured

94 Id. § 2203d-5.0(a).
95 Id. § 2203d-5.0(b).
96 The position of Commissioner of Consumer Affairs was created by the city in 1968 at the time of the establishment of the Department of Consumer Affairs (NEW YORK, N.Y., AD. CODE, ch. 64, §§ 2201-2203.), and the commissioner has been vested with these powers since that time (id. § 2203(e)). The provision setting forth the powers of the commissioner was amended upon enactment of the Consumer Protection Law of 1969 in order to vest the commissioner with the power to receive and administer monies received by the city as a result of actions brought for violations of the ordinance. Id.
consumers with compensatory relief if the commissioner chooses not to pursue the mass restitution remedy to the fullest extent, or if that remedy is found to be unconstitutional. Moreover, in view of the fact that the ordinance makes the mass restitution remedy available only in cases of "repeated, multiple, or persistent violations," the consumer who is injured as a result of a lesser violation has no basis for compensatory relief under the ordinance. Ideally what is needed is a provision allowing individuals injured by unfair trade practices to recover attorney’s fees and to obtain multiple damages in private actions based on violations of the ordinance.

Although the city is in no position to override the state procedural rules which have been interpreted to severely limit the availability of compensatory relief through consumer class actions, it probably could, pursuant to its power to impose "penalties" and "forfeitures" as punishment for violation of ordinances, enhance the traditional private damage or restitution remedy which may be pursued by an individual consumer. A measure of this type would be closely analogous to the treble damage remedy of the Clayton Act, which authorizes the award of punitive damages in private anti-trust actions regardless of intent. It has been suggested that to avoid placing an undue penalty on all violators, any authorization for multiple damages would best be limited to knowing violations. On the other hand, since the possibility of recovering multiple damages would serve to increase the number of private restitution and damage actions, and correspondingly reduce the burden of litigation placed upon the commissioner, it can be argued that recovery of multiple damages as well as attorney’s fees should be made available in all private actions based on violations of the ordinance. This would not only increase the likelihood of vigorous enforcement of the ordinance, but would also minimize dependence on the commissioner to take action.

IV. CONCLUSION

With the exception of its failure to provide any inducement for the utilization of existing private consumer remedies, the New

97 Consumer Protection Law of 1969, § 2203d-3.0(c).
98 Determination of procedural rules for the state’s courts is vested solely in the state government. N.Y. Civ. Prac. § 101 (McKinney 1963). This section provides, in part, as follows: "The civil practice law and rules [state law] shall govern the procedure in judicial proceedings in all courts of the state and before all judges, except where the procedure is regulated by inconsistent statute."
101 Rice, supra note 4, at 575.
York City Consumer Protection Law of 1969 establishes a broad basis for the protection of the interests of the city’s consumers. Although subject to constitutional challenge,\textsuperscript{102} the ordinance establishes a comprehensive ban against a wide range of deceptive and unconscionable trade practices, something which traditionally has been a rarity in consumer legislation. Moreover, it creates both formal and informal public remedies, and establishes a means for centralized administration and enforcement. It should most certainly serve as a model for municipal consumer legislation.

In short, the ordinance is a legislative manifestation of the fact that

\begin{quote}
[w]e have reached the point where “Let the buyer beware” is a poor business philosophy for a social order allegedly based upon a man’s respect for his fellow man. Let the seller beware, too! A free enterprise system not founded upon personal morality will ultimately lose its freedom.\textsuperscript{103}
\end{quote}

\textit{— Thomas G. Morgan}

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\textsuperscript{102} The constitutionality of the ordinance and a regulation issued thereunder prohibiting creditor’s pre-judgment communications to employers of delinquent debtors was upheld in Commercial Lawyers Conference v. Grant (N.Y. County Sup. Ct., Special Term, Part 1, Jan. 27, 1971, \textit{reported in} 165 N.Y.L.J., Jan. 28, 1971 at 2, col. 4.) Grounds for the challenge were (1) conflict with state and federal law, (2) deprivation of free speech, and (3) denial of due process rights with respect to the alleged power of the commissioner to levy penalties without court action. The court held all three contentions to be unfounded, pointing out that the third was based on nothing more than a misinterpretation of the commissioner’s power under the ordinance.

\textsuperscript{103} Lefkowitz v. ITM, Inc., 52 Misc. 2d 39, 54, 275 N.Y.S.2d 303, 321 (Sup. Ct. 1966). In this action, the New York Supreme Court granted a decree sought by the Attorney General, enjoining promoters of a referral-type sales program from further engaging in alleged fraudulent and illegal practice.