

Michigan Law Review

Volume 68 | Issue 5

1970

Consumer Protection in Michigan: Current Methods and Some Proposals for Reform

Michigan Law Review

Follow this and additional works at: <https://repository.law.umich.edu/mlr>



Part of the [Consumer Protection Law Commons](#), [Legislation Commons](#), and the [State and Local Government Law Commons](#)

Recommended Citation

Michigan Law Review, *Consumer Protection in Michigan: Current Methods and Some Proposals for Reform*, 68 MICH. L. REV. 926 (1970).

Available at: <https://repository.law.umich.edu/mlr/vol68/iss5/4>

This Response or Comment is brought to you for free and open access by the Michigan Law Review at University of Michigan Law School Scholarship Repository. It has been accepted for inclusion in Michigan Law Review by an authorized editor of University of Michigan Law School Scholarship Repository. For more information, please contact mlaw.repository@umich.edu.

COMMENTS

Consumer Protection in Michigan: Current Methods and Some Proposals for Reform

During the past decade, a great deal of effort has been expended at all levels of government in the United States to enhance the prosperity of the poor and underprivileged elements of society. Much legislation has been passed—especially at the federal level¹—but it has been incomplete in that its main thrust has been simply to increase the income levels of poor people without a corresponding effort to ensure that they receive their money's worth as consumers.² As a result, the long-standing evil of fraud in the market place has not been significantly reduced, but has contributed to the serious economic and social problems that confront contemporary society.³ It has been estimated, for example, that, in purely monetary terms, Michigan consumers lose as much as one hundred million dollars annually to fraudulent merchants.⁴ This loss is particularly devastating since the victims of the unethical and deceptive practices are very often persons with low incomes who cannot easily bear financial loss.⁵ Consumer fraud thus tends to reinforce the vicious circle of poverty with its attendant social ills.

Fraudulent business practices have also contributed to the violent upheavals that have occurred in urban ghetto areas in recent years. A study of the 1967 Detroit riots concluded that a primary cause of the violence that erupted was the sense of frustration that the people of the inner city felt as a result of (1) constant exposure to dishonest merchants, (2) perpetual indebtedness because of too liberal and too costly extensions of credit, and (3) the inability to

1. See Manpower Development and Training Act, 42 U.S.C. §§ 2571-628 (Supp. IV, 1965-1968); Economic Opportunity Act, 42 U.S.C. §§ 2701-994d (Supp. IV, 1965-1968). See also Tax Reform Act of 1969, Pub. L. No. 91-172, § 802, 83 Stat. 676 (special tax allowance for low-income taxpayers).

2. See Note, *Consumer Legislation and the Poor*, 76 YALE L.J. 745, 746 (1967).

3. For an examination of the problem of consumer fraud in the United States, especially as that problem relates to the inner city, see H. BLACK, *BUY NOW PAY LATER* (1967); D. CAPLOVITZ, *THE POOR PAY MORE* (1967); W. MAGNUSON & J. CARPER, *THE DARK SIDE OF THE MARKETPLACE* (1968). The only comparable work on consumer fraud in Detroit is *Focus: Hope 68*, a study of comparative food and drug prices and services in the Detroit metropolitan area.

4. Detroit News, Oct. 5, 1969, § E., at 1, col. 4.

5. D. CAPLOVITZ, *THE POOR PAY MORE* 105-36 (1967). A study by the Federal Trade Commission of the customers of those merchants in the District of Columbia most likely to engage in fraudulent sales practices and to charge inordinately high prices showed that the average purchaser was supporting an abnormally large family (3.6 to 4.3 members) on an income below the average for the district (\$4,176 as compared to an average of \$6,920). FTC, *ECONOMIC REPORT ON INSTALLMENT CREDIT AND RETAIL SALES PRACTICES OF DISTRICT OF COLUMBIA RETAILERS* x, 35-44 (1969) [hereinafter *FTC CREDIT STUDY*].

seek redress for economic grievances because of the complexity and inaccessibility of the legal system.⁶

There has been some governmental response to the critical problem of consumer fraud, although to date it has been manifestly inadequate. President Nixon recently announced the entry of the federal government into the fight against fraud in the market place with the statement that "[c]onsumerism—Upton Sinclair and Rachel Carson would be glad to know—is a healthy development that is here to stay."⁷ Unfortunately, there has been little effective federal legislation⁸ or enforcement, and the consumer remains substantially unshielded by federal law from businessmen, who, like Babbit, are "nimble in the calling of selling houses for more than people could afford to pay."⁹ As a result, the consumer must look to state and local governments for whatever protection is available against unscrupulous merchants. The states too, however, have been less than zealous guardians of consumer interests. In most states, consumer fraud problems are dealt with by statutes that are confusing, disjointed, and incomplete,¹⁰ and by procedures that are cumbersome and inefficient.¹¹ But perhaps the most serious problem is one of misplaced priorities. Seldom do officials who are charged with the responsibility of safeguarding consumer interests direct their primary efforts toward the element of society most seriously and persistently exploited in the market place—the low-income consumer.¹²

The State of Michigan is certainly no exception to the general pattern, insofar as consumer protection is concerned. Its consumer fraud legislation is ill-conceived, and its enforcement procedures are inadequate. But most discouraging is the state's apparent lack of concern about the seriousness of the problem of fraud in the market

6. That study was undertaken by the Detroit *Free Press* and The Detroit Urban League. See also NATIONAL ADVISORY COMM. ON CIVIL DISORDERS, REPORT 274 (1968).

7. Address to Congress on Consumer Affairs, Oct. 31, 1969, in N.Y. Times, Oct. 31, 1969, at 22, col. 1.

8. There has been some such legislation, however. Fair Packaging & Labeling Act, 15 U.S.C. §§ 1451-61 (Supp. IV, 1965-1968); Consumer Credit Protection Act, 15 U.S.C. §§ 1601-77, (Supp. IV, 1965-1968).

9. S. LEWIS, *BABBIT* 1 (1922).

10. See Rice, *Remedies, Enforcement Procedures and the Duality of Consumer Transaction Problems*, 48 B.U. L. REV. 559, 583-88 (1968); Saxbe, *The Role of the Government in Consumer Protection: The Consumer Frauds and Crimes Section of the Ohio Attorney General*, 29 OHIO ST. L.J. 897, 901-04, 908-15 (1968); Note, *The Regulation of Advertising*, 56 COLUM. L. REV. 1018, 1057-72 (1956).

11. Note, *supra* note 10, at 1063-65; *Developments in the Law—False Advertising*, 80 HARV. L. REV. 1005, 1123 (1967).

12. See *Installment Sales: The Plight of the Low Income Buyer*, 2 COLUM. J.L. & SOC. PROB. 1 (1966); Kripke, *Gesture and Reality in Consumer Credit Reform*, 44 N.Y.U. L. REV. 1 (1969). For an examination of the current inability of the legal system to protect consumers, see D. CAPLOVITZ, *supra* note 3, at 155-70; Hester, *Deceptive Sales Practices and Form Contracts—Does the Consumer Have a Private Remedy?*, 1968 DUKE L.J. 831.

place, a problem which daily confronts poor and uneducated consumers; the various units of governments in Michigan simply have not been willing to provide the funds and manpower necessary to combat the problem successfully.¹³

A necessary adjunct to any legal reform in the area of consumer protection is the establishment of a consumer education program that is designed to apprise citizens—particularly those who lack adequate education—of their rights as consumers and to advise them where to go for governmental assistance before as well as when they have been defrauded. Studies have shown that most defrauded consumers do not at present utilize the resources of the state governmental agencies that are responsible for consumer protection, either because they are unaware of the existence of such agencies, or because they lack faith in the government's willingness or ability to help the average citizen.¹⁴ Nevertheless, although serious attempts must be made to convince consumers that they need not passively accept the economic injury inflicted upon them by dishonest merchants, it is first necessary to provide a meaningful set of remedies that may be invoked in their behalf. It is to that initial requirement that this study of Michigan law is primarily directed.

I. THE STATUTORY FRAMEWORK

A. Criminal Statutes

In most states, criminal statutes have traditionally provided the primary means for combatting fraudulent business practices.¹⁵ It has been generally conceded, however, that attacking fraud in the market place with criminal sanctions has been patently unsuccessful,¹⁶

13. For a discussion of this problem, see pt. II *infra*.

14. D. CAPLOVITZ, *supra* note 3, at 175-78. It has been reported that even if defrauded consumers know where they may go to seek governmental assistance, nine out of ten will not pursue any remedy at all. Usually their distrust of all governmental institutions is so great that they cannot understand that help, as well as harm, can be received from them. See generally Murphy, *Attorneys for the Poor View the U.C.C.*, 44 N.Y.U. L. REV. 298, 303-04 (1969). The author contends that the lower one's position on the socio-economic scale, the less likely he is to be aware of the potential value of legal services.

15. The primary attack on consumer fraud has been through regulation of advertising, accomplished by the use of criminal statutes similar to the model act prepared by *Printer's Ink* magazine in 1911. Such statutes have been adopted in 43 states, including Michigan. See Saxbe, *supra* note 10, at 901-04; Note, *supra* note 10, at 1058-65; MICH. COMP. LAWS ANN. § 750.33 (1967); OHIO REV. CODE ANN. § 2911.41 (Page 1962). Most states have also adopted criminal statutes prohibiting the obtaining of money and property by false pretenses. Saxbe, *supra* note 10 at 901-02; Comment, *Translating Sympathy for Deceived Consumers into Effective Programs for Action*, 114 U. PA. L. REV. 395, 424-26 (1966). See Pearce, *Theft by False Promises*, 101 U. PA. L. REV. 967 (1953); MICH. COMP. LAWS ANN. § 750.218 (1967); PA. STAT. ANN. tit. 18 § 4836 (1963).

16. See Saxbe, *The Role of Government in Consumer Protection: The Consumer Frauds and Crimes Section of the Ohio Attorney General*, 29 OHIO ST. L.J. 897, 902 (1968); *Developments in the Law—False Advertising*, 80 HARV. L. REV. 1005, 1018-19,

and several states have abandoned that method in favor of a more flexible approach involving administrative remedies.¹⁷ Nevertheless criminal provisions are still among the primary "weapons" in the fight against consumer fraud in Michigan.¹⁸ The two criminal statutes invoked most often¹⁹ against fraudulent merchants are the statute prohibiting false advertising²⁰ and that prohibiting the obtaining of money under false pretenses.²¹

The Michigan false-advertising statute prohibits placing before the public with the intention of selling merchandise any "untrue, deceptive, or misleading statement."²² Convictions under such statutes have been exceedingly rare²³ because of the insistence of the courts that there is no criminal offense absent proof that the seller intended to deceive, as well as to sell to, the public.²⁴ Moreover, not even every intentionally misleading statement is actionable; the courts have decided that allowance must be made for normal "puffing" of a product.²⁵ Thus the trier of fact must in every case decide whether the allegedly misleading statement was merely an opinion of the seller which a reasonable man would have recognized as such or whether it was a calculated falsehood upon which a buyer could have reasonably relied.²⁶ Only in the most blatant cases, therefore, have convictions been obtained; and even in those cases the defendant has generally received a suspended sentence or a fine—a small price to pay for operating in an illegal manner.²⁷

1122-23 (1967); Comment, *Translating Sympathy for Deceived Consumers into Effective Programs for Action*, 114 U. PA. L. REV. 395, 424-27 (1966) [hereinafter *Effective Programs*].

17. For a list of states that have enacted deceptive-practice legislation, see note 287 *infra*.

18. Interview with Jay Nolan, Chief, Fraud and Special Services Section, Wayne County Prosecutor's Office, Detroit, Michigan, Oct. 22, 1969 [hereinafter Nolan Interview]. Consumer fraud presents one of the few instances of crime in society about which there is little if any public outcry. Apparently people do not mind being robbed with a pen.

Criminal statutes are used in many jurisdictions. See *Effective Programs*, *supra* note 16, at 424-26; Letters on file at the Michigan Law Review from David S. Shannon, Deputy District Attorney, Multnomah County (Portland), Oregon, Oct. 10, 1969; Robert Brown, Asst. State Attorney, Eleventh Judicial Circuit (Dade County), Florida, Oct. 6, 1969; Eugene Gold, District Attorney, Kings County (Brooklyn), New York, Oct. 1, 1969.

19. Nolan Interview, *supra* note 18.

20. MICH. COMP. LAWS ANN. § 750.33 (1967).

21. MICH. COMP. LAWS ANN. § 750.218 (1967).

22. MICH. COMP. LAWS ANN. § 750.33 (1967).

23. See *Developments in the Law*, *supra* note 11, at 1123.

24. *People v. Austin*, 301 Mich. 456, 460, 3 N.W.2d 841, 843 (1942).

25. *People v. Austin*, 301 Mich. 456, 460, 3 N.W.2d 841, 843 (1942); *People v. Clarke*, 252 App. Div. 122, 297 N.Y.S. 776 (1937).

26. *People v. Austin*, 301 Mich. 456, 3 N.W.2d 841 (1942).

27. Only two decisions under this statute have been reported, and both of those

The statute prohibiting the obtaining of money or other property under false pretenses is just as ineffective. In a consumer fraud case arising under that provision, the state must prove the seller's intent to defraud, his use of a false pretense, and reliance by the purchaser upon that pretense.²⁸ Furthermore, the false pretense must refer to an existing fact; statements concerning acts that are to take place in the future are not sufficient to sustain a conviction.²⁹ Thus, for example, if a seller tells a buyer that a watch has seventeen jewels when in fact it has only four, he is criminally liable; but if the seller tells the buyer that he will repair the watch free of charge, and then later refuses to do so, he is not criminally liable. Finally the defendant must have actual knowledge of the falsity of the statement; it is not enough if he is merely negligent in making the statement.³⁰

The strict interpretation given the false-pretenses statute, especially the requirement that the false pretense relate to an existing fact, severely limits the usefulness of that provision in normal consumer fraud cases, such as that in which a merchant promises to deliver a certain article to a buyer and in fact delivers another, that in which the seller refuses to honor a guarantee, or that in which the seller makes false representations concerning the amount of future payments that the buyer is obligated to make or the length of time he has in which to make them. The obvious concern of the courts in restricting the scope of the statute is to prevent the criminal sanction from being used to enforce contractual obligations or from being invoked to mollify the victim of a bad bargain.³¹ But this policy of preventing criminal penalties from being used in what are essentially civil controversies would not be undermined by a strict provision making false promises actionable only in cases in which there is proof that the promisor, at the time the promise was made, did not intend to perform.³² Yet such a provision would afford the consumer more protection than he has under the current interpretation of the false-pretenses statute.

cases were prosecuted during the Second World War when gasoline was at a premium. In one of the cases, the defendant portrayed his brand of gasoline as "grade-one," although the jobber's manual clearly indicated that it was not. *People v. Austin*, 301 Mich. 456, 3 N.W.2d 841 (1942). Even with the clear-cut falsehood in that case, however, prosecution and conviction may perhaps be attributed more to the strong feelings against war profiteering that prevailed at the time than to the fact that the case was an easy one for the prosecution.

The information relating to sentencing practices was obtained in the Nolan Interview, *supra* note 18.

28. *People v. Lee*, 259 Mich. 355, 356, 243 N.W. 227, 228 (1932).

29. *People v. Morrison*, 348 Mich. 88, 91, 81 N.W.2d 667, 668 (1957).

30. *People v. Larco*, 331 Mich. 420, 429, 49 N.W.2d 358, 363 (1951).

31. See *Chaplin v. United States*, 157 F.2d 697, 699 (D.C. Cir. 1946); Saxbe, *supra* note 10, at 902.

32. See *Effective Programs*, *supra* note 16, at 425. Indeed, in order to make their

However, even in the rare case in which all the elements of an offense under the false-pretenses statute are present, it is doubtful that many prosecutors will invoke the statute against businessmen because of the traditional hesitancy on the part of officials at all levels of law enforcement to apply criminal statutes to white-collar crimes.³³ That hesitancy may be particularly pronounced with respect to the false-pretenses statute because of the relatively severe penalties attached to conviction; indeed, if the amount taken by false pretenses is more than one hundred dollars, the crime is a felony.³⁴

In addition to the false-advertising and false-pretenses statutes—the two most commonly used consumer protection laws in Michigan—the state legislature has also enacted seventy-four “product statutes” and seventy-six “service statutes.”³⁵ Each of these statutes prohibits fraud in the sale of a specific type of goods or services, and each carries a criminal penalty which is enforced by one of a multitude of governmental agencies ranging from the Department of Agriculture to the Cemetery Commission.³⁶ These provisions, however, contribute little to the over-all fight against fraud in the market place. Because the power of enforcement has been delegated to so many disparate agencies, resources have been dissipated, coordination has been made impossible, and, most important, consumer access

false-pretense statutes more functional, two states have amended their criminal codes to provide that false promises made with the intent not to perform are actionable. NEB. REV. STAT. § 28-1207 (1964); N.J. STAT. ANN. § 2A:111-1 (1969). Other states have reached the same result by judicial construction. *See, e.g.,* *People v. Cohn*, 358 Ill. 326, 193 N.E. 150 (1934); *Commonwealth v. Green*, 326 Mass. 344, 94 N.E.2d 260 (1950); *see Effective Programs*, *supra* note 16, at 425-26. Several recent decisions of the Michigan Court of Appeals have involved future promises—the failure to make good on post-dated checks—but in each case there were also misrepresentations concerning present facts upon which the victim was found to have relied. *See People v. Niver*, 7 Mich. App. 652, 152 N.W.2d 714 (1967); *People v. Vida*, 2 Mich. App. 409, 140 N.W.2d 559 (1966).

33. *See Developments in the Law*, *supra* note 18, at 1123; *Effective Programs*, *supra* note 16, at 426.

34. MICH. COMP. LAWS ANN. § 750.218 (1967).

35. For as complete a compilation as is presently available, see MICHIGAN CONSUMERS' COUNCIL, SUMMARY OF CONSUMER PROTECTION LEGISLATION (May 1969).

36. *E.g.,* MICH. COMP. LAWS ANN. § 289.501 (1967):

[W]ithin this state no person shall manufacture, offer or expose for sale, keep in possession with intent to sell, or sell any ground buckwheat containing any product of wheat, corn, rice or other foreign substance unless each and every package thereof be distinctly and legibly branded or labeled “Buckwheat Flour Compound”

Violation of this section is a misdemeanor. MICH. COMP. LAWS ANN. § 289.505 (1967). Similarly, the Insurance Bureau of the Department of Commerce is empowered to bring criminal action against any insurance broker who fraudulently obtains a renewal of a life insurance policy without the explicit consent of the insured. MICH. COMP. LAWS ANN. § 500.2023 (1967). Fifty-four of these statutes attempt to control various fraudulent practices by specific prohibition and criminal sanction. *See generally* MICHIGAN CONSUMERS' COUNCIL, *supra* note 35.

has been inhibited.³⁷ Moreover, by providing for only a criminal penalty, the legislature has denied the enforcement agencies needed flexibility in framing effective remedies and thus has encumbered the utility of the statutes. Most of these provisions could be eliminated with the enactment of a broad deceptive-practices statute³⁸ such as that proposed by the Federal Trade Commission³⁹ or the Council of State Governments.⁴⁰ While some details of the proposed acts differ, both acts place the enforcement authority in a centralized agency that may seek both criminal and noncriminal sanctions.⁴¹ In addition, both acts share a common definition of what is prohibited: "[u]nfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce."⁴² The advantage of such a broad prohibition is obvious; under it a centralized enforcement agency can deal with a variety of deceptive practices that previously may have cut across various jurisdictional lines or that may not even have been covered by pre-existing legislation. In addition, the broad language offers added flexibility for dealing with new types of fraud and deception not prevalent at the time of enactment.⁴³

37. See Rice, *Remedies, Enforcement Procedures and the Duality of Consumer Transactions*, 48 B.U. L. REV. 595, 595-600 (1968).

38. A few of these provisions, however, although designed to prohibit fraudulent sales practices, deal with matters of public health or safety that should remain within the jurisdiction of a specialized agency. See, e.g., MICH. COMP. LAWS ANN. §§ 286.451-.462 (1967), providing criminal penalties or injunctive relief against dealers who mislabel toxic substances. This statute is enforced by the Department of Agriculture.

39. FTC, UNIFORM UNFAIR TRADE PRACTICES AND CONSUMER PROTECTION LAW [hereinafter FTC UNIFORM ACT], reprinted in FTC, REPORT ON DISTRICT OF COLUMBIA CONSUMER PROTECTION PROGRAM 3 (1969) [hereinafter FTC PROTECTION PROGRAM].

40. COUNCIL OF STATE GOVERNMENTS, SUGGESTED STATE LEGISLATION, CONSUMER PROTECTION ACT (1970 Draft) [hereinafter CSG ACT]. The National Conference of Commissioners on Uniform State Laws is also completing studies on the Uniform Consumer Sales Practices Act [hereinafter NCCUSL ACT]. That proposed act is now in its third draft.

41. Under the FTC uniform act and the CSG act the administrator of a state deceptive-practices statute is to be the attorney general, whereas the NCCUSL act makes no recommendation as to where the centralized authority should lie. With regard to the FTC proposed act, see FTC PROTECTION PROGRAM, *supra* note 39, attachment A, at C. (1968). See also MASS. GEN. LAWS ANN. ch. 93A, §§ 2, 4, 5 (Supp. 1967); N.M. STAT. ANN. § 49-15-7 (Supp. 1953). A few states have placed consumer protection programs in another regulatory agency. See, e.g., CONN. GEN. STAT. ANN. § 42-111-115a (Supp. 1969) (Commissioner of Consumer Protection).

42. Federal Trade Commission Act § 5, 15 U.S.C. § 45(a)(1) (1964). This language has been incorporated into § 2 of the FTC Uniform Act and into § 2, alternative 1, of the proposed CSG act. For those states not wishing to repeal present unfair-competition laws, the CSG act, § 2, alternative 2, also defines prohibited conduct as simply "[f]alse, misleading, or deceptive acts or practices in the conduct of any trade of commerce"

43. Some states have adopted language similar or identical to that of the existing Federal Trade Commission Act (see note 42 *supra*). E.g., HAWAII REV. LAWS § 205A-1.1 (Supp. 1965); MASS. GEN. LAWS ANN. ch. 93A, § 2(a) (Supp. 1967); WASH. REV. CODE ANN. § 19.86.020 (Supp. 1968). This language requires the state courts and the administrator of the state legislation to draw heavily upon decisions construing the Federal Trade

The Attorney General of Michigan has urged the adoption of such legislation;⁴⁴ but the attitude of the legislature, although it has changed from "hostility to cool approval,"⁴⁵ does not foreshadow quick passage. In the meantime, dishonest merchants who prey upon poor consumers can find comfort in the knowledge that they are better off than the Mafia; they do not have to pay bribes.

B. *Civil Statutes Regulating Retail Sales*

The first comprehensive civil statute regulating retail sales was enacted in Indiana in 1935.⁴⁶ Michigan followed soon thereafter with the enactment in 1939 of the Motor Vehicle Retail Installment Sales Act.⁴⁷ But unlike the Indiana statute, which had a broad scope, the Michigan statute regulated merely the form of the contract to be used in an installment sale of an automobile, requiring the inclusion of a statement of the cash price, the amount of the down payment, the amount of any unpaid balance, and the amount of finance charges.⁴⁸ That Act remained the only retail-sales regulation in Michigan until 1951 when the Motor Vehicle Sales Finance Act was adopted.⁴⁹ During the decade of the fifties, many state legislatures enacted comprehensive retail-sales legislation.⁵⁰ The Michigan legislature, however, lagged behind until 1966 when it passed the Retail

Commission Act. A provision both in the suggested CSG act [§ 3(b)] and NCCUSL act (§§ 4b, 9) goes further, however, and requires that any rules or regulations issued by the state administrator be in conformity with such decisions. Although the state administrator should avoid conflicts between state and federal law as much as possible, there does not seem to be any compelling reason to limit the authority of the state to provide greater protection to its citizens. In the event that a standard less stringent than the federal provision is adopted by the state, the consumer would still have the higher level of protection under the federal act from interstate deceptive activities. Still, the availability of federal legislation should not preclude the states from experimenting with increased regulation if current measures are not sufficient. For example, a state could insist that retail merchants not use "list prices" in advertising goods unless those prices are, in fact, the normal prices at which the goods are sold. This requirement would probably greatly help the consumer in assessing the true value of a so-called discount or sale price. It seems, however, that the doctrine of compatibility with FTC decisions would prohibit such a requirement since the FTC has established a lesser standard. See Baum, *The Consumer and the Federal Trade Commission*, 44 J. URBAN LAW 71, 81-82 (1966).

44. Interview with George Platsis, Assistant Attorney General in charge of the Consumer Protection Division, Michigan Attorney General's Office, Lansing, Michigan, Oct. 7, 1969 [hereinafter Platsis Interview].

45. Detroit News, Oct. 5, 1969, § E., at 1, col. 4.

46. IND. ANN. STAT. §§ 58-902 to -934 (1961); see Note, *Retail Installment Sales Legislation*, 58 COLUM. L. REV. 854, 856 (1958).

47. MICH. COMP. LAWS ANN. §§ 566.301-.302 (1967).

48. MICH. COMP. LAWS ANN. § 566.302 (1967).

49. MICH. COMP. LAWS ANN. §§ 492.101-.138 (1967).

50. See Hogan, *A Survey of State Installment Sales Legislation*, 44 CORNELL L.Q. 38 (1958).

Installment Sales Act⁵¹ which is an all-goods statute.⁵² During the same session, the legislature enacted the Home Improvement Finance Act regulating the form of home improvement contracts which are for services having a value exceeding three hundred dollars.⁵³

These Michigan statutes, like almost all retail-sales legislation in the United States, are basically disclosure-oriented and for the most part do not rigorously regulate the substantive content and the conditions of retail-sales agreements.⁵⁴ The Retail Installment Sales Act, for example, requires that all installment contracts be in writing and contain a notice to the buyer in at least eight-point type that he is entitled to a copy of the contract, that he should not sign the contract if it contains any blank spaces, and that he is entitled to a partial return of the finance charge if the balance is prepaid.⁵⁵ The Motor Vehicle Sales Finance Act and the Home Improvement Finance Act contain similar provisions and basically do not go much beyond the requirement that pertinent information be disclosed on the face of motor vehicle sales contracts and home improvement contracts.⁵⁶ The state statutory requirements for disclosure of financing terms in installment contracts have been superseded by the Federal Consumer Credit Protection Act;⁵⁷ and the Michigan legislature has stipulated that the federal standards, which include the requirement that the seller furnish the installment buyer with a statement of the annual percentage rate of finance charges, are absorbed into the present

51. MICH. COMP. LAWS ANN. §§ 445.851-.872 (1967).

52. For a comprehensive compilation of both all-goods and limited-purpose state legislation, see B. CURRAN, TRENDS IN CONSUMER CREDIT LEGISLATION, chart 11, at 254-55, chart 17, at 293-300, chart 19, at 312-22 (1965).

53. MICH. COMP. LAWS ANN. §§ 445.1101-.1431 (1967).

54. Hogan, *supra* note 50, at 44-47; Note, *Retail Installment Sales Legislation*, 58 COLUM. L. REV. 854, 866-72 (1958); see B. CURRAN, *supra* note 52, chart 17, at 293-300. There is a considerable difference between regulating the manner in which substantive terms are presented to the buyer and regulating the terms themselves. The retail-sales acts, for instance, require the sales price to be disclosed but do not place any limit upon that sales price, which could be done with an unconscionability clause. See NCCUSL Act § 2(c); Note, *Inadequacy of Consideration as a Factor in Determining Unconscionability Under Section 2-302 of the UCC*, 67 MICH. L. REV. 1248 (1969). The greatest failing of retail-sales legislation, however, is that it does not deal at all with the inducements for the sale or with the negotiations before the signing of the contract. This precontract stage is crucial; once the consumer has assented, the signing itself is a mere formality.

55. MICH. COMP. LAWS ANN. § 445.853(a) (1967).

56. MICH. COMP. LAWS ANN. §§ 445.1202(b), 492.112(d) (1967). In addition to establishing disclosure requirements, the Motor Vehicle Sales Finance Act provides that all persons engaged in the selling of motor vehicles under installment sales contracts, as well as the financial institutions taking assignments of such contracts, must be licensed by the state. MICH. COMP. LAWS ANN. § 492.103 (1967). The Act vests authority in the Financial Institutions Bureau to grant such licenses. See text accompanying notes 227-34 *infra*.

57. 15 U.S.C. §§ 1631-41 (Supp. IV, 1965-1968).

Michigan regulatory scheme.⁵⁸ For all practical purposes, the Michigan statutes, combined with the Federal Act, provide for the disclosure of virtually all the information that is relevant to the consumer who is purchasing goods on an installment basis. A significant question remains, however, as to whether the disclosure provisions actually protect the average consumer in the market place.

In order to answer that question, it is necessary to understand the purposes which disclosure provisions are intended to serve. Basically, disclosure statutes attempt to provide buyers on the credit market with the opportunity to compare the credit terms of various sellers; they do so in order to assist the consumer in obtaining the best bargain and thereby to reduce the possibility that the buyer will be victimized by an unscrupulous merchant. Theoretically, such statutes could be of assistance to relatively sophisticated middle- and upper-class buyers, who are able to understand the financial information presented in installment contracts and loan agreements, and who are able to choose freely among the various credit merchants because they offer merchants a low credit risk.⁵⁹ Most of these sophisticated consumers, however, are aware that it is cheaper to borrow money from a bank or to buy from a reputable merchant than it is to borrow from a sales finance company or to buy from an "easy credit" merchant. For these consumers, then, the disclosure provisions, which are aimed at high-priced finance companies and unscrupulous merchants, may as a practical matter be of little use.⁶⁰

Poor and uneducated lower-class consumers, on the other hand, lack the ability to understand the disclosed financial information and are thus unable to shop comparatively in the credit market.⁶¹ In addition, they suffer from gullibility fostered in part by ignorance and in part by the desire to compensate for a secondary position in society by purchasing material goods.⁶² Moreover, most poor urban

58. No. 30, [1969] Mich. Acts 69-70 (to be codified in MICH. COMP. LAWS ANN. § 445.111); No. 31, [1969] Mich. Acts 70 (to be codified in MICH. COMP. LAWS ANN. § 445.851); No. 35, [1969] Mich. Acts 77 (to be codified in MICH. COMP. LAWS ANN. § 492.122).

59. Kripke, *Gesture and Reality in Consumer Credit Reform*, 44 N.Y.U. L. REV. 1, 4-5 (1969); Note, *Consumer Legislation and the Poor*, 76 YALE L.J. 745, 746-54 (1967).

60. Kripke, *Consumer Credit Regulation: A Creditor Oriented Viewpoint*, 68 COLUM. L. REV. 445, 455-69 (1968); Kripke, *Gesture and Reality in Consumer Credit Reform*, 44 N.Y.U. L. REV. 1, 4-5 (1969). The latter article is an excellent answer to those who believe disclosure is the cure-all for consumer credit problems. For a more favorable view of disclosure statutes, see Jordon & Warren, *Disclosure of Finance Charges: A Rationale*, 64 MICH. L. REV. 1285 (1966). It should also be mentioned that today much purchasing is done with all-purpose credit cards. It is doubtful that the interest charges of such cards enter into the consumer's decision whether to use them instead of a loan or other form of financing.

61. D. CAPLOVITZ, *THE POOR PAY MORE* 13-15 (1967).

62. See Project, *The Direct Selling Industry: An Empirical Study*, 16 U.C.L.A. L. REV. 883, 917-19 (1969); D. CAPLOVITZ, *supra* note 3, at 12-13.

consumers have little desire and even less ability to shop in stores outside the ghetto;⁶³ their generally poor credit ratings all but preclude the possibility of their receiving credit in stores catering to the middle and upper classes.⁶⁴ Finally, the poor consumer seldom shops for credit separately from the purchase of goods. As a consequence, the retail merchant dealing with poor consumers also provides financing and is able to conceal finance charges in the selling price and thus to offer very attractive, but deceptive, credit terms.⁶⁵

The primary weakness of disclosure-oriented retail-sales statutes, therefore, is that they are not designed to combat the evils that beset the poor, inner-city consumer. Deceptive sales practices, unscrupulous merchants, and exorbitant prices and credit terms are facts of life in the ghetto—but not in the shopping centers of the suburbs. Yet the disclosure statutes are designed so that only educated and economically prosperous consumers can benefit from them. Perhaps the greatest danger in such legislation is not that it fails to provide a solution to consumer fraud problems, but that enough people will think that it does provide a solution that any further reform will be precluded.

Although most retail-sales legislation is disclosure-oriented, the statutes in many states, including Michigan, do attempt some regulation of certain sales practices that are particularly harsh upon consumers.⁶⁶ The practices receiving the most statutory attention are the various cut-off devices by which financial institutions, as assignees of consumer obligations, can avoid the consumer's claims and defenses which arise out of the original sale and which are raised in actions to compel the consumer to pay the amount due on the sales contract.

The holder-in-due-course doctrine is one such device. The doctrine allows the assignee of a consumer obligation to compel the consumer to satisfy that obligation, but it does not subject the

63. See FTC CREDIT STUDY, *supra* note 5, at 42-45, in which it was found that 70% of the customers of low-income (ghetto) retailers never purchase on credit from other than a low-income retailer. This statistic is significant in light of the fact that most low-income consumers can purchase only on credit. See D. CAPLOVITZ, *supra* note 3, at 14-15.

64. D. CAPLOVITZ, *THE POOR PAY MORE* 98 (1967); Note, *Consumer Legislation and the Poor*, 76 YALE L.J. 745, 757 (1967).

65. Kripke, *Gesture and Reality in Consumer Credit Reform*, *supra* note 60, at 6-7. Since mark-ups are so much higher in the ghetto (see FTC CREDIT STUDY, *supra* note 5, at 25-28), and since the poor have little opportunity to be exposed to a different price structure, there is much more flexibility in the list prices, and additional credit charges may be absorbed without significant competitive disadvantage. The requirements of federal and state disclosure statutes can be easily met since no concealment of the actual finance charge is involved; no disclosure statute prohibits a merchant from raising the selling price rather than credit charges.

66. See generally Hogan, *supra* note 50; MICH. COMP. LAWS ANN. §§ 445.853, .864, .1203, 492.114(b) (1967). See also MICHIGAN CONSUMER'S COUNCIL, *COMPARISON OF THE UCCC WITH MICHIGAN CREDIT LEGISLATION* table 4, at 15-18 (Aug. 1969).

assignee to the claims—such as failure of consideration, fraud, or breach of warranty—that the consumer may have against the merchant who contracted with him for the sale of the goods. In the typical installment sale, the buyer executes a promissory note to the seller in conjunction with the sales contract. In order to meet current capital needs, many merchants sell both the note and the contract to a finance company or bank.⁶⁷ Under article 3 of the Uniform Commercial Code (UCC), if the assignee purchases the instrument for value, in good faith, and without notice of any defense or claim, the assignee is a holder in due course⁶⁸ and as such is not subject to the defenses or claims of the consumer which arise out of the sale.⁶⁹ The drafters of the UCC, in an attempt to preserve the free transferability of commercial paper, adopted a “subjective” standard which requires that the assignee have actual knowledge of a claim or defense in order for him to be denied holder status.⁷⁰ Courts in some states, however, recognizing the harshness of this test, have held that when there is a “close connection” between the seller and the assignee—such as when the finance company provides forms for the negotiable instrument and approves the terms of the sale⁷¹ or when there is duplication of management between the seller and assignee⁷²—the subsequent purchaser must be denied holder status.⁷³ The

67. The assignee is then able to enforce the contract for the balance due, to enforce the security agreement and obtain possession of the goods, or to do both. This process is examined in Note, *Consumer Sales Financing: Placing the Risk for Defective Goods*, 102 U. PA. L. REV. 782, 783-85 (1954). There is some conflicting evidence concerning the extent to which the holder-in-due-course doctrine is a real problem. The FTC CREDIT STUDY, *supra* note 5, reported that low-income retailers assigned only 20% of their paper. The Michigan Financial Institutions Bureau, on the other hand, estimates that over 90% of automobile purchase contracts and notes are assigned by dealers and that a large percentage of paper generated by other retailers, with the exception of department stores, is assigned as well. Interview with Alvin J. Trierweiler, Director, Consumer Finance Division, Financial Institutions Bureau, Department of Commerce, Lansing, Michigan, Oct. 14, 1969 [hereinafter Trierweiler Interview]. See note 112 *infra*. Most poverty lawyers feel that the doctrine is a principal obstacle to combatting fraud. See Murphy, *Lawyers for the Poor View the U.C.C.C.*, 44 N.Y.U. L. REV. 298 (1969).

68. UNIFORM COMMERCIAL CODE, § 3-302 [hereinafter UCC].

69. UCC § 3-305.

70. See Littlefield, *Good Faith Purchase of Consumer Paper: The Failure of the Subjective Test*, 39 S. CAL. L. REV. 48, 63-65 (1966).

71. *Commercial Credit Corp. v. Orange County Machine Works*, 34 Cal. 2d 766, 771, 214 P.2d 819, 822 (1950); *Mutual Fin. Co. v. Martin*, 63 S.2d 649, 653 (Fla. 1953).

72. See *United States v. Schaeffer*, 33 F. Supp. 547 (D. Md. 1940) (assignee of the note was a wholly owned subsidiary of the assignor); *Toms v. Nugent*, 12 S.2d 713 (La. App. 1943) (finance company wholly owned by the president of the company which had sold an automobile to the defendant).

73. For discussions of this subject, see Jones, *Finance Companies as Holders in Due Course of Commercial Paper*, 1958 WASH. U. L.Q. 177; Jordan & Warren, *The U.C.C.C.*, 68 COLUM. L. REV. 387, 434 nn.131-32 (1968); Littlefield, *supra* note 70; Murphy, *Another "Assault Upon the Citadel": Limiting the Use of Negotiable Notes and Waiver-*

theory of these decisions is that holder status must be denied either because the transfer was not made in good faith⁷⁴ or because the financial institution is so related to the seller that it is reasonable to consider the institution a party to the original transaction.⁷⁵ Other courts have gone even further and have held that under certain circumstances—such as when the financial institution has knowledge of a dealer's poor business reputation⁷⁶ or of his fraudulent business practices⁷⁷—the institution must be charged with "objective notice" of any defenses available to the consumer that would have been discovered by a reasonable investigation. Under this theory, the institution acquiring the consumer's obligation is liable to the extent of any of the buyer's claims which are based upon the original transaction.⁷⁸ These decisions have not been universally accepted, however, and many courts have rejected any deviation from the actual-knowledge standard envisioned by the Code.⁷⁹ Michigan seems to have adopted the latter course,⁸⁰ hence the consumer can probably

of-Defense Clauses in Consumer Sales, 29 OHIO ST. L.J. 667 (1968); Comment, *Consumer Protection—The Role of Cut-Off Devices in Consumer Financing*, 1968 WIS. L. REV. 505.

74. *Commercial Credit Co. v. Childs*, 199 Ark. 1073, 137 S.W.2d 260 (1940); *Commercial Credit Corp. v. Orange County Mach. Works*, 34 Cal. 2d 766, 214 P.2d 819 (1950); *Mutual Fin. Co. v. Martin*, 63 S.2d 649 (Fla. 1953); *Unico v. Owen*, 232 A.2d 405, 50 N.J. 101 (1967); see Comment, *Consumer Protection—The Role of Cut-Off Devices in Consumer Financing*, 1968 WIS. L. REV. 505, 514.

75. *Commercial Credit Co. v. Childs*, 199 Ark. 1073, 137 S.W.2d 260 (1940); *Commercial Credit Corp. v. Orange County Mach. Works*, 34 Cal. 2d 766, 214 P.2d 819 (1950); see Comment, *Consumer Protection—The Role of Cut-Off Devices in Consumer Financing*, 1968 WIS. L. REV. 505, 514.

76. *Westfield Inv. Co. v. Fellers*, 74 N.J. Super. 575, 590-91, 181 A.2d 809, 818 (1962).

77. *Norman v. World Wide Distrib., Inc.*, 202 Pa. Super. 53, 58-59, 195 A.2d 115, 118 (1963); *Jaeger & Branch, Inc. v. Pappas*, 20 Utah 2d 100, 433 P.2d 605 (1967). See also *Local Acceptance Co. v. Kinkade*, 361 S.W.2d 830 (Mo. 1962), in which the court held that knowledge and approval by the finance company of the seller's general practice of using chattel mortgages and promissory notes contemporaneously with sales contracts was sufficient to deny holder-in-due-course status to the finance company. The court rejected the idea that knowledge of the specific note and sales contract was needed.

78. Such decisions are not in accord with the standard set by the draftsmen of the UCC, but they represent the judicial distaste for the various cut-off devices, at least when consumers are involved. See Littlefield, *supra* note 70.

79. *E.g.*, *Waterbury Sav. Bank v. Janzewski*, 4 Conn. Cir. 620, 238 A.2d 446 (1967); *Buchett v. Allied Concord Fin.*, 74 N.M. 575, 396 P.2d 186 (1964). See also *Jordan & Warren*, *supra* note 73, at 434; Kripke, *Consumer Credit Regulation: A Creditor Oriented Viewpoint*, 68 COLUM. L. REV. 445, 469 (1968).

80. The Michigan courts have held that actual knowledge of a claim or defense is necessary before holder-in-due-course status will be denied. *Alropa Corp. v. King's Estate*, 279 Mich. 418, 272 N.W. 728 (1937); *Muskegon Citizen's Loan & Inv. Co. v. Champayne*, 257 Mich. 427, 241 N.W. 135 (1932). The purchaser is under no duty to inquire as to possible defenses unless, from something appearing on the face of the instrument or from something actually communicated to the purchaser, the failure to investigate would amount to "bad faith." *King v. C.B. Todd & Sons*, 310 Mich. 181, 16

expect little help from the courts when he is sued by an assignee of his contract or note and seeks to interpose, as a defense, claims he has against the seller which have arisen out of the sale.

Even if the financial institution is denied holder status, however, it may employ another cut-off device—the waiver-of-defense clause—in an effort to preclude the consumer from asserting defenses. Such clauses are inserted in retail-sales contracts and usually stipulate that the buyer agrees not to assert any claims arising out of the sale against any assignee of the contract.⁸¹ The courts of some states have recognized waiver-of-defense clauses as being an unfair imposition upon a purchaser of consumer goods and have therefore held such clauses to be contrary to public policy.⁸² In those states, the enforcement of the clauses has been denied. In most states, however, the courts have upheld waiver-of-defense clauses as valid contractual provisions, cutting off the buyer's claims against an assignee of the sales contract.⁸³ The issue of the validity of waiver-of-defense clauses has never been directly faced by the courts in Michigan; but since the Michigan legislature has placed some limitations upon the use of such clauses,⁸⁴ there is reason to believe that the courts will not trench upon legislative ground and extend the consumers' right any further. Such a policy of judicial passiveness would be in keeping

N.W.2d 709 (1945); *Muskegon Citizen's Loan & Inv. Co. v. Champayne*, 257 Mich. 427, 241 N.W. 135 (1932). The test is the subjective intent of the purchaser, and mere negligence, or even gross negligence, in making the purchase will not be sufficient if bad faith is not shown. *King v. C.B. Todd & Sons*, 310 Mich. 181, 16 N.W.2d 709 (1945); *Hakes v. Thayer*, 165 Mich. 476, 131 N.W. 174 (1911); *Armstrong v. Stearns*, 156 Mich. 597, 121 N.W. 312 (1909). Most of these cases were decided under the Negotiable Instruments Law, the predecessor of the UCC provisions, as were most of the cases in other jurisdictions. See cases cited in notes 71, 74-77 *supra*. The Michigan appellate courts have not passed upon this issue since the adoption of the UCC in 1964, but there is nothing in article III of the UCC that would appear to mandate a different result. See Littlefield, *Good Faith Purchase of Consumer Paper: The Failure of the Subjective Test*, 39 S. CAL. L. REV. 48, 49-50, 53-60, 74-77 (1966); Note, *Unico v. Owen: Consumer Finance Companies as Holders in Due Course Under the U.C.C.*, 54 VA. L. REV. 279, 284-92 (1968). The validity of the "close-connection" test as a measure of good faith or notice is similarly unresolved by the Michigan courts.

81. See *Unico v. Owen*, 50 N.J. 101, 107, 232 A.2d 405, 408 (1967), in which the court stated that the purpose of a sales contract containing such a clause is to get the most and give the least. Overall it includes a multitude of conditions, stipulations, reservations, exceptions, and waivers skillfully devised to restrict the liability of the seller within the narrowest limits, and to leave no avenue of escape from liability on the part of the purchaser.

82. See, e.g., *American Natl. Bank v. Sommerville*, 191 Cal. 364, 216 P. 376 (1923); *Unico v. Owen*, 50 N.J. 101, 232 A.2d 405 (1967); *Quality Fin. Co. v. Hurley*, 337 Mass. 150, 148 N.E.2d 385 (1958). These decisions are consistent with UCC § 9-206(1). That provision, while generally upholding the use of waiver clauses, stipulates that a different rule may be established for consumer sales. The decisions are also consistent with UCC § 2-302, which prohibits the enforcement of unconscionable clauses.

83. E.g., *Commercial Credit Corp. v. Biagi*, 11 Ill. App. 2d 80, 136 N.E.2d 580 (1956); *National City Bank v. Prospect Syndicate, Inc.*, 170 Misc. 611, 10 N.Y.S.2d 759 (1939); *Anglo-California Trust Co. v. Hall*, 61 Utah 223, 211 P. 991 (1922).

84. See text accompanying notes 92-95 *infra*.

with the traditional reluctance of Michigan courts to take action in the consumer protection area.⁸⁵

The harshness to the consumer of the holder-in-due-course doctrine or the waiver-of-defense clause has caused many state legislatures, including Michigan's, to restrict the use of those devices to cut off the consumer's claims or defenses. Several states, through their all-goods retail-sales statutes or through special legislation,⁸⁶ have withdrawn holder status from financial institutions in cases in which the institutions purchase consumer paper. The Michigan Home Improvement Finance Act accomplishes essentially the same result by providing that no negotiable instrument may be executed with a home improvement contract.⁸⁷ The Motor Vehicle Sales Finance Act, however, contains no limitations upon the use of commercial paper in automobile installment sales and thus leaves the provisions of the Uniform Commercial Code unchanged.⁸⁸ The Retail Installment Sales Act allows a negotiable note to be executed in conjunction with an installment contract; but it provides that an assignment of the note, even if made to an institution which qualifies as a holder in due course, does not bar the buyer from raising a defense against the institution unless a written notice of the assignment is mailed to the buyer and he fails to notify the institution of a claim within fifteen days.⁸⁹

There have been similar legislative responses with regard to waiver-of-defense clauses, and almost all recent changes either prohibit⁹⁰ or limit⁹¹ the use of such clauses. In Michigan, the Retail Installment Sales Act prohibits waiver clauses entirely;⁹² while under the Home Improvement Finance Act such clauses are valid only if the assignee notifies the buyer that there has been an assignment, and receives no notice of any claims of the buyer within fifteen days

85. See text accompanying note 186 *infra*.

86. See Cal. Retail Installment Sales Act, CAL. CIV. CODE § 1803.2(a) (West Supp. 1970); Md. Retail Installment Sales Act, MD. ANN. CODE art. 83, § 147 (1957); N.Y. PERS. PROP. LAW § 403(1) (McKinney Supp. 1969); UNIFORM CONSUMER CREDIT CODE § 2.403. See also Murphy, *supra* note 73, 673-74, 678-84 & n.23.

87. MICH. COMP. LAWS ANN. § 445.1207(1) (1967). If a promissory note is executed to the dealer, it must contain a notice that it is subject to the terms of the executory home improvement contract. MICH. COMP. LAWS ANN. § 445.1207 (1967).

88. See note 68 *supra*.

89. MICH. COMP. LAWS ANN. § 445.865(d) (1967).

90. Alas. Retail Installment Sales Act, ALAS. STAT. § 45.140 (1962); Conn. Home Solicitation Sales Act, CONN. GEN. STAT. § 42-136 to -143 (Supp. 1968); Hawaii Retail Installment Sales Act, HAWAII REV. LAWS § 201A-17(d) (Supp. 1967); see Murphy, *supra* note 73, 678-84.

91. N.Y. Retail Installment Sales Act, N.Y. PERS. PROP. LAW § 403(1) (McKinney Supp. 1969); Pa. Motor Vehicle Sales Finance Act, PA. STAT. ANN. tit. 69, § 615 (1965); see UNIFORM CONSUMER CREDIT CODE § 2.404.

92. MICH. COMP. LAWS ANN. § 445.864(f) (1967).

thereafter.⁹³ The Motor Vehicle Sales Finance Act also prohibits waiver clauses,⁹⁴ but stipulates that this provision does not affect the rights of a holder in due course.⁹⁵

The Michigan statutory provisions relating to cut-off devices contribute little to reducing the harsh effects of those devices upon poor and uneducated consumers. Under all three acts, it is possible, either through the use of the traditional holder-in-due-course doctrine or through meeting a notice requirement, to deprive a buyer of his defenses. The notice requirement, while in theory protecting an uneducated consumer against a cut-off of his defenses, does not seem in practice to have that effect, since such consumers are not likely to comprehend the significance of the notice from the finance company.⁹⁶ Moreover, even if the consumer does understand that he must notify the financial institution of his claims in order to preserve his right of action, he may still not be protected, since in many cases claims do not arise until after the fifteen-day statutory period for giving notice of assignment.⁹⁷

In light of the weaknesses of the current statutory scheme, the Michigan Attorney General and most poverty lawyers feel that all cut-off devices should be eliminated in consumer sales.⁹⁸ The arguments in support of this position are strong.⁹⁹ Perhaps most significant is the contention that the elimination of cut-off devices would bring the reality of consumer transactions into line with consumer expectations, enabling consumers to exercise their most potent self-help weapon—refusal to pay—against assignees of their obligations. In addition, advocates of eliminating cut-off devices point out that the policy of making commercial paper unconditionally transferable was originally intended to facilitate negotiations among merchants for whom freely transferable notes were an essential form of currency.¹⁰⁰ This policy, the consumer advocates stress, does not justify the use of cut-off devices in normal retail sales in which instruments are

93. MICH. COMP. LAWS ANN. §§ 445.1206(a), .1208 (1967).

94. MICH. COMP. LAWS ANN. § 492.114(f) (1967).

95. MICH. COMP. LAWS ANN. § 492.114(f) (1967).

96. Murphy, *supra* note 67, at 320; *Effective Programs*, *supra* note 16, at 400; Comment, *Consumer Protection—The Role of Cut-Off Devices in Consumer Financing*, 1968 WIS. L. REV. 505, 521.

97. Some defenses, such as that of fraud, may well exist when the notice is received. But others, especially breach of warranty, may not arise until months, or even years, after the time period for notification has elapsed.

98. Plattsis Interview, *supra* note 44; Interview with Vincent Donnelly, Staff Attorney, Neighborhood Legal Services, Detroit, Michigan, Aug. 21, 1969 [hereinafter Donnelly Interview].

99. Murphy, *supra* note 73, at 674 n.24.

100. Littlefield, *supra* note 70; Murphy, *supra* note 73, at 672.

rarely negotiated beyond the first assignment.¹⁰¹ Another argument favoring the elimination of cut-off devices is that financial institutions are better able to absorb the losses arising out of dealer misbehavior—by increasing credit rates, by expanding operations, or by purchasing insurance—than are individual consumers.¹⁰² Moreover, the argument runs, a small rise in the cost of credit would be justified by the benefits resulting from the elimination of cut-off devices, particularly since those increases would be distributed among a large number of consumers, not only among the poor consumers most likely to be victimized by dishonest merchants. A final argument is that since much financing of consumer transactions is characterized by relatively close ties between the dealer and the financial institution,¹⁰³ the institution is in a much better position than is the consumer, and perhaps even the state, to control dealer practices.¹⁰⁴ As a matter of policy, therefore, it may be worthwhile to tap that source of control by motivating financial institutions to become watchdogs of consumer interests out of concern for the security of their own investments.

As a practical matter, however, it must be recognized that not all of the changes which will result from a prohibition of cut-off devices will be favorable to the public—especially the poor consumer. For example, an elimination of cut-off devices might motivate financial institutions to establish stricter security arrangements with dealers in order to offset the increased risks of purchasing the dealers' consumer paper without the protection of the cut-off devices.¹⁰⁵ The net effect of such a change would be to increase the dealers' cost of doing business and thus to increase his prices to consumers.¹⁰⁶

101. A finance company, after purchasing consumer paper, may assign it to a bank as security for a loan, but this paper is not freely negotiated between merchants as a method of payment.

102. Littlefield, *Preserving Consumer Defenses: Plugging the Loophole in the New UCCC*, 44 N.Y.U. L. REV. 272, 294 (1969).

103. Littlefield, *supra* note 70, at 63-64.

104. Littlefield, *supra* note 102, at 280-86; Murphy, *supra* note 67, at 320; *Effective Programs*, *supra* note 16, at 417-18; see *Mutual Fin. Co. v. Martin*, 63 S.2d 649 (Fla. 1953).

105. *Effective Programs*, *supra* note 16, at 418; Note, *A Case Study of the Impact of Consumer Legislation: The Elimination of Negotiability and the Cooling-Off Period*, 78 YALE L.J. 618, 640-41 (1969); see Vernon, *Priorities, the UCC, and Consumer Financing*, 4 B.C. IND. & COM. L. REV. 531, 547 (1964).

106. Some advocates of the use of cut-off devices have argued that an elimination of such devices would probably motivate financial institutions to attempt to return the risk of default to the dealer either through a dealer reserve fund or through an agreement by which the dealer agrees to repurchase the assigned paper if it is defective. See note 105 *supra*. Such a change would clearly increase the dealers' cost of doing business. In Michigan, however, that argument is inapposite since most Michigan financial institutions purchasing consumer paper already use either reserve funds or repurchase agreements. Trierweiler Interview, *supra* note 67; Interview with Professor William J. Pierce, Executive Secretary, NCCUSL, Ann Arbor, Michigan, Feb. 27, 1970.

Moreover, while an elimination of cut-off devices might motivate financial institutions to undertake more detailed investigations of dealers,¹⁰⁷ such investigations would probably focus on the ability of the merchant to meet its financial obligations—including, for example, any repurchase agreements—rather than on the merchant's business ethics.¹⁰⁸ The financial institution would be primarily concerned with the risk involved in purchasing the dealer's commercial paper; and the risk factor that is related to any particular transaction is a matter of economics, not morality, especially when the seller agrees to repurchase the paper or to reimburse the assignee if any defects in the paper are uncovered. Although such investigations would help to eradicate the problem of undercapitalized dealers that are prone to become insolvent, the investigations would do little to protect the consumer from a prosperous but dishonest merchant.¹⁰⁹

Another possible institutional response to an elimination of cut-off devices—and perhaps an even more damaging one to low-income consumers—is for financial institutions to discontinue their indirect financing of consumer sales through the purchase of consumer paper, and instead to place more emphasis upon making of direct loans to consumers.¹¹⁰ Retail dealers, particularly those regarded as poor risks by the financial community, would then be faced with the alternatives of either financing their own installment sales or relying exclusively upon cash sales.¹¹¹ If dealers were to adopt the former

Nevertheless, increased costs to the dealer would still result if financial institutions, because of a greater number of consumer suits or because of the fear of such suits, were to require a larger percentage of the contract value or the value of a promissory note executed in conjunction with the contract to be placed in the reserve fund. Of course, if such increases in the amount of the reserve fund were not demanded of all merchants, but only of those merchants who engage in dishonest practices and whose paper is thus defective, then reputable merchants would not be hurt. If a repurchase agreement is used, on the other hand, the entire cost of dishonest sales practices would be shifted back to the merchant who committed those practices, unless the merchant is financially unable to repurchase his defective paper. The financial institution could protect itself against the possibility of insolvent dealers by accepting paper only from highly capitalized merchants. Unfortunately, however, this practice would not discriminate between smaller merchants who are honest and therefore present few risks and merchants who use deceptive practices and thus present a high probability of consumer suits. Thus some reputable small merchants would be forced to undertake their own financing or else to go out of business. In the former case, consumers would face increased prices, and in the latter, they would have fewer merchants with whom to deal. See note 110 *infra*.

107. Note, *A Case Study of the Impact of Consumer Legislation: The Elimination of Negotiability and the Cooling-Off Period*, 78 YALE L.J. 618, 639 (1969).

108. *Id.*

109. See Murphy, *supra* note 67, at 280 n.29.

110. See Comment, *Consumer Protection—The Role of Cut-Off Devices in Consumer Financing*, 1968 WIS. L. REV. 505, 525; Note, *A Case Study of the Impact of Consumer Legislation: The Elimination of Negotiability and the Cooling-Off Period*, 78 YALE L.J. 618, 642 (1969).

111. Littlefield, *supra* note 102, at 272-73, 292-93; Note, *A Case Study of the Impact*

course and finance their own installment sales, the consequences to the consumer would be increased prices or finance charges—particularly in ghetto areas—because the dealer would have to absorb the losses resulting from uncollectible accounts and from other costs of administering installment contracts, and because he would have to do so without the expertise and loss-spreading capabilities of financial institutions. In addition, there would be greater likelihood of dealer insolvency.¹¹²

Because of the demands upon capital which are imposed by installment financing, however, it is probable that few merchants would be able to afford to make installment sales unless they had the opportunity to sell their commercial paper to institutional purchasers.¹¹³ Thus most retail dealers would turn to a greater use of cash sales, thereby increasing the incidence of direct lending from banks and finance companies to consumers. For poor consumers, this shift would probably lead to a decreased ability to purchase goods because of their general inability to obtain credit other than from retailers catering to low-income buyers.¹¹⁴ But even if such consumers were able to obtain loans, they would lose the benefits of the elimination of cut-off devices, since the loan from the bank or finance company would not be tied to any purchase; the buyer would be required to repay the loan even if he was defrauded by a dealer. Furthermore, many poverty lawyers are fearful that increased reliance by dealers upon cash sales, coupled with more direct lending by financial institutions, would result in the development of a "referral" system whereby the lender accepts customers referred to him by the dealer.¹¹⁵ Under such a scheme, both the dealer and the lender would

of Consumer Legislation: The Elimination of Negotiability and the Cooling-Off Period, 78 YALE L.J. 618, 642-46 (1969).

112. Even large department stores, which regularly finance all installment sales themselves, report that their credit operations produce a net loss. But the ratio of the loss to gross credit sales increases as the size of the store decreases. NATIONAL RETAIL MERCHANTS ASSN., *ECONOMIC CHARACTERISTICS OF DEPARTMENT STORE CREDIT* 51-52 (1969). Small, low-income retailers who operate closer to the legal limit on interest charges and depend much more on installment sales than do large retailers would be less able to undertake financing operations themselves. Any increased costs would, of course, be passed on to the consumer, probably in the form of higher prices. See FTC CREDIT STUDY, *supra* note 5, at 5, 26-27. Also, the smaller merchants, in order to maintain a flow of capital, would either have to take out loans themselves, which might not be feasible, or to reduce the time period for payment on installment sales from several years to several months. Either way the poor consumer is harmed.

113. Littlefield, *supra* note 102, at 274; Note, *supra* note 104, at 644-45.

114. See notes 63, 106 *supra*. This inability to obtain credit may not be an entirely undesirable consequence, since many poor consumers do purchase items that they do not need or cannot afford. Unfortunately, however, this restriction also prevents the poor from purchasing goods that are useful or necessary.

115. Littlefield, *supra* note 102, at 272-73, 292-93; Murphy, *Another "Assault Upon the Citadel"—Limiting the Use of Negotiable Notes and Waiver of Defense Clauses in Consumer Sales*, 29 OHIO ST. L.J. 667, 687 (1968). See also Note, *supra* note 104, at 645.

profit at the buyer's expense—the dealer by obtaining a cash sale and the lender by obtaining an absolute obligation on the part of the buyer to repay the loan.¹¹⁶

The problem of deciding what to do about cut-off devices is compounded by the lack of empirical data demonstrating the actual costs and benefits that will result from any given course of action. A careful analysis of the pros and cons of cut-off devices from the standpoint of the consumer, however, suggests that elimination of those devices should be favored because of the likelihood that the benefits of elimination will outweigh the disadvantages.¹¹⁷ After an initial period of overreaction in the finance industry, the added risks of financing without the benefit of cut-off devices would probably be spread among the various parties involved in consumer sales and in consumer finance, and the extreme burden previously placed upon the defrauded consumer whose obligation is purchased by a financial institution would be removed. It also seems reasonable to assume that, without cut-off devices, dealers experiencing a high percentage of complaints from buyers would find it more difficult and more expensive to sell commercial paper to financial institutions and would find it more costly to remain in business.¹¹⁸ Eliminating cut-off devices therefore may tend to weed out at least the most blatant perpetrators of fraud in the market place. If referral schemes between merchants and lenders become a serious problem, that problem can be dealt with either by new legislation¹¹⁹ or by an extension of the "single transaction" doctrine which denies holder-in-due-course status to financial institutions when the institution and the merchant have a "close connection."¹²⁰ On balance, then, a complete elimination of cut-off devices seems desirable. That elimination could be best accomplished through an all-inclusive deceptive-practices statute,¹²¹

116. The loan, under current theory at least, would not be conditional even if the merchant accompanied the consumer to the finance company, and the company approved. There is also the possibility that an increase in the risk of sales to low-income consumers would exert pressure on dealers to obtain greater sales volume and could lead to an increase in the use of fraudulent or high-pressure sales tactics.

117. In at least one state, New Mexico, there is evidence that elimination of cut-off devices has not made any appreciable difference in the ability of low-income consumers to purchase on credit. See Felsenfeld, *Some Ruminations About Remedies in Consumer Credit Transactions*, 8 B.C. IND. & COM. L. REV. 535, 551-52 (1967). With a rational allocation of risks, the result of the elimination of cut-off devices should be the same in Michigan. See also Note, *supra* note 105, at 655-56; Comment, *Consumer Protection—The Role of Cut-Off Devices in Consumer Financing*, 1968 WIS. L. REV. 505, 525.

118. See Note, *supra* note 104, at 645-50.

119. For a suggested solution, see Littlefield, *supra* note 102, at 293-96.

120. See Littlefield, *supra* note 102, at 286-97; text accompanying notes 71-78 *supra*.

121. Section 9 of the CSG act, *supra* note 40, contains a provision which eliminates all cut-off devices in consumer sales. In addition, the act allows a consumer to maintain an affirmative action against the assignee; although the consumer cannot recover an amount greater than the amount owed to the assignee, he is not limited to a simple set-off. This provision gives the consumer a way to avoid harassment or loss of credit

rather than through limited-purpose acts such as those that are in effect to some degree in Michigan.¹²² A comprehensive provision would eliminate gaps in coverage and would contribute to the development of an integrated statutory framework to deal with consumer fraud problems.

Apart from the regulation of cut-off devices, the statutes of many states contain provisions that afford a consumer the opportunity to rescind a sales contract during a designated period of time after the contract is executed.¹²³ In Michigan, only one statute contains such a "cooling-off" provision—the Home Improvement Finance Act.¹²⁴ That statute allows a buyer, for any reason, to rescind a home improvement sales contract if written notice is given to the seller at his place of business, or is mailed to him by certified letter, by 5:00 p.m. of the next business day following the execution of the contract.¹²⁵ Notice of the right to rescind must be printed in eight-point type on the home improvement contract.¹²⁶

The proposed Uniform Consumer Credit Code¹²⁷ and the laws of several states¹²⁸ contain provisions calling for a cooling-off period.¹²⁹ Most of these statutes apply to all sales made through home solicitations;¹³⁰ but the Michigan statute, which is not limited to

rating while waiting for the assignee to sue. In Michigan, where consumer sales are presently covered by three major acts, the adoption of a comprehensive deceptive-practices statute would reduce the complexity of handling consumer cases.

122. See text accompanying notes 87-89 *supra*.

123. See ILL. ANN. STAT. ch. 121½, §§ 261-71 (Smith-Hurd Supp. 1970) (covers goods and services sold at the buyer's home); MASS. GEN. LAWS ANN. ch. 255D, § 14 (Supp. 1969) (covers installment sales of any goods and services if such sales are executed somewhere other than the seller's place of business); VT. STAT. ANN. tit. 9, § 2454 (Supp. 1969) (covers goods and services sold anywhere).

124. MICH. COMP. LAWS ANN. §§ 445, 1101 (1967).

125. MICH. COMP. LAWS ANN. § 445.1202(c)(4) (1967).

126. MICH. COMP. LAWS ANN. § 445.1202(b)(4) (1967). Statutes such as this one will be effective only if consumers know that they have a right of rescission and are able to exercise that right effectively. This is especially critical since in most cases the right must be exercised within a short time after the execution of the contract. The requirement that notice be displayed in eight-point type will increase utilization of the statute, but will not itself always adequately inform the low-income consumer. A better approach would be to require that the seller provide the buyer with a separate notice of the right to rescind and a separate form for exercising the right, such as a post card. See Project, *The Direct Selling Industry: An Empirical Study*, 16 UCLA L. REV. 890, 1014 (1969).

127. UNIFORM CONSUMER CREDIT CODE §§ 2.502(1)-(3), 2.503(2) (Proposed Draft, 1969).

128. CONN. GEN. STAT. §§ 42-134 to -139 (Supp. 1969); ILL. ANN. STAT. ch. 121½, §§ 261-71 (Smith-Hurd Supp. 1969); MASS. GEN. LAWS ANN. ch. 255D, § 14 (Supp. 1966); PA. STAT. ANN. tit. 73, § 500-203 (Supp. 1969); VT. STAT. ANN. tit. 9, § 2454 (Supp. 1969).

129. See note 123 *supra*.

130. See, e.g., ILL. ANN. STAT. ch. 121½, §§ 261-71 (Smith-Hurd Supp. 1970); MASS. GEN. LAWS ANN. ch. 255D, § 14 (Supp. 1969); WASH. LAWS. ch. 234 WASH. REV. CODE § 63.14.154 (Supp. 1969).

home solicitations, covers only home improvement contracts.¹³¹ The Michigan Act therefore offers little benefit to the large percentage of inner-city residents who do not own their own homes.

There has been some controversy among commentators concerning the value to the consumer of cooling-off provisions.¹³² One recent study, for example, concluded that a cooling-off provision in the Connecticut Home Solicitations Sales Act benefited the consumer very little.¹³³ The study showed that most consumers did not reconsider a contract until after the goods were received or the services performed, which was usually long after the cooling-off period had ended. Yet if the statutory cooling-off period did significantly extend the length of time within which the buyer could rescind—such as providing for a period extending to the time of the seller's first performance on the contract—then, at least according to the businessmen, retail sales and the financing process would be intolerably burdened.¹³⁴

Despite the doubts expressed both by advocates of consumer interests and by businessmen concerning the efficacy of various types of cooling-off provisions, the idea of providing the buyer with a right of rescission under appropriate circumstances is probably a sound one.¹³⁵

131. MICH. COMP. LAWS ANN. §§ 445.1202(c), .1203(l) (1967).

132. See *Effective Programs*, *supra* note 16, at 421-22, in which it is argued that there are many consumers who would like to rescind but cannot. No evidence is offered, however, to show that if a statute allowed consumers to rescind, the consumers would utilize the statute.

133. Note, *supra* note 104, at 628-30. The only difference between the Michigan and Connecticut statutes is the requirement in Michigan that the contract contain a notice of the right to rescind. The Connecticut statute did not have such a requirement, but this absence probably did not cause the lack of effectiveness of the Connecticut cooling-off provision. Lawyers for the poor indicate that cooling-off provisions do little to aid the poor, because poor people generally do not own homes, because the poor are seldom aware of the right to rescind even if that right does exist, and because, even when the poor are aware of such a provision, they are seldom able to utilize it. Donnelly Interview, *supra* note 98.

134. Note, *supra* note 104, at 628-30. Opposition to cooling-off statutes is found primarily among reputable merchants. Project, *The Direct Selling Industry: An Empirical Study*, 16 UCLA L. REV. 890, 1008-09 (1969). Such merchants feel that a statute eliminating cut-offs would harm them and would not affect the fly-by-night sellers who presumably present the most difficulties. *Id.* at 1009.

135. There is danger that emphasis on the availability of a cooling-off provision will obscure other rights of the purchaser. For example, the agreement which a consumer signs at his home is usually an offer by the buyer, not a binding contract. The buyer becomes bound only when acceptance is made at the seller's home office and until that time the buyer has the right to withdraw his offer. G. GRISMORE, *CONTRACTS* § 32 (rev. ed. 1965). The consumer will probably feel, however, that he has only the cooling-off period in which to rescind when in fact he may be able to revoke his offer for a much longer period. Most consumers do not even realize they are signing only an offer and that they have a right to revoke until an acceptance is received. The solution to this problem seems to be increased education of consumers regarding their legal rights or perhaps a requirement that salesmen inform consumers of the significance of the document they are signing. In addition, the cooling-off period could be made longer in order to reflect more accurately the normal time which sellers take to accept offers.

For example, a statute allowing rescission, within a reasonable time, of all sales of goods and services under an installment credit contract solicited at the consumer's home would be of value to the consumer and would not place an extreme burden on retail dealers¹³⁶ or financial institutions. A reasonable time period, coupled with clear notice on the face of the installment contract that the buyer had the right to rescind,¹³⁷ would afford the consumer the opportunity to re-evaluate his purchase out of the presence of the salesman and to check over the contract to ensure that it accurately reflects his conception of the oral agreement he has consummated. The dealer could protect himself by postponing performance on the contract until the buyer has waived his right of rescission or until the period for rescission has run. Alternatively, the statute could protect dealers through the inclusion of a provision requiring the buyer to pay a small percentage of the purchase price for each day between the execution of the contract and rescission,¹³⁸ with the percentage increasing in proportion to the time elapsed. Combined with an effective consumer education and credit counseling program, a statute granting the consumer a right of rescission would operate as a check on at least the most blatant dealer malpractices and would encourage more rational purchasing on the part of consumers.

Before leaving the discussion of consumer protection legislation, it is worthwhile to consider a recent attempt in Michigan to combat deceptive advertising. In 1966 the Michigan legislature enacted a new false-advertising statute which provides for civil remedies against violators.¹³⁹ The act, which reflects the current trend away from reliance upon criminal statutes to protect the consumer,¹⁴⁰ prohibits anyone from "knowingly" placing before the public any untrue, deceptive, or misleading statement,¹⁴¹ and from publishing an advertisement either with the intent not to sell at the price stated therein or with the intent not to sell the goods or services that were advertised.¹⁴² Pursuant to the act's remedial provisions, the Attorney

136. Indeed, many reputable businesses, especially large department stores, offer liberal rescission privileges even when there is no statute requiring them to do so. Thus, it can be argued that an extension of the right to rescission to all consumer sales would have a substantial effect on only those merchants dealing largely with low-income consumers.

137. See MICH. COMP. LAWS ANN. § 445.1202(c)(4) (1967).

138. There is a clause of this sort in at least one state statute. PA. STAT. ANN. tit. 73, § 500-206(f) (Supp. 1969). See also MICH. COMP. LAWS ANN. § 445.1202 (1967).

139. MICH. COMP. LAWS ANN. § 445.801-.809 (1967).

140. Rice, *Remedies, Enforcement Procedures and the Duality of Consumer Transaction Problems*, 48 B.U. L. REV. 559, 584-85 (1968).

141. MICH. COMP. LAWS ANN. § 445.801 (1967).

142. MICH. COMP. LAWS ANN. § 445.805 (1967). This section prohibits so-called "bait" advertising, which occurs when an advertisement for one article is used as an inducement for the sale of higher-priced goods.

General may ask for an injunction against the continuation of a violation,¹⁴³ but such a request may be granted only after the defendant has been given forty-eight hours to cease violating the statute.¹⁴⁴ In the event an injunction is obtained, a subsequent violation of it subjects the merchant to a fine of not more than one thousand dollars.¹⁴⁵ The Attorney General may also accept an assurance of discontinuance from a person allegedly in violation of the act.¹⁴⁶ This assurance, which does not constitute an admission of any fact or issue at law, must be filed with the clerk of an appropriate circuit court.¹⁴⁷ The act says nothing about any sanction for violating the terms of an assurance.¹⁴⁸

The new statute has several basic weaknesses. First, the requirement that the dealer be notified forty-eight hours in advance of any attempted injunction and that he be given the opportunity in all cases, to desist voluntarily, compels the Attorney General to deal with flagrant or frequent violators in the same way that he deals with first offenders. Although it seems fair to give first offenders the chance to desist voluntarily, the same is not true of frequent violators since they have shown that their voluntary compliance is not made in good faith.¹⁴⁹ In addition, the fine is in reality meaningless; it is not severe enough to act as a deterrent and can easily be absorbed as a cost of doing business by all but the smallest dealers. Finally, injunctive relief by itself provides only prospective relief; it does nothing to rectify the economic injury already suffered by those who have been defrauded by the deceptive advertising. It is difficult to assess the effectiveness of this act in practical terms, since it has been "invoked" only once in the three years of its existence.¹⁵⁰ But for the reasons suggested, it does not appear to be a particularly

143. MICH. COMP. LAWS ANN. § 445.807(1) (1967).

144. MICH. COMP. LAWS ANN. § 445.807(2) (1967).

145. MICH. COMP. LAWS ANN. § 445.808 (1967).

146. MICH. COMP. LAWS ANN. § 445.809 (1967).

147. MICH. COMP. LAWS ANN. § 445.809 (1967).

148. MICH. COMP. LAWS ANN. § 445.808 (1967) provides a penalty for violation only of an order or injunction issued pursuant to the act. Although the assurance must be filed with the court, no order is issued, and thus the assurance does not come within the scope of § 445.808. The question is open whether a violation of an assurance allows the Attorney General to ask for an injunction without again giving the merchant notice and an opportunity to cease the prohibited conduct.

149. With regard to frequent violators, the Attorney General perhaps should be given authority to take direct action without giving the violator an opportunity to desist. Such a provision would allow a full range of contempt sanctions to be applied against the dealer who has demonstrated bad faith and would prohibit him from playing cat and mouse with the Attorney General by a cunning use of voluntary agreements to desist.

150. In that case, an assurance was obtained during the Christmas season from a Detroit jeweler who agreed not to continue advertising used watches as new. No other action was taken and no relief was given to defrauded customers, although a few settlements were obtained. Detroit News, Oct. 5, 1969, § E, at 1, col. 1.

potent weapon against deceptive advertisers; and unless it is used more frequently, it can obviously have little impact in the consumer protection area.

The sad truth about the entire Michigan statutory scheme is that this new false-advertising statute is the only real weapon with which the Attorney General can wage the war against consumer fraud. His authority to ask for injunctions under either the Retail Installment Sales Act or the Home Improvement Sales Finance Act is essentially meaningless, since violations of those statutes are seldom prosecuted and are rarely repeated.¹⁵¹ In summary, Michigan's Attorney General is given inadequate power and resources to deal with the limited problems of false advertising and illegal credit arrangements—and no power at all to deal with other types of fraudulent and deceptive practices in the market place.

II. THE ENFORCEMENT MACHINERY

The five principal agencies charged with enforcing the criminal and civil consumer protection statutes in Michigan are the local police and prosecutors,¹⁵² the Secretary of State, the Financial Institutions Bureau of the Department of Commerce,¹⁵³ the Attorney General,¹⁵⁴ and the Bureau of Consumer Protection in the Department of Agriculture.¹⁵⁵

A. *The Prosecuting Attorney and the Police Department*

Since the most pressing consumer fraud problems in the State of Michigan are related to the exploitation of low-income consumers in the city of Detroit,¹⁵⁶ it is worthwhile to consider what enforcement agencies are available to consumers in the Detroit area. The

151. There have been only two prosecutions under each act since they were enacted, and no injunctions have been issued. Nolan Interview, *supra* note 18; see text accompanying notes 189-90 *infra*.

152. See text accompanying notes 157-200 *infra*.

153. See text accompanying notes 201-64 *infra*.

154. See text accompanying notes 265-78 *infra*.

155. This Bureau has regulatory power with respect to the quality of goods and drugs, and it deals with deceptive practices only as they relate to this primary function. The Bureau of Consumer Protection is not concerned with installment sales. As a result, the Bureau is not in the mainstream of consumer protection activity. Nevertheless, the Bureau does have a great deal of expertise in matters relating to public health, and it performs important services in that area. Thus the Bureau should retain jurisdiction over the narrow area of deceptive practices that are within the ambit of public-health matters. This does not mean that the administrator of state deceptive-practice legislation cannot take cognizance of deceptive acts also regulated by the Department of Agriculture, for the nature of the product should not leave a merchant immune from the greater variety of sanctions and remedies available to the administrator.

156. See note 12 *supra*.

most obvious of those agencies are the Wayne County prosecutor and the Detroit police department. Hence, it is important to evaluate the effectiveness of those agencies in enforcing the criminal laws of the state in order to prevent or punish fraudulent conduct and in order to secure relief for defrauded consumers.

The Wayne County prosecutor has established a Fraud and Special Services Section (Fraud Section) to hear, and act directly upon, complaints from consumers. The Fraud Section is headed by an assistant prosecutor, and he is aided by two other assistant prosecutors who work only on consumer fraud problems, and by one investigator. Consumer fraud, however, is not the only area supervised by the Fraud Section;¹⁵⁷ cases involving embezzlement, larceny by conversion, improper use of credit cards, violations of the state employment and wage laws, and illegal receipt or withholding of welfare allowances are handled as well.¹⁵⁸ In fact, of 239 warrants processed by the fraud section from May to August 1969, only twelve were for offenses that could be classified as fraudulent business practices; and most of those warrants involved fraudulent practices that were not related to consumer transactions.¹⁵⁹ Nevertheless, the bulk of the actual working time of the members of the fraud section is devoted to hearing and acting upon consumer complaints, since all other types of offenses are first investigated by the Fraud Division of the police department, and since the function of the prosecutor's Fraud Section in those cases is usually limited to the decision whether or not to issue a warrant.¹⁶⁰

The Fraud Division of the police department is located in the same building as the prosecutor's Fraud Section, and until recently all consumer complaints were handled initially by the police.¹⁶¹ Although the prosecutor now hears some consumer complaints directly, the majority of the complaints received by the Fraud Section are still processed first by the police Fraud Division.¹⁶² Under the customary procedure, therefore, the Fraud Section does not see a complaint unless a warrant recommendation is submitted by the detective investigating the case. This screening process would present no difficulties if the police and prosecutor had the same philosophy with regard to the enforcement of the legislation prohibiting fraud in the market

157. When not prosecuting fraudulent merchants, the assistant prosecutor may well be processing charges resulting from bar room brawls or a vice raid on a brothel.

158. FRAUD AND SPECIAL SERVICES SECTION, WAYNE COUNTY PROSECUTOR'S OFFICE, REPORT ON WARRANT RECOMMENDATIONS, May-August 1969.

159. *Id.*; Nolan Interview, *supra* note 18. A clerk who submitted false vouchers for payment by his employer would be prosecuted under the same statute as a merchant making false representations to a consumer in order to induce a sale.

160. Nolan Interview, *supra* note 18.

161. *Id.*

162. *Id.*

place, and if both had the same ability to judge the legal sufficiency of a complaint. But unlike the prosecutor's Fraud Section, which favors increased use of criminal sanctions against dishonest merchants,¹⁶³ the police officials in the Fraud Division regard themselves as little more than a mediation service.¹⁶⁴ Hence, although the police have been quite successful at persuading businessmen to make restitution to complaining consumers,¹⁶⁵ they have done little to help the vast majority of defrauded consumers who do not seek governmental assistance.¹⁶⁶ Furthermore, very few of the cases in which the police Fraud Division has decided to seek warrants involve ordinary fraudulent business practices; rather, most of the warrants have been issued against perpetrators of unusual fraudulent schemes unrelated to normal consumer transactions.¹⁶⁷ Even the cases that have involved "normal" consumer fraud have not always been properly disposed of; many cases have been dropped by the Fraud Division on the ground that the acts complained of did not constitute a criminal violation, although in fact a case could have been made out under one of the statutes less commonly used in consumer fraud cases.¹⁶⁸ In fairness to the police department, however, it must be noted that the Fraud Division has only one detective with legal training and that it suffers from a severe manpower shortage since only four detectives are assigned to the broad category of fraud work.¹⁶⁹ Those four men are responsible for approximately 1,200 investigations per month in the general area of frauds,¹⁷⁰ and those investigations give rise to between twenty-four and seventy-one warrants per month.¹⁷¹ Moreover, these figures do not include the "mediation services," which account for the settlement of a vast majority of the three hundred or more consumer fraud complaints received annually.¹⁷² Finally, the Fraud Division's emphasis on mediation rather than on prosecution is not unpopular among ag-

163. *Id.*

164. *Id.* Interview with Edward V. Boggs, Lieutenant, Fraud Division, Detroit Police Department, Detroit, Michigan, Oct. 2, 1969 [hereinafter Boggs Interview].

165. *Id.*

166. The assistant prosecutor in charge of the Fraud and Special Services Section estimates that 98 to 99% of consumers who are defrauded do not seek his help. Nolan Interview, *supra* note 18; see text accompanying notes 276-93 *infra*. Obviously, mediation does not solve the essential problems of stopping the deceptive practices and deterring violators from future deceptive conduct. Mediation alone may even be harmful, since it reduces the desire of the victim to seek other governmental action.

167. Boggs Interview, *supra* note 164.

168. For example, restitution was obtained from a retailer selling prepaid television repair contracts, when it was determined that this type of activity was arguably covered by insurance regulation laws. Nolan Interview, *supra* note 18.

169. This category includes the enforcement, *inter alia*, of blue-sky laws, confidence schemes, and credit card and check forgery cases. Boggs Interview, *supra* note 164.

170. CRIMINAL INVESTIGATION DIVISION MONTHLY WORK REPORT, July-Sept. 1959.

171. *Id.*

172. Boggs Interview, *supra* note 164.

grieved consumers. Complainants are not particularly interested in prosecution of unscrupulous merchants; rather they are interested in the quickest and most effective way of getting their money back—and that way is most often through the mediation services.¹⁷³ But regardless of whether the police department has been somehow culpable for the lack of concerted action against fraudulent merchants—and there are sound reasons to believe that it has not—the fact remains that the Fraud Division has not been a potent force in the fight against consumer fraud.

The increased activity of the prosecutor in the consumer fraud area is at least in part a response to the lack of effective police action. Although the police Fraud Division still initially handles the bulk of routine consumer fraud matters, the prosecutor's Fraud Section has attempted to open direct lines of communication between its office and defrauded consumers.¹⁷⁴ This method of operation is apparently neither unique nor particularly common among prosecutors in major urban areas.¹⁷⁵ The motives underlying direct action by

173. Any changes giving greater authority to law-enforcement officials are not, of course, designed to eliminate or even reduce mediation efforts. For many consumers mediation will always remain the most efficient way to obtain restitution, especially in small-claims cases. What is desired is a system which provides the consumer with his remedy, but at the same time does not discourage the prosecution of, or other action against, fraudulent merchants.

174. The assistant prosecutor has requested various individuals and groups concerned with the problems of low-income consumers—particularly Neighborhood Legal Services, urban clinics, and local consumers' councils—to inform him of the fraudulent practices currently being used in the inner city. He also has met with consumer groups both to solicit complaints and to exchange ideas concerning the most effective strategy for combatting fraud. Nolan Interview, *supra* note 18.

175. The *Michigan Law Review* sent inquiries to prosecutors or district attorneys in thirty-two major cities; fifteen prosecutorial offices sent replies outlining their consumer protection activities. Five (Baltimore, St. Louis, Phoenix, Newark, and Denver) reported that they performed no consumer protection functions of any consequence unless a clear criminal violation of a substantial nature was involved, and that all cases—the great majority—were sent to the attorney general or to some other state official. In four of these states there is reasonably strong deceptive practice legislation. On the other hand, in cities located in states that have not enacted strong deceptive practices legislation, the pattern is similar to that found in Detroit: the prosecutor does what he can with only ill-suited criminal laws to use as leverage, and much mediation is performed with few actual prosecutions. Usually the police perform the investigative work, but one prosecutor (in Portland, Oregon) found the same problems with that system as did the prosecutor in Detroit; and he solved it in the same manner, soliciting his own complaints and dealing directly with the public. The remaining six prosecutorial offices (Bronx, Queens, Brooklyn, and Manhattan in New York, and San Francisco and Los Angeles in California) are aided by fraud bureaus in the attorney general's office, but there is no comprehensive state statute giving a full range of remedies. In all six of these areas, consumers make complaints directly to the district attorney's office; investigation is then conducted by the police assigned to that office. New York City also has established a strong department of consumer affairs; and it has a home-rule consumer protection act, but the prosecutor plays no part in the enforcement of that act. In the cities, in which the prosecutor has authority to enforce an injunction statute, especially in San Francisco and Los Angeles, consumer protection activity is marked by a spirit of cooperation between the state and local agencies. The probable result is that there is more protection in those cities than there is in cities with no

the prosecutor are to provide more vigorous action against businessmen operating in a fraudulent manner, to aid the vast majority of defrauded consumers who do not complain to the police, and to discover as early as possible the appearance of dishonest merchants who are not yet listed in police records.¹⁷⁶ During the past several months the Fraud Section has received between 200 and 300 complaints referred from Neighborhood Legal Services,¹⁷⁷ private attorneys,¹⁷⁸ the Urban Clinic of the University of Detroit Law School,¹⁷⁹ and individuals in the community who have learned about the prosecutor's activities.¹⁸⁰ Leaders of indigenous consumer groups in the inner city have reported confidence in the Fraud Section,¹⁸¹ and that confidence may justify vesting concurrent jurisdiction in the Attorney General and the prosecutor when, and if, a broad deceptive-practices statute is enacted in Michigan.¹⁸²

The Fraud Section has obtained some favorable results in the fight against fraudulent merchants, but it has not done so without difficulty. The main problems confronting the Fraud Section are lack of manpower, attempts by defendants or potential defendants to undercut prosecutions by settling with the victim,¹⁸³ and judicial insensitivity to the serious nature of fraudulent business practices. Prosecutions for various types of fraud often require considerable investigative work, mainly in the form of obtaining circumstantial

state action, and perhaps more than there is in cities in which there is a strong state provision but listless enforcement. However, in those six areas, the coordination between the agencies involved is not as great as would exist if one official possessed plenary power in this area, and there are probably wasted resources. If nothing else, Detroit should assign Detroit city police to the prosecutor's office in order to aid the prosecutor in making investigations. See text accompanying note 185 *infra*.

176. Nolan Interview, *supra* note 18.

177. This source of complaints seems to be particularly promising. See FTC PROTECTION PROGRAM, *supra* note 39, at 4.

178. In one case, an attorney for a finance company who defended several merchants filed a complaint that his daughter had been defrauded, and the prosecutor promptly obtained restitution. Nolan Interview, *supra* note 18.

179. The Urban Clinic is a legal-aid society staffed by students from the University of Detroit Law School.

180. Leaders of consumer groups have reported that the reputation of the prosecutor's office is spreading in the inner city, and that consumers now take complaints directly to the Fraud Section, bypassing other agencies such as the police or the Better Business Bureau. Interview with Consumers' Research Advisory Council, Detroit, Michigan, Aug. 21, 1969.

181. Interview, *supra* note 180.

182. It should be noted that the trend in the model legislation is to vest sole authority in the attorney general. See text accompanying notes 291-92 *infra*. If concurrent jurisdiction were granted to both the prosecutor and the attorney general, the attorney general would still have plenary power over all actions, but the local prosecutors could also act after notifying the attorney general and affording him the opportunity to intervene. See N.M. STAT. ANN. § 49-15-13 (Supp. 1969).

183. Nolan Interview, *supra* note 18.

evidence to show fraudulent intent;¹⁸⁴ but the prosecutor has only one investigator. Moreover, the prosecutor, as a county official, does not have authority over the Detroit police department and thus cannot utilize its services for his investigative work.¹⁸⁵ Even when the Fraud Section is able to obtain the necessary information to go to court, and the victim is willing to testify, there remains the problem that the judges in the Recorder's Court apparently do not believe that defrauding poor people is a serious offense.¹⁸⁶ Perhaps this seeming incredulity can be explained by the fact that the judge in a given case sees only one violation by the defendant unless that defendant has been convicted previously, and thus does not generally realize the history of fraudulent dealings in which the defendant may have engaged.¹⁸⁷ In addition, neither judge nor jury is very willing to send a businessman to jail. But whatever the reason for the hesitancy on the part of courts to apply criminal sanctions to dishonest merchants, it seems clear that the deterrent effect of criminal prosecution is not enhanced when a suspended sentence is given to a dealer with several hundred complaints against him. Apart from the problem of judicial sympathy to members of the business community, the prosecutor faces pressure from judges who feel that he is wasting the court's time and the taxpayers' money by prosecuting such petty crimes as consumer fraud when muggers and rapists roam the streets.¹⁸⁸ Despite these difficulties, the prosecutor's fraud section has obtained several convictions, including two for violation of the Retail Installment Sales Act¹⁸⁹ and two for violation of the Motor Vehicle Sales Finance Act.¹⁹⁰ Those convictions arose out of the first prosecutions in the history of both statutes.¹⁹¹

The Fraud Section has achieved its limited successes by using, or threatening to use, the extreme sanction of a criminal action. As a result of the increased vitality of the Fraud Section in the consumer fraud area, and as a result of the assistant prosecutor's willingness to

184. *Id.*

185. Detroit could increase the usefulness of the prosecutor's Fraud Section by assigning skilled police officers to that office, as is presently done in several major cities. See note 171 *supra*. Alternatively, the Section could be authorized more than one investigator of its own choice.

186. This conclusion was derived from a series of interviews with individuals involved in consumer protection activities. The consensus was that Recorder's Court judges simply do not view "white collar" offenses as real crimes deserving the imposition of severe penalties. Boggs Interview, *supra* note 164; Nolan Interview, *supra* note 18.

187. This fact illustrates another advantage of using injunctions or other civil proceedings: evidence of a merchant's past business practices may be presented to the judge. See notes 317-23 *infra* and accompanying text.

188. Boggs Interview, *supra* note 164; Nolan Interview, *supra* note 18.

189. MICH. COMP. LAWS ANN. § 445.856 (1967); Nolan Interview, *supra* note 18.

190. MICH. COMP. LAWS ANN. § 492.137 (1967); Nolan Interview, *supra* note 18.

191. Boggs Interview, *supra* note 164; Nolan Interview, *supra* note 18.

go to court, the Better Business Bureau and related groups, such as Neighborhood Legal Services, have been able to use the mere threat of invoking the assistance of the Fraud Section to obtain settlements on behalf of defrauded consumers and in some cases even to effectuate a change in business practices.¹⁹² Thus, for example, although there have been only four prosecutions for violations of legislation prohibiting a dealer from using blank contracts in the sale of automobiles¹⁹³ or other consumer goods,¹⁹⁴ reports from consumer groups and legal services indicate that the use of blank contracts has significantly decreased since the assistant prosecutor's consumer protection campaign began.¹⁹⁵ However, outside the area in which legislation precisely defines the prohibited conduct, thus enabling potential offenders easily to compare their business practices with conduct that is being prosecuted, the deterrent effect of criminal prosecutions is substantially reduced. The prosecutor admits, for instance, that he is able successfully to attack false and deceptive advertising only upon a case-by-case basis.¹⁹⁶ A deceptive advertiser may reform his practices when he is directly confronted with a threat of prosecution, but the fact that another dealer is being prosecuted for an advertisement that bears little resemblance to his own seldom deters him from engaging in such practices. Perhaps this situation is as it should be. Giving a law-enforcement official the unfettered ability to use threats of prosecution in order to control the dissemination of business information would certainly raise grave constitutional questions about the chilling effect of that power upon free speech.¹⁹⁷ Moreover, such power could tend to stifle experimentation and originality in the marketing of consumer goods.

In essence, the argument against making the prosecutor and the criminal law the primary weapons in the fight against the perpetrators of consumer fraud is not that criminal sanctions are inappropriate for the offenses commonly committed; indeed, in certain cases harsh treatment may not only be warranted,¹⁹⁸ but may be uniquely effec-

192. Donnelly Interview, *supra* note 98; Nolan Interview, *supra* note 18.

193. MICH. COMP. LAWS ANN. § 492.112 (1967); Nolan Interview, *supra* note 18.

194. MICH. COMP. LAWS ANN. § 445.856 (1967); Nolan Interview, *supra* note 18.

195. One automobile dealer now keeps all of his blank installment sales contracts in a safe to ensure that none is ever used without his supervision. Donnelly Interview, *supra* note 98.

196. Nolan Interview, *supra* note 18.

197. *Dombrowski v. Pfister*, 380 U.S. 479 (1965); Note, *The Chilling Effect in Constitutional Law*, 69 COLUM. L. REV. 808 (1969).

198. See, e.g., *Lefkowitz v. ITM, Inc.*, 53 Misc. 2d 39, 275 N.Y.S.2d 303 (Sup. Ct. 1966). The pyramid franchising operations of the defendant in this case were so blatant and involved so many innocent consumers in unconscionable transactions that the judge recommended to the prosecutor that criminal prosecution be initiated for a wide variety of offenses. The culpability of the perpetrators was felt to be so great that even a permanent injunction and business dissolution was not considered a severe enough sanction or deterrent.

tive as well. In the great majority of cases, however, criminal convictions are difficult to obtain and are likely to result in relatively light sentences.¹⁹⁹ Furthermore, law-enforcement activity generally results in restriction for only the small number of victimized consumers who are involved in mediation,²⁰⁰ and it may result in only a temporary and sporadic halt in deceptive practices. As mentioned previously, one possible solution to this problem is to make the prosecutor a co-enforcer, with the Attorney General, of a comprehensive deceptive-practices statute. But until such a statute is enacted, the prosecutor will be forced to continue his bludgeon tactics without much hope of making a substantial dent in the volume of fraudulent business practices plaguing the inner city. The problem in Detroit is not lack of concern or initiative on the part of the prosecutor; rather, the problem is that the tools of enforcement with which he is provided to combat consumer fraud are simply unsuited to the task.

B. *Licensing Statutes*

All automobile dealers in Michigan must be licensed under the Motor Vehicle Code,²⁰¹ and the Secretary of State is empowered by the Code to issue such licenses.²⁰² In addition, automobile dealers who sell on an installment basis—and the financial institutions taking assignments of such contracts—must also be licensed under the Motor Vehicle Sales Finance Act;²⁰³ and the Act vests authority to grant such licenses in the Financial Institutions Bureau²⁰⁴ whose primary responsibility is to ensure the financial integrity of lending institutions, including automobile dealers who finance their own installment sales.²⁰⁵ The latter Act is the only licensing provision in Michigan applicable to retail dealers offering installment sales to the public.

Both statutes impose a general requirement of character and fitness upon the applicants for those licenses.²⁰⁶ If an applicant is rejected either by the Secretary or by the Bureau, he may appeal the decision to the state's circuit court.²⁰⁷ Both agencies may also revoke a license if the dealer holding it is found to have engaged in fraudu-

199. Boggs Interview, *supra* note 164; Nolan Interview, *supra* note 18; see *Effective Programs*, *supra* note 16, at 426-27.

200. See note 166 *supra* and accompanying text.

201. MICH. COMP. LAWS ANN. §§ 257.248-250 (1967).

202. MICH. COMP. LAWS ANN. § 257.248(a) (1967).

203. MICH. COMP. LAWS ANN. § 492.103 (1967).

204. MICH. COMP. LAWS ANN. § 492.103(1) (1967).

205. Trierweiler Interview, *supra* note 67.

206. MICH. COMP. LAWS ANN. §§ 257.248(b), 492.103(a) (1967).

207. MICH. COMP. LAWS ANN. §§ 257.250(b), 492.103(b) (1967).

lent activities.²⁰⁸ Again, appeals from a decision revoking a license may be taken to the circuit court.²⁰⁹ Of course, withdrawal of a license by the Financial Institutions Bureau pursuant to the provisions of the Motor Vehicle Sales Finance Act prohibits only the installment sales of vehicles; and consequently cash sales may continue until the Secretary of State acts, after a formal hearing, to remove the seller's general dealer's license. Indeed, the Financial Institutions Bureau is concerned with automobile dealers only insofar as they act as lending institutions, and it regulates them only with regard to their financial affairs.²¹⁰

Ideally, the licensing provisions of both acts must be used either to prevent probable defrauders from obtaining a license or to remove a license from a dealer who is operating in a fraudulent manner.²¹¹ In practice, however, the licensing acts have not been used for those purposes;²¹² and as a result, the consumer benefits little from their existence.

There are several reasons for the ineffectiveness of the licensing statutes. First, the state does not have enough information about applicants to prevent dishonest merchants from receiving a license. Both the Motor Vehicle Code and the Motor Vehicle Sales Finance Act require an applicant for a license to submit a detailed form. If the dealer is a corporation, the form must include the names and addresses of all directors and the name and address of some individual who has power of attorney to receive process.²¹³ The Motor Vehicle Code also requires a statement of the previous history of the applicant "sufficient to establish . . . [his] reputation and character in business,"²¹⁴ and a statement disclosing any previous license applica-

208. MICH. COMP. LAWS ANN. §§ 257.249(d), 492.109(a)(9) (1967).

209. MICH. COMP. LAWS ANN. §§ 257.250(b), 492.109(d) (1967).

210. MICH. COMP. LAWS ANN. § 492.110 (1967) permits the Financial Institutions Bureau to examine the books and records of a licensee and to subpoena witnesses or documents. Essentially the field investigators seek to determine whether the dealer is using sound methods of record-keeping and accounting, whether he charges proper credit rates, and whether he has exceeded the legal limit placed on loans made by certain financial institutions, such as small loan companies. Trierweiler Interview *supra* note 67; see text accompanying notes 232-34 *infra*.

211. Of course, when a license is denied or removed, the dealer may be prosecuted for operating without a license. In Michigan, these provisions are of primary importance in the sales of used automobiles. First, the fly-by-night operator is precluded from selling new automobiles because of the requirement that new car dealers possess a valid dealer franchise from a manufacturer. The new car buyer, especially in Detroit, usually has a greater than average knowledge about automobiles than does the purchaser of a used car. The new-car dealer must therefore respond to this more knowledgeable group and cannot successfully use many sales gimmicks that he could use on less sophisticated buyers. Of course, a new-car dealer may also possess a license to sell used cars.

212. See notes 213-16, 218 *infra* and accompanying text.

213. MICH. COMP. LAWS ANN. §§ 257.248(b), 492.104(b) (1967).

214. MICH. COMP. LAWS ANN. § 257.248(b) (1967).

tions, suspensions, or revocations in Michigan.²¹⁵ But apart from the character statement, no information is required concerning the applicant's business activities in other states. In general, therefore, the license application process does not provide the issuing authority with much information concerning the applicant's past business dealings, especially those of a noncriminal nature or those committed out of state.²¹⁶

A possible solution to this problem is to require each applicant to attest to his business ethics by submitting affidavits from the licensing authority or attorney general of each state in which he has conducted business activities. This requirement could eventually be supplemented by the establishment of a national data bank to maintain records on actions taken against fraudulent dealers in all states; that data bank could then be used by licensing authorities in screening applicants.²¹⁷

The second reason for the ineffectiveness of licensing acts is that the authorities do not use even the available information and resources to screen out undesirable applicants. Approval of a license application is, for the most part, a purely clerical function. The Motor Vehicle Code, for example, requires the Secretary of State to make an investigation of the applicant's qualifications within fifteen days after the receipt of the application.²¹⁸ In practice that investigation consists simply of a check of back files of the Department of

215. MICH. COMP. LAWS ANN. § 257.248(b) (1967).

216. *Effective Programs*, *supra* note 16, at 420-21.

217. This data bank would be similar in nature to the central file now used to ensure that a driver who has had his operator's license revoked does not obtain a license from another state. A state official would request information concerning the history of an applicant and would then make a determination as to whether this previous activity should bar the issuance of a license. The applicant would have an opportunity to reply to the information placed in the file by various officials, both before and during the licensing process. The file would be confidential, open only to state licensing officials and the applicant.

Another possible improvement in the license application process would be to require the applicant to post a bond which would be forfeited if the dealer is found, in an administrative or judicial proceeding, to have engaged in fraudulent business practices. The bond would be used as a fund to reimburse defrauded victims who complain to licensing authorities. This procedure would help to stimulate consumers to file complaints. Applicants in Michigan are currently required to post a \$10,000 civil indemnity bond. MICH. COMP. LAWS ANN. § 257.288(g) (1967). This bond is to ensure that purchasers are reimbursed for any monetary loss caused by the fraudulent practices of a dealer or his employees. Unfortunately, the surety is not required to make reimbursement until judgment has been entered against the dealer in a court of record. MICH. COMP. LAWS ANN. § 257.248(9) (1967). In reality this procedure makes the bond worthless to an individual consumer, because the possible award is not high enough to justify litigation. Since there is adequate judicial review of a decision made by the Secretary of State [MICH. COMP. LAWS ANN. § 257.250(b) (1967)], there is no compelling reason not to allow the Secretary of State to require dealers to make restitution to consumers as a condition of remaining in business. Such a requirement would make the licensing structure a much more effective consumer aid.

218. MICH. COMP. LAWS ANN. § 257.248(e) (1967).

State to see if any action has ever been taken against the applicant, a credit check, and a check of the files of the state police and the Federal Bureau of Investigation to see if the applicant has ever been convicted of a felony.²¹⁹ Under the Motor Vehicle Sales Finance Act, the Bureau of Financial Institutions is not required to go even that far. Although the Bureau has extensive investigative powers under the Act,²²⁰ there is no statutory *requirement* for an investigation, and no application is ever challenged on the basis of information that does not appear on the application form itself. In practice if all the blanks on the application form are filled in correctly, and if the license fee is paid, an employee of the Bureau issues the license.²²¹

License renewals are also a matter of form. The Motor Vehicle Code specifically states that an investigation of a dealer seeking a renewed license is not required.²²² It is unfortunate that so little concern is exhibited for license renewals since even the most vigorous preliminary investigations cannot eliminate all fraudulent dealers. Moreover, the business character of a dealer is easier to ascertain after a period of actual operation than it is before he has commenced functioning. If more stringent renewal provisions were enacted, a more flexible approach to new applicants would be possible, since the Secretary of State could then issue what would amount to probationary licenses to dealers with questionable backgrounds, and renewal privileges could be conditioned upon the licensee's avoidance of false and deceptive practices.

A necessary incident to an effective licensing scheme is participation by the public or by public agencies in the licensing process. A consumer with a valid complaint against a dealer who is applying for license renewal—or against a dealer who has changed his name or location and is seeking a new license—should have the opportunity to be heard in opposition to the dealer's application. At the present time, the State of Michigan does not provide a specific procedure to afford consumers such an opportunity.²²³ But a notice provision could

219. Interview with Joseph H. Mullaney, Legal Advisor to the Special License Division, Secretary of State's Office, Lansing, Michigan, Aug. 22, 1969 [hereinafter Mullaney Interview].

220. The Bureau may examine witnesses, issue subpoenas, and issue rules and regulations relating to the Act. MICH. COMP. LAWS ANN. § 492.110 (1967).

221. Trierweiler Interview, *supra* note 67.

222. MICH. COMP. LAWS ANN. § 257.248(e); *see* note 223 *infra*.

223. Under the Motor Vehicle Code, a complaint by a consumer, if it is in writing and verified, could possibly lead to the denial of an application for the renewal of a dealer's license. If the Secretary of State, after investigation, finds the complaint to be meritorious, a full hearing may be conducted on that complaint. If the Secretary of State finds at the hearing that the charges are true, he can then apply one of three sanctions: suspension of the dealer's license, revocation of the license, or denial of an application for renewal of the license. MICH. COMP. LAWS ANN. §§ 257.249-250 (1967). Of course, if a license is not due for renewal, denial of a renewal application is not an available sanction. Since a license may expire at any of several dates during the

be enacted requiring the Secretary of State to notify county prosecutors, the Attorney General, and the general public whenever license applications are submitted.²²⁴ The current hearing procedure could then be used to adjudicate challenges against a dealer. It would be sufficient to allow challenges only against those applicants who seek a general dealer license under the Motor Vehicle Code; if that general license is granted, the additional license for installment sales could then be granted as a matter of course.²²⁵ In cases in which the applicant's misconduct is not serious enough to warrant a rejection of his application, another means of protecting consumers with rightful claims and of stimulating them to file complaints could be provided. The Secretary could be empowered in such cases to require the applicant, as a condition of the issuance or renewal of his license, to make restitution to the consumer who is challenging the application.²²⁶

Both the Motor Vehicle Sales Finance Act²²⁷ and the Motor Vehicle Code²²⁸ empower licensing officials to withdraw a dealer's license for disciplinary reasons. Under the former statute, the Financial Institutions Bureau may revoke or suspend a license—after thirty days notice is given to the offending dealer²²⁹—for any of ten reasons,

year [MICH. COMP. LAWS ANN. § 257.248(d) (1967)], the chance that an individual consumer will intentionally become involved in the renewal process is slim.

224. In order to implement such a procedure, an applicant could be required to submit notice of intent to seek a renewal thirty to sixty days before the expiration of his old license. Notice could then be given to law-enforcement officials through a newsletter and to the general public through an advertisement similar to those used in liquor license renewals. Attorneys and groups dealing with consumers would presumably be alert to such publication; but to ensure notice, they could ask to be placed on the mailing list for the newsletter. The extra cost could be offset by an increase in license fees. The costs of such an administrative procedure would probably be minimal since most applications would probably not be challenged. To protect the dealer, his license could be extended pending the outcome of the hearing.

225. The Bureau would still have the power to deny a renewal application on the basis of a technical statutory violation under the Motor Vehicle Sales Finance Act. MICH. COMP. LAWS ANN. § 250.249 (1967). But the Bureau would no longer be empowered to reject a renewal request on the basis of complaints from buyers alleging fraudulent sales practices.

226. Since the rather severe sanction of denial of a license is involved, it is necessary that as much evidence as possible of dealer misconduct be presented at the hearing and on review. Thus a primary advantage of this form of regulation is that it provides the opportunity to present claims in an effective manner, particularly if consumer groups become involved. To the extent that legal-services attorneys, urban clinics, and indigenous consumer groups act on the renewal notices, they will help to provide the needed link between the consumer and the government and thus will help to solve the present problem of inaccessibility. In addition, there is less chance that a dealer will escape sanction, as frequently happens in single-case adjudication, because of a failure of a victim or witness to testify. See text accompanying note 254 *infra*.

227. MICH. COMP. LAWS ANN. § 492.109(a) (1967).

228. MICH. COMP. LAWS ANN. § 257.249 (1967). For a discussion of the Secretary of State's power to suspend or revoke a dealer's license under the Motor Vehicle Code, see text accompanying note 241 *infra*.

229. MICH. COMP. LAWS ANN. § 492.109(a) (1967).

including fraud in the sale of vehicles and willful failure to perform any written agreement.²³⁰ This power, however, is seldom if ever used; indeed, in the past four years there have been no suspensions or revocations under the Motor Vehicle Sales Finance Act.²³¹ One reason for the lack of regulatory activity on the part of the Bureau is that its administrator believes that the prime function of the Bureau is not to regulate, but to use its extensive authority for the purpose of examining dealer records to ensure that statutory requirements are met, licensing fees are paid, and financial integrity is maintained.²³² Thus the administrator evinces a conscious policy of deferring to the Secretary of State in regard to matters of suspension or revocation. The only regulatory role which the Bureau does play is that of providing evidence and testifying at hearings and thereby assisting the Secretary of State in processing complaints against dealers.

The fact that the Financial Institutions Bureau does not pursue an active role in dealer regulation, however, may not be of significant consequence to the consumer, since the Bureau is not, as an institution, an appropriate agency to deal with the problems of consumer fraud. The Bureau's primary administrative responsibility is to enforce the licensing requirements for lending institutions—requirements that are contained in the Motor Vehicle Sales Finance Act²³³ and the Small Loan Company Act.²³⁴ The Bureau's expertise, therefore, is in the area of finance, not in the area of retail-sales operations. In addition, two other factors prevent the Financial Institutions Bureau from being of assistance to consumers. Very few buyers of motor vehicles realize that the Bureau has been delegated authority to oversee sellers,²³⁵ and the Bureau has made no attempt to encourage complaints from consumers and thereby to publicize its role as overseer.²³⁶ The assistant prosecutor has occasionally referred complaints to the Bureau, but no revocations or suspensions have emanated from those referrals.²³⁷ Moreover, as in the case of the other agencies that are responsible for consumer protection, the Bureau is plagued by a serious personnel shortage; there are only three investigators to police the 2,400 dealers and 230 financial institutions operating in Michigan.²³⁸

230. MICH. COMP. LAWS ANN. § 492.109(a)(9) (1967).

231. Trierweiler Interview, *supra* note 67.

232. *Id.* See note 210 *supra* and accompanying text.

233. MICH. COMP. LAWS ANN. § 492.101 (1967).

234. MICH. COMP. LAWS ANN. §§ 493.1-.26 (1967).

235. Donnelly Interview, *supra* note 98; Nolan Interview, *supra* note 18.

236. Trierweiler Interview, *supra* note 67.

237. Nolan Interview, *supra* note 18.

238. Trierweiler Interview, *supra* note 67.

It seems obvious, therefore, that the Financial Institutions Bureau is not an effective agency for protecting the consumer from deceptive sales practices by automobile dealers.²³⁹ Indeed, one of the problems with consumer protection legislation in Michigan is that the relevant statutes vest regulatory and enforcement authority in diverse agencies that are usually inadequately funded and that are often ill-suited for the task of combatting fraudulent business practices. It would seem much more logical, for example, to limit the jurisdiction of the Bureau to the function it performs best—ensuring the financial integrity of licensed lending institutions—and to turn over its nominal authority in the consumer fraud area to the Secretary of State or to the Attorney General. If nothing else, this change would help to centralize enforcement authority and would focus responsibility for the safeguarding of consumer interests upon elected state officials.²⁴⁰

The Secretary of State, however, must follow a more complicated procedure to revoke or suspend a license than must the Financial Institutions Bureau. Under the Motor Vehicle Code,²⁴¹ the Secretary must investigate the circumstances of any complaint in order to decide whether further proceedings are warranted. If the complaint is substantiated, the Secretary must give the licensee ten-days notice before a formal hearing is held on the merits. If, at the hearing, the hearing examiner finds against the licensee, he may enter an order suspending or revoking the license, and that order becomes final in thirty days unless in the meantime the licensee appeals to a circuit court.

This administrative process is usually initiated by a complaint from one of the one hundred field investigators of the Department of State.²⁴² But since the field investigators are empowered to enforce the entire Motor Vehicle Code, not just the licensing provisions,²⁴³ they cannot, as a practical matter, spend much of their time investigating fraudulent sales practices.²⁴⁴ Thus, while fraudulent practices are a basis for suspension under the Motor Vehicle Code,²⁴⁵ com-

239. See note 210 *supra*.

240. The current enforcement machinery, in addition to inhibiting consumer access, tends to disperse consumer pressure for reform. Consumers could use their political powers to better advantage if one agency were made responsible for the bulk of consumer protection programs.

241. MICH. COMP. LAWS ANN. § 257.250 (1967).

242. Mullaney Interview, *supra* note 219.

243. MICH. COMP. LAWS ANN. §§ 257.248-250 (1967).

244. Most of the work of the investigators does not involve consumer fraud. Complaints usually relate to (1) violations of the reporting requirements that are established to assist in the prosecution of automobile thefts, (2) cases involving the withholding or fraudulent concealment of payments owed to the state, or (3) cases involving dealers operating without a proper license. Mullaney Interview, *supra* note 219.

245. MICH. COMP. LAWS ANN. § 257.249(d) (1967).

plaints are rarely received alleging such practices, and licenses are seldom suspended for reasons of dealer fraud.²⁴⁶ Indeed, one of the first cases decided under the Motor Vehicle Code stated that the purpose of the licensing provisions was to ensure compliance with statutory requirements relating to reports and payment of revenues,²⁴⁷ rather than to protect the consumer.

Complaints are also received at times from a county prosecutor or a private group such as the Better Business Bureau, but rarely are they received from a private citizen.²⁴⁸ As with the Financial Institutions Bureau, few consumers, especially those living in the inner city, realize that they can turn to the Secretary of State for protection against dishonest automobile dealers.²⁴⁹ There is little publicity concerning this function of the Secretary, and branch offices either refuse to process consumer complaints or do so with little enthusiasm.²⁵⁰

Despite all the difficulties, however, a number of consumer fraud complaints are received each year, and some of them are deemed serious enough to require a full hearing.²⁵¹ In those cases the one attorney in the license division usually acts as hearing officer, with a deputy attorney general designated as prosecutor.²⁵² Both the Secretary of State and the Attorney General are unhappy about this procedure, because it requires that a deputy attorney general be called from an undermanned staff in order to prosecute a matter with which he has little familiarity and which is usually based on a technical violation.²⁵³ As a consequence, prosecutions are probably not as vigorous as they might be in the hands of a knowledgeable prose-

246. Mullaney Interview, *supra* note 219.

247. *Powers v. Vignam*, 312 Mich. 315, 20 N.W.2d 203 (1945). This case was decided under a predecessor of the present act, MICH. COMP. LAWS § 256.114(c) (1948).

248. The fact that complaints are seldom received from private citizens is probably due to the lack of publicity about the Department and to the fact that very little mediation is done. Mullaney Interview, *supra* note 219.

249. Donnelly Interview, *supra* note 98; Mullaney Interview, *supra* note 219.

250. The head of the Wayne County prosecutor's Fraud Section, who was deputized to prosecute one of the few actual consumer fraud cases heard recently, remarked that the assistant attorney general usually assigned to consumer fraud cases was inclined to adjourn the proceedings frequently or even to settle the case and dismiss the hearing. Nolan Interview, *supra* note 18.

251. There are five levels of administrative action that can be utilized to process an alleged violation of the Motor Vehicle Code by a dealer. They range in complexity from the field level district proceeding—in which an investigator merely obtains an assurance from the dealer that the prohibited conduct will not continue—to a formal hearing. In fiscal 1968-1969, 317 dealers were cited for violating the Motor Vehicle Code. Of these dealers, only 49 were required to appear for a formal hearing. The remaining dealers had their cases settled either by a less formal proceeding or without any administrative hearing. Telephone Interview with Peter Bommarito, Director of Public Relations, Office of the Secretary of State, Lansing, Michigan, March 3, 1970.

252. Mullaney Interview, *supra* note 219.

253. Mullaney Interview, *supra* note 219; Platsis Interview, *supra* note 44.

cuting attorney. There is also the problem of obtaining witnesses. Most hearings are held in Lansing with the result that witnesses, especially those from Detroit, often fail to appear.²⁵⁴ The Department has taken steps to rectify this problem and has recently shown a willingness to move hearings to Detroit if inner-city residents are involved.²⁵⁵

If the hearing examiner finds against the dealer on the complaint, he may enter an order suspending the dealer's license for a specified period of time. In almost every case, the dealer exercises his right of appeal to the circuit court.²⁵⁶ Of course, the actual suspension is delayed and the accused dealer is permitted to continue in business as usual pending the disposition of the appeal.²⁵⁷ Although the circuit court is not supposed to conduct a *de novo* review, it may, at its discretion, receive evidence that was not available at the time of the hearing.²⁵⁸ The court's function is not to weigh the evidence, but to ascertain whether it supports the findings of the hearing examiner.²⁵⁹ In practice, the same problems exist in these appellate proceedings as in appellate proceedings under criminal statutes; judges usually do not have a complete record of the licensee's wrongdoing and thus generally treat him as a first offender.²⁶⁰ Accordingly, they either make an independent judgment of guilt or greatly reduce the penalty imposed by the hearing officer.²⁶¹

Even in the rare cases in which the license of a fraudulent dealer is ultimately suspended or revoked,²⁶² however, the defrauded consumer gains no benefit apart from the satisfaction of having the dealer's license removed. Moreover, the dishonest dealer may suffer no real penalty, for nothing in the statute prohibits the issuance of a new license to a relative or a business associate of the dealer, and the dealer's business may thus proceed as usual after a brief "remodeling."

In light of the delays and other difficulties associated with the

254. Mullaney Interview, *supra* note 219.

255. *Id.*

256. *Id.*

257. MICH. COMP. LAWS ANN. § 257.250(b) (1967).

258. MICH. COMP. LAWS ANN. § 257.250(b) (1967).

259. See *Salway v. Alger*, 321 Mich. 211, 32 N.W.2d 505 (1948). It should be noted that in this case the dealer continued to function during the review.

260. See text accompanying notes 186-88 *supra*.

261. Mullaney Interview, *supra* note 219.

262. During fiscal year 1968-1969, forty-nine cases were scheduled for a formal hearing. In two cases the dealer's license was revoked, while in two others a suspension was ordered. Three dealers went out of business pending the hearing. Five were given a conditional suspension on the condition that if any additional violations were detected during a stated period, the Secretary of State could seize the license without additional proceedings. The remaining cases are still pending. Bommarito Interview, *supra* note 251.

present license removal process that is administered by the Secretary of State, it seems advantageous to develop some alternative means of dealing with fraudulent automobile dealers. Perhaps the best method is to include in a comprehensive deceptive-practices statute a provision granting the Attorney General broad powers to combat all fraudulent business practices. Under such a provision, all jurisdiction over consumer fraud would be centralized in the Attorney General's office, and automobile dealers would be treated in the same manner as other retail merchants.²⁶³ The Secretary of State would retain the power to hold hearings and to remove dealer licenses for reasons other than fraudulent business practices, but all fraud complaints would go directly to the Attorney General. If the Attorney General finds that a particular automobile dealer has engaged in illegal practices, he could directly order the dealer's license to be suspended or revoked, or he could take other administrative action against the dealer and submit the results of the hearing to the Secretary of State for a determination of whether the dealer's license should be removed. In the event that the latter procedure is followed, the Secretary could make his decision without the added cost or delay of another administrative hearing.

The primary advantage of such a system is that it would allow a full range of sanctions to be applied against a dishonest automobile dealer and would thus provide relief for the individual complainant as well as for the general public. If such a system were combined with increased public involvement in the licensing and renewal process,²⁶⁴ the consumer would be afforded significantly more protection against dishonest automobile dealers than he now receives from the lethargic practices of the Secretary of State.

C. Attorney General

In approximately half of the states, including Michigan, a consumer fraud branch of the attorney general's office has been created either by statute or administrative action.²⁶⁵ But only in those states with strong deceptive-practice legislation, and centralized administration of that legislation is sufficient authority delegated to that branch to allow the agency to be effective.²⁶⁶ In Michigan, therefore,

263. For a further discussion of the possibility of making the attorney general the administrator of a comprehensive deceptive-practices statute, see pt. II. C. *infra*.

264. See text accompanying notes 223-26 *supra*.

265. See Comment, *Translating Sympathy for Deceived Consumers into Effective Programs for Action*, 114 U. PA. L. REV. 395, 429 (1966). Since that comment was published, Colorado, Massachusetts, and Missouri have established consumer fraud bureaus. See ch. 143, §§ 1-16, [1969] COLO. LAWS 371-76; MASS. ANN. LAWS ch. 93A, §§ 1-12 (Supp. 1969); MO. ANN. STAT. § 407.010-130 (Supp. 1969).

266. MASS. GEN. LAWS ANN. ch. 93a, §§ 1-9 (Supp. 1969); N.M. STAT. ANN. § 49-15-13 (Supp. 1969). These are probably the two strongest consumer-fraud statutes in the nation.

the Consumer Fraud Bureau, like the similar agencies that exist in the numerous other states with a piecemeal approach to consumer protection,²⁶⁷ has few powers beyond the prestige of the Attorney General's office.

The Consumer Fraud Bureau in Michigan was instituted by the Attorney General in 1959 without any action by the legislature; in fact, the first monetary expenditure for the Bureau was not authorized until several years later.²⁶⁸ The current budgetary allocation for the Bureau is only 60,000 dollars per year, which permits the hiring of one deputy attorney general, one investigator, and three secretaries.²⁶⁹ The Bureau makes no attempt to solicit complaints—for obvious economic and practical reasons—but approximately 1,500 complaints are received annually at the Lansing office, either by phone or by mail.²⁷⁰ About sixty per cent of those complaints are mediated successfully; the rest are abandoned unresolved or are referred to some other agency.²⁷¹

The Bureau views its role as primarily that of encouraging settlements, usually through a letter or a phone call to the offending merchant.²⁷² To a large extent, this limited view is a function of the lack of enforcement machinery at the Bureau's disposal. Apart from its general powers of persuasion and the ability to use the threat of adverse publicity, the Bureau has only three tools of enforcement that may be invoked against a dishonest merchant: the injunctive provisions of the Retail Installment Sales Act,²⁷³ those of the Home Improvement Finance Act,²⁷⁴ and those of the Deceptive Trade Practices Act.²⁷⁵ As noted previously, these provisions are generally ineffective to combat most fraudulent practices.²⁷⁶ The Bureau does maintain a "hot line" with prosecutors, better business bureaus, and other interested groups, in order to exchange information and to

267. Comment, *supra* note 265, at 430-33. For an attorney general's view, see Saxbe, *The Role of Government in Consumer Protection: The Consumer Frauds and Crimes Section of the Ohio Attorney General*, 29 OHIO ST. L.J. 897 (1968).

268. Platsis Interview, *supra* note 44; Detroit News, Oct. 5, 1969, § E, at 1, col. 4.

269. Platsis Interview, *supra* note 44.

270. *Id.*

271. *Id.* For example, automobile cases are referred to the Secretary of State for possible licensing actions, and complaints against food dealers are referred to the Insurance Bureau of the Department of Commerce. In addition, if criminal sanctions seem warranted, notice is given to the appropriate county prosecutor.

272. Platsis Interview, *supra* note 44.

273. MICH. COMP. LAWS ANN. § 445.869 (1967).

274. MICH. COMP. LAWS ANN. § 445.1422 (1967).

275. MICH. COMP. LAWS ANN. § 445.807 (1967); see text accompanying notes 140-50 *supra*.

276. See text accompanying notes 59-65 *supra*. The injunctive provisions of the Retail Installment Sales Act and Home Improvement Finance Act have never been utilized either by the Attorney General or by a local prosecutor. Platsis Interview, *supra* note 44.

plot strategy for dealing with fraud schemes that are statewide.²⁷⁷ But the "hot line" does not significantly benefit consumers because of the inability of the Bureau to apply adequate remedial provisions. Moreover, focusing upon statewide fraud schemes ignores the retail dealers' localized dishonest practices, which daily plague the urban poor.

Although the Consumer Fraud Bureau is severely handicapped by an almost complete lack of effective enforcement powers, the Attorney General frequently recommends new legislation and is currently urging the enactment of the Federal Trade Commission's Uniform Trade Practice and Consumer Protection Act.²⁷⁸ But until there is legislation providing the Attorney General with comprehensive jurisdiction and enforcement powers with respect to fraud in the market place, little can be expected from the Consumer Fraud Bureau in the way of effective action against dishonest merchants.

III. SOME PROPOSALS FOR REFORM

It seems apparent that the present statutory and administrative measures in Michigan for the relief of defrauded consumers are totally inadequate. The lack of integration in Michigan's statutory scheme, combined with the relative impotence of the substantive provisions dealing with consumer fraud, ensure that little can be done under current law to aid the victims of fraudulent business practices. The deficiencies in Michigan's statutory scheme are compounded by the lack of effective action in this area from judicial and nongovernmental sources. The courts, instead of implementing needed reform in judicial administration, provide a system of justice that is unintelligible to the vast majority of citizens and seems oppressive to those most in need of assistance. Default judgments,²⁷⁹

277. Detroit News, Oct. 5, 1969, § E, at 1, col. 1; Platsis Interview, *supra* note 44.

278. Platsis Interview, *supra* note 44.

279. The vast majority of suits by finance companies or merchants against consumers are disposed of through default judgments. Indeed, the sales practices of many inner-city merchants are designed to rely upon eventual default by the consumer, followed quickly by a default judgment, repossession and resale of the goods, and garnishment. FTC CREDIT REPORT, *supra* note 5, at 34. The common pleas court in Detroit, with nine full-time judges, handled 57,142 "assumpsit" and 6,445 "replevin" cases in 1968. 1968 ANNUAL REPORT OF COMMON PLEAS COURT 2. No figures are available as to the percentage of these cases disposed of through default judgments, but 73,023 of the 76,258 cases adjudicated were not contested. Furthermore, \$20,489,194 of the \$22,882,243 awarded in judgments resulted from proceedings in which no defendant appeared. *Id.* at 4. Staff members of the *Michigan Law Review* examined, at random, several hundred assumpsit and replevin case records and were unable to find any in which a consumer had interposed an answer to the complaint.

Aside from the social problems caused by such summary justice, this system wastes the money of taxpayers by providing merchants with an inexpensive collection agency; the court fees charged to merchants obtaining default judgments do not begin to cover the costs of operating the common pleas court. Interview with Herbert Levin, Clerk, Common Pleas Court, Detroit, Michigan, Oct. 16, 1969 [hereinafter Levin Interview].

garnishment,²⁸⁰ lack of effective representation,²⁸¹ and an archaic body of common law²⁸² are conspicuous realities in lower courts that adjudicate debtor-creditor controversies. In addition, private groups and industry self-regulation have proved inadequate to combat the problem of consumer fraud.²⁸³ Despite the seriousness of these prob-

280. Due to the outdated record-keeping system of the common pleas court, it is impossible to determine what percentage of the default judgments entered by that court against defendants eventually lead to garnishments. The clerk estimates, and it seems reasonable to conclude, that almost all default judgments result in garnishment. Levin Interview, *supra* note 279. The common pleas court has experimented with a partial payment plan as an alternative to garnishment. Under that plan, a judgment debtor may avoid garnishment by paying to the court weekly an amount that is commensurate with his income and with the amount of the judgment. Unfortunately, during 1968-1969, 9,133 partial-payment orders were cancelled because of failure to pay, while only 13,330 new orders were entered. 1968 ANNUAL REPORT OF COMMON PLEAS COURT 7. Thus the partial payment plan has not worked in Detroit. For discussions of wage garnishment, see Brunn, *Wage Garnishment in California: A Study and Recommendations*, 53 CALIF. L. REV. 1214 (1965); Kerr, *Wage Garnishment Should Be Prohibited*, 2 PROSPECTUS 371 (1968); Note, *Garnishment of Wages Prior to Judgment Is a Denial of Due Process: The Sniadach Case and Its Implications for Related Areas of the Law*, 68 MICH. L. REV. 986 (1970).

281. The problem of lack of effective representation for defrauded consumers is basically one of money—the amounts in dispute are too small to warrant litigation—and lack of knowledge on the part of the poor concerning how to utilize the services of attorneys. See Kripke, *Gesture and Reality in Consumer Credit Reform*, 44 N.Y.U. L. REV. 1, 46-48 (1969). One possible solution to that problem, the establishment of legal services for the poor, is currently hindered by a lack of funds. The Detroit legal services office has only one attorney specializing in consumer cases, and he must consequently limit himself to suits which are of precedent-setting value. The attorneys at the neighborhood offices are so pressed for time that they are often able to do little more than make a phone call or send a letter to an offending merchant. Many times such a merchant settles with complaining consumers as soon as he is informed that legal services are involved. But, while this provides restitution to some consumers, it has no deterrent value against continued unfair practices. Donnelly Interview, *supra* note 98. Moreover, test litigation undertaken by legal-services attorneys in an attempt to make the common law more responsive to the needs of the poor is expensive, lengthy, and usually fruitless. On the whole it is an ineffective alternative to statutory change as a vehicle for reform in the area of consumer protection. For an article illustrating these difficulties, see Schrag, *Bleak House 1968: A Report on Consumer Test Litigation*, 44 N.Y.U. L. REV. 115 (1969).

282. In regard to the substantive problems of consumer suits for damages, see Hester, *Deceptive Sales Practices and Form Contracts—Does the Consumer Have a Private Remedy?*, 1968 DUKE L.J. 831.

283. See Comment, *supra* note 265, at 404-09. See also Project, *The Direct Selling Industry: An Empirical Study*, 16 UCLA L. REV. 890, 931-42 (1969), in which the student author concluded that "the [Better Business] Bureau's capacity for aggressive protection of consumers is drastically limited by its need to avoid alienating its source of funds, the local businessmen." *Id.* at 940. Although the Detroit Better Business Bureau (BBB) handled over 18,000 complaints or inquiries last year, it is similarly limited in its ability to aid inner-city consumers effectively. The major handicap of the BBB is the fact that it does not enjoy the confidence of the poor consumers who are most in need of its assistance. This handicap is evidenced by the fact that one half of all complaints or inquiries to the BBB traditionally come not from the inner city or even Detroit, but from the more affluent suburban areas. Caucus, October 1969, at 1 (BBB Newsletter). Indeed, the problem is so acute that poor consumers have undertaken the task of organizing their own parallel group, the Consumer Protection Association, Inc. The objective of that association is to allow the poor to become involved in consumer protection activities and to utilize the power of organized consumers to

lems, state officials, including the Governor, do not seem to have placed a high priority on the restructuring of consumer legislation;²⁸⁴

elicit needed reform. Interview with Consumer Research Advisory Council, Detroit, Michigan, Aug. 21, 1969.

Perhaps the most fundamental handicap of the BBB in regard to its relationship with poor consumers is that it can do little to solve their problems. To most consumers, the primary function of the BBB is to adjust their complaints with merchants. Successful mediation, however, depends upon the willingness of the merchant to make some sort of restitution or to change his sales practices. Absent that willingness, the consumer may be advised to seek other remedies. Caucus, Sept. 1968, at 2. (Interestingly enough, this publication, which mentions specific merchants engaging in fraudulent schemes, is not distributed to the general public.) If the deceptive practice of the scheme involved is pervasive enough, and if the violator refuses all requests for voluntary action, the BBB may inform various members of the advertising media and suggest that advertisements for the scheme be discontinued. Of course, this procedure reaches only deceptive advertisements and does so only long after the fraudulent practices have been instituted. As a last resort, the records of the BBB may be turned over to governmental authorities empowered to prosecute offenders engaging in consumer fraud. But this last resort also fails to provide the defrauded consumer with relief for past fraudulent transactions of the dealer.

The other major service of the BBB, answering inquiries from prospective customers concerning the integrity of particular merchants, suffers because the information given is limited to the number of complaints against that merchant; no opinion is given regarding these practices. In addition, for those who have not had the foresight to inquire before purchasing—probably the vast majority of low-income consumers—this service is useless.

The success of the self-imposed guidelines so favored by the BBB as a restraint upon merchants depends upon voluntary cooperation from the businessmen, and it seems unlikely that the patently fraudulent operators are going to be influenced by these standards. *Special Report: Truth in Advertising*, Caucus, Nov. 1968. In summary, it appears that the BBB, operating from its vantage point as an arm of the business community, is simply not attuned to the serious nature of the problems that inner-city consumers face or to the need for strong action to alleviate those problems. The BBB may even have an over-all negative impact on consumer interests, since the BBB often opposes reform and provides businessmen with a friendly regulator to whom they can point in order to show that business does indeed "care."

The other major business group, the Chamber of Commerce, is equally useless and is also a formidable opponent of reform. The Chamber of Commerce views its function as that of providing lines of communication between consumers and management in order to facilitate resolution of general consumer problems. To further this goal, the Chamber is working to have prominent business leaders speak to consumer groups both to allow consumers to air complaints and to educate consumers about their rights. While this program appears to be based upon good intentions, the Chamber suffers from an even greater distrust on the part of the poor consumer than does the BBB; leaders of consumer groups in Detroit are unanimous in their characterization of the Chamber as the enemy, not the ally, of the poor consumer. Interview with the Consumers Research Advisory Council, *supra*. If the Chamber merely did nothing constructive to aid consumers, it would not be a major obstacle to consumer reform; the Chamber is, after all, a business group, not a consumer protection agency. But the Chamber does not remain passive; rather, it opposes all new legislation on the ground that present laws are sufficient. Its position is that additional legislation would "restrict" reputable businessmen and be nothing more than another tool for government to harass legitimate operators. Interview with Robert P. Marquart, Vice-President, Detroit Chamber of Commerce, Aug. 19, 1969. While this attitude is perhaps to be expected from such a group, it is certainly evidence of the Chamber's inability to aid oppressed consumers.

284. See Governor's State of the State Message, Jan. 15, 1970; Governor's Budget Message, Feb. 5, 1970.

and the few potentially helpful bills that have been recently introduced languish in committee.²⁸⁵

The need for statutory reform in most of the states has been recognized by three eminent groups: the Federal Trade Commission (FTC), the Council of State Governments (CSG), and the National Conference of Commissioners on Uniform State Laws (NCCUSL). Each has prepared a model consumer protection act.²⁸⁶ Several states have already enacted broad deceptive-practices legislation, patterned after the FTC or CSG model acts.²⁸⁷

In form the three acts are quite similar; all are comprehensive deceptive-practices statutes which vest a single administrator—usually the state attorney general—with broad enforcement powers encompassing an array of remedial devices.²⁸⁸ Such legislation has been attacked by some advocates of consumer interests on the ground that it leads to an over-all reduction in activities which protect the consumer.²⁸⁹ A survey by the *Michigan Law Review* indicates that in those states with comprehensive deceptive-practices legislation, prosecutors and other consumer protection agencies do tend to defer to the attorney general and to reduce substantially, if not to eliminate, their own antifraud activities.²⁹⁰ Nevertheless, this type of legislation does offer the advantages of coordination and consistent enforcement throughout the state. As the arguments of the critics suggest, however, care must be taken to ensure that the increased centralization of enforcement authority does not produce an illusory victory for the consumer. Passing a comprehensive deceptive-practices statute without substantially increasing the powers and resources of the statute's administrator would most likely reduce statewide protection efforts. But if the administrator is granted broad powers, it is difficult to imagine how the level of protection afforded consumers could be reduced. At least in Michigan, the various agencies charged with the responsibility of combatting consumer fraud have demonstrated so

285. The Attorney General's proposal for enactment of the FTC's recommended act has not been considered by the legislature; the Uniform Consumer Credit Code has not been reported out of committee; and the proposal to establish a city consumer agency in Detroit has not been enacted seven months after a special mayor's task force recommended the proposal to the legislature. Interview with Andrew Eiler, Executive Secretary, Michigan Consumers Council, Lansing, Michigan, Oct. 14, 1969; Platsis Interview, *supra* note 44.

286. See notes 293-95 *supra*. The NCCUSL act is currently in the third tentative draft and is still being considered by committee. It has not been adopted by the whole conference.

287. HAWAII REV. LAWS §§ 205A-1 to -22 (Supp. 1965); MO. ANN. STAT. §§ 407.010-.130 (Supp. 1968); N.J. STAT. ANN. §§ 56:8-1 to -12 (1964); WASH. REV. CODE ANN. §§ 19.86.010-.920 (Supp. 1968).

288. See text accompanying notes 316-41 *infra*.

289. See note 173 *supra*. See also Kripke, *Consumer Credit Regulation: A Consumer Oriented Viewpoint*, 68 COLUM. L. REV. 445, 445-47 (1968).

290. See note 175 *supra* and accompanying text.

little success in that endeavor that almost any effective action from another source would be a distinct improvement.

In Michigan, the administrator of a deceptive-practices statute should be the Attorney General. His role as administrator under such a statute would be in keeping with his role as chief law-enforcement officer of the state. Moreover, the Attorney General's office already has a Consumer Fraud Bureau—although it is currently understaffed and inadequately funded²⁹¹—which could be expanded to provide the administrative apparatus necessary to implement a pervasive consumer fraud statute. Finally, since the Attorney General is basically a prosecutorial official, he can be expected to take more vigorous and forthright action against dishonest merchants than would other agencies or officials who view themselves more as administrative functionaries than as law enforcers. As mentioned previously,²⁹² it might be useful to provide county prosecutors—particularly those in counties that enclose urban areas—with concurrent jurisdiction under the deceptive-practices statute, or to make them agents of the Attorney General for the purpose of enforcing the statutory provisions. The latter possibility is perhaps the more desirable one, since it would avoid dispersal of authority and would help to maintain the centralized character of the enforcement process.

In order to be effective, a deceptive-practices statute must meet several basic requirements. First, it must be truly comprehensive, that is, it must include within its coverage as many varieties of fraudulent practices as possible. The FTC proposed act defines the scope of its coverage very broadly by prohibiting unfair or deceptive acts or practices in the conduct of any trade.²⁹³ The CSG act accepts this broad definition as the most appropriate one,²⁹⁴ while the NCCUSL act simply prohibits any deceptive practice in a consumer transaction.²⁹⁵ The NCCUSL act further defines the general category deceptive act, without limiting its scope, by listing thirteen practices that are specifically prohibited.²⁹⁶ Unlike other statutes in which enumeration of prohibited acts adds little to the coverage,²⁹⁷ the NCCUSL act probably reaches more deceptive methods with the specification than without. The first twelve subsections are apparently an attempt to ensure that the most common deceptive practices are prohibited, including "bait" advertising,²⁹⁸ misrepresenting

291. See text accompanying notes 268-72 *supra*.

292. See text accompanying notes 181-82 *supra*.

293. FTC UNIFORM ACT § 2. See also § 3, which mandates that courts of the enacting state are to be guided by judicial interpretations given to the Federal Trade Commission Act § 5, 15 U.S.C. § 45(a)(5) (1964). See note 43 *supra*.

294. CSG Act § 2, alternative 1.

295. NCCUSL Act § 2(a).

296. NCCUSL Act §§ 2(b)(1)-(12), (c).

297. See, e.g., CONN. GEN. STAT. ANN. § 42-115(e) (Supp. 1968).

298. NCCUSL Act § 2(b)(6); see note 142 *supra*.

used goods as new,²⁹⁹ and referral sales,³⁰⁰ while the last section is aimed at unconscionable transactions.³⁰¹ The last section is necessary because of the possibility that some overreaching activities by merchants may not constitute deceptive practices within the meaning of that term as it is usually defined;³⁰² in that event the general prohibition against unconscionability should be available as a final protection for the consumer.³⁰³ If a practice is neither deceptive nor unconscionable, it probably should be beyond the reach of a regulatory statute, and any confusion by the consumer will have to be alleviated by consumer education or self-regulation. In summary, the best approach to providing maximum protection for the consumer seems to be adoption of the FTC standard, supplemented by the NCCUSL

299. NCCUSL Act § 2(b)(3).

300. NCCUSL Act § 2(b)(11). A referral sale is one in which the consumer is induced to purchase goods by the seller's representations to the consumer that the consumer will be able to recoup the purchase price by referring others to the seller as potential customers. In reality, the odds against any consumer earning as much as his purchase price by referring potential customers to the seller are astronomical. For an illustrative case, see *Lefkowitz v. ITM, Inc.*, 52 Misc. 2d 39, 275 N.Y.S.2d 303 (Sup. Ct. 1966).

301. NCCUSL Act § 2 (emphasis added):

....

- (c) An act or practice of a supplier is unlawful, if:
 - (1) it is unconscionable; and
 - (2) the unconscionability involves a consumer transaction.
- (d) Without limiting the scope of subsection (c) the following factors are to be considered in applying that subsection:
 - (1) that the supplier has *knowingly* taken advantage of the inability of the consumer reasonably to protect his interests by reason of physical or mental infirmities, ignorance, illiteracy, inability to understand the language of the agreement, lack of education, or similar factors;
 - (2) that the supplier has *knowingly* charged a price which is grossly in excess of the price at which similar property or services is readily obtainable in *similar consumer transactions by like consumers*;
 - (3) that the supplier *knew* at the time of the consumer transaction of the inability of the consumer to receive substantial benefits from the subject of the consumer transaction; or
 - (4) that the supplier *knowingly* required the consumer to waive substantial legal rights.

The only difficulty with this section is the requirement of knowledge on the part of the supplier. Not only does that requirement present a substantial evidentiary problem for the prosecutor—even with his ability to obtain records and oral testimony—but it also deprives the consumer of needed relief. To a consumer who has purchased goods that are worthless, or are grossly overpriced, it makes little difference whether or not the merchant had knowledge of the unconscionable nature of the transaction.

302. For example, a statement concerning the quality of goods may be only "puffing," an opinion to the average consumer and hence not deceptive. The same statement if made to a poor, ignorant consumer may still not be deceptive, but it probably is unconscionable. See Rice, *Remedies, Enforcement Procedures and the Duality of Consumer Transaction Problems*, 48 B.U. L. REV. 559, 597-98 (1968).

303. Consumers can, of course, rely on UCC § 2-302, which prohibits unconscionable contractual provisions, but a similar prohibition in a deceptive-practices statute might be more effective. The NCCUSL act, for example, provides a broader range of remedies than is available under UCC § 2-302. See text accompanying notes 325-31 *infra*. Moreover, the additional guidelines presented in the NCCUSL act concerning what constitutes unconscionable conduct may stimulate the courts to extend the concept to more unfair transactions.

act's specifications, particularly its prohibition against unconscionable transactions.

The second basic requirement of an effective deceptive-practices statute is that it provide the attorney general with broad investigative and decision-making powers. Ideally the attorney general should do more than simply prosecute individual cases based upon consumer complaints. He should be granted authority to conduct investigations and to issue rulings in order to help establish standards of conduct for dealers covered by the statute. The power to investigate, along with the authority to request both documentary evidence and the presence of witnesses, should not be limited to judicial proceedings. A provision granting the attorney general broad investigative powers would allow him to keep abreast of developments in the marketing of retail goods and would assist him in formulating consumer education programs to inform the public about the types of fraudulent schemes and practices that are currently being used by merchants. The statute should also grant the attorney general the authority to issue a specific advisory ruling at the request of a businessman, since that authority would allow merchants to ascertain the legality of a particular sales practice before putting it into operation and would thus protect the public from potentially injurious activities.³⁰⁴ Finally, granting the attorney general the power to establish general regulations would be desirable, because such regulations could be used by reputable merchants as guidelines for fair conduct.³⁰⁵

In this area the NCCUSL act provides the narrowest provisions. Although it permits public hearings to be held at any time,³⁰⁶ it allows investigations only when there is probable cause to believe

304. The use of advisory opinions would remove one of the arguments against strict enforcement of a broad range of statutory remedies—the fear of injuring innocent businessmen. If the declaratory or advisory ruling, as opposed to a general regulation, were made appealable, the merchant would be able to embark on a course of conduct with full knowledge of its legal implications. If the merchant were to choose not to avail himself of the right to obtain an advisory opinion, there would be no reason for not applying sanctions against him.

A specific advisory ruling would be binding on the state, but only with respect to the merchant requesting the ruling, unless the administrator were to adopt the ruling as a regulation. Consumers, however, should be bound neither by a private ruling of the administrator nor by any general regulations defining permissible conduct. This freedom would permit the private suit to operate as a continuing check upon any complacency of, or lack of innovative action by, the state agency. See Spanogle, *The U3C—It May Look Pretty, But Is It Enforceable?*, 29 OHIO ST. L.J. 624, 629-30 (1968).

305. Not only would reputable merchants be sure of what is legal, but the public would have a standard by which to judge a seller's practices. That standard would help to provide another enforcement tool—public opinion and consumer pressure. Most merchants are probably sufficiently afraid of losing business that they will not engage in practices that the public can readily identify as illegal. Publishing guidelines might also generate more complaints, since the public would realize that certain acts are illegal and that such acts can be stopped. See Spanogle, *supra* note 304, at 629.

306. NCCUSL Act § 4(a).

that an individual has committed a violation.³⁰⁷ The FTC proposed act, on the other hand, requires only that an investigation relate to a "possible" violation of the statute,³⁰⁸ while the CSG act stipulates simply that an investigation is permissible if it appears to the attorney general that a dealer has engaged in, or is about to engage in, a practice violative of the act.³⁰⁹ In addition, the CSG provision permits the attorney general, whenever he deems it to be in the public interest, to undertake an investigation in order to ascertain whether a violation is being committed.³¹⁰ Both the NCCUSL and the CSG acts permit the attorney general to issue regulations and guidelines defining deceptive practices,³¹¹ but the FTC statute contains no provisions relating to those matters. Unlike the NCCUSL provision, however, the CSG act stipulates that such regulations are to have the force of law.³¹² Only the NCCUSL act specifically authorizes the attorney general to render advisory opinions,³¹³ but it is arguable that such power is included in the right to make regulations. Under all three acts, failure to comply with a court order enforcing an investigative demand is punishable by contempt sanctions;³¹⁴ but the CSG proposal goes even further and provides that, if a suspected violator refuses to cooperate, a court, upon the motion of the attorney general, may enjoin the violator from doing business or may remove his

307. NCCUSL Act §§ 4(a), (b), (c). The provision for a public hearing does not give the administrator the authority to administer oaths, to compel attendance of witnesses, or to subpoena records; that power is given only when an investigation is authorized, and such an investigation may be undertaken only if there is probable cause that a merchant is violating the act. The drafters of the act, however, apparently do not intend to require the same level of evidence to establish probable cause under the act as would be required to establish probable cause to arrest a suspect in a criminal case. The "slightest amount" of proof showing a violation would be enough to establish probable cause under the NCCUSL act; only the so-called "fishing expedition" would be prohibited. Interview with William J. Pierce, Executive-Secretary, NCCUSL, Ann Arbor, Michigan, Feb. 27, 1970. The actual standard envisioned, then, seems to be much less stringent than that applied to criminal cases. But care should be taken in drafting such a standard to ensure that the wording used clearly communicates the desired meaning. In the hands of an unfriendly or ignorant judge, the term "probable cause" could be interpreted much more strictly than the term "slightest amount."

308. FTC UNIFORM ACT § 7(a).

309. CSG Act § 11(a).

310. CSG § 11(a).

311. NCCUSL Act § 4(b); CSG Act § 3(a). A later section in the NCCUSL act authorizing the administrator to ask for a declaratory judgment concerning the legality of any conduct casts doubt upon the force that the rulings are intended to have. It seems that those rulings are simply "advisory" and are not to be given the same weight as a formal administrative regulation.

312. CSG Act § 12.

313. NCCUSL Act § 4(b). The administrator must first consult with "interested parties," presumably business and consumer groups, and must hold hearings "if appropriate."

314. FTC UNIFORM ACT § 7(i); CSG Act § 14(3); NCCUSL Act § 4(c)(3).

corporate charter.³¹⁵ Obviously, severe sanctions are needed to deal with uncooperative suspects, since a dealer's refusal to cooperate not only indicates a greater likelihood that he has committed a violation, but also makes it more difficult for the attorney general to gain access to the dealer's records and thus in many instances may reduce the chance for conviction.³¹⁶ It would be anomalous to allow a fraudulent merchant to continue in business, simply because he refuses to obey an investigative order.

The third requirement of a deceptive-practices statute is that it provide the attorney general with a wide range of effective enforcement powers which he can use both to stop the prohibited conduct and to obtain restitution for defrauded consumers. In this connection, the attorney general may, of course, be empowered to make use of the adjudicatory process of the courts. All three model acts have provisions permitting the attorney general to seek an injunction ordering the merchant involved to cease the fraudulent practices in which he is allegedly engaged or in which there is reason to believe he is about to engage.³¹⁷ All three statutes provide that, if the injunction is violated, a penalty may be exacted from the offending dealer. The FTC proposed act provides for a penalty of 2,500 dollars for violating the injunction,³¹⁸ the CSG act mandates the same penalty for each violation,³¹⁹ and the NCCUSL statute establishes a 5,000-dollar fine for each day that the merchant continues the deceptive practice.³²⁰ Two of the acts, however—the FTC statute and the NCCUSL statute—have a significant drawback. Under both, if a court finds that a practice violative of the act is occurring or is about to occur, it may issue an injunction prohibiting the merchant from

315. CSG Act § 14(1), (2), (3); *see* ILL. ANN. STAT. ch. 121½, § 266 (Smith-Hurd Supp. 1969); MASS. GEN. LAWS ANN. ch. 93A, § 8 (Supp. 1969); N.J. STAT. ANN. § 56:8-6 (1964).

316. Discovery and subpoena powers would allow the attorney general to obtain quickly and easily important information such as the wholesale price of goods sold, the source of allegedly "new" merchandise, or the actual quantity of advertised goods that was available for sale. While much of this information could probably be obtained under Michigan's civil discovery rules (*see* MICH. CR. R. 302-13), arming the Attorney General with the authority to issue his own discovery orders has many advantages. He could pursue his inquiries without the necessity of litigation; he could not be compelled to submit to deposition or discovery by the defendant; and he would not be bound by the requirement that the material sought or the questions asked be admissible as evidence. Perhaps of greatest significance would be the additional penalties prescribed for failure to comply with a court order enforcing a demand. *See* text accompanying note 315 *supra*. Providing the attorney general only with the powers available to an ordinary litigant, then, needlessly limits the flexibility of the state in obtaining needed information, and encourages defendants to delay enforcement proceedings.

317. FTC Act § 5; CSG Act § 5; NCCUSL Act § 5.

318. FTC UNIFORM Act § 8.

319. CSG Act § 15(a). It is conceivable that under this provision each sale could be a violation.

320. NCCUSL Act § 5(a)(1).

engaging in that practice in the future;³²¹ but neither statute permits an injunction to be issued prohibiting the future use by a merchant of a deceptive practice which he has used in the past but which he is no longer using or cannot be shown to be contemplating. Thus it may be possible for a dealer, by desisting temporarily from the illegal conduct, to defeat the issuance of an injunction unless the attorney general can show that there is reason to believe that the dealer's deceptive practices will continue. In order to make such a showing, the attorney general would have to overcome difficult evidentiary problems. The CSG statute, however, allows an injunction to be based on past actions as well as on present and future actions.³²² Indeed, there is no compelling reason to shield fraudulent merchants from an injunction simply because they have temporarily ceased using their deceptive practices. A deceptive-practices statute, then, should allow injunctive orders to be drawn broadly enough to prohibit all future use not only of those deceptive practices that are occurring or are about to occur, but also of those deceptive practices in which the merchant has engaged in the past.³²³ Such an order would provide maximum protection to the public without encroaching upon any protected rights of the accused dealer.

Furthermore, a comprehensive deceptive-practices statute should ensure not only that fraudulent practices are discontinued, but also that defrauded victims get their money back. Too many existing "consumer protection" statutes do not provide complete protection to consumers, since they provide only for an injunction of deceptive practices and do not make a corresponding effort to allow the attorney general to seek restitution or some other form of relief for defrauded victims.³²⁴ In this regard, the FTC statute leaves much to be desired; it stipulates that a court may issue an injunction when it finds that a practice violative of the act is occurring or is about to occur, but it does not permit the court to provide the defrauded consumers with any form of relief.³²⁵ The remedial provision contained in the CSG act, however, does provide substantial relief to

321. FTC UNIFORM ACT § 5; NCCUSL ACT § 5(a)(1).

322. CSG ACT § 5.

323. Whether the injunction is based only on present and future deceptive practices or whether it is based also on past practices, it is clear that the court is not limited to prohibiting merely the precise act which violated the statute. It may also enjoin related practices. *See* FTC v. Colgate-Palmolive Co., 380 U.S. 374, 392-95 (1965).

324. *See* HAWAII REV. LAWS § 205A-13 (Supp. 1965); IOWA CODE § 713 (1966); N.Y. EXEC. LAW § 63(12) (McKinney Supp. 1969); WASH. REV. CODE ANN. § 18.86.080 (Supp. 1968).

325. FTC UNIFORM ACT § 5. The provision does allow the issuance of an injunction without a showing of persistent or continuous fraudulent conduct, as is required by some statutes. *See, e.g.*, N.Y. EXEC. LAW § 63(12) (McKinney Supp. 1969). The provision also does not require a showing that the dealer acted with an intent that others rely. Some statutes do require probable reliance by a consumer. *See, e.g.*, Illinois Consumer Fraud Act, ILL. ANN. STAT. ch. 121½, § 262 (Smith-Hurd Supp. 1969).

defrauded consumers. Under that act, a court may issue, along with the injunction, an order requiring the dealer to return to a defrauded consumer all money or property acquired from the consumer through the use of the fraudulent practice.³²⁶ In order to implement that order, the court may appoint a receiver to gather the assets of the defendant and to pay out those assets to injured customers. The NCCUSL act contains similar provisions for granting restitution,³²⁷ but such a remedy is conditioned upon a showing by the administrator either that the supplier knew or in the exercise of ordinary care should have known that the acts involved were deceptive, or else that he knew that they were unconscionable.³²⁸ Thus the administrator is forced to show not only the fact that the acts were committed by the supplier and were deceptive, but also the state of mind of the supplier. Since in the normal case the administrator's staff is insufficient and overworked, this necessity will probably lead to much less litigation and thus to much less relief for defrauded consumers.³²⁹ There seems to be no sound reason for exempting innocent conduct from nonpunitive sanctions.³³⁰ The purpose of a deceptive-practice statute is not to prosecute the dishonest merchant in a criminal sense, but to protect the public from conduct that is deceptive or unconscionable. This section of the NCCUSL act is particularly illogical in that the harshest sanction—the injunction with its 5,000 dollars per day fine for violation—is imposed on innocent violators, whereas lesser restrictions are reserved for the violator meeting a higher standard of culpability.

In addition to providing nonpunitive remedies—injunction and restitution—for *all* types of violations, a deceptive-practices statute should contain a penalty for willful violations of its terms. The only one of the proposed statutes that does so is the CGS act which imposes a fine of 200 dollars for each willful violation of the statute.³³¹ Simply ordering the willful violator to cease his deceptive practice and to

326. CSG Act § 6; *see* MO. ANN. STAT. § 407.100 (Supp. 1968); N.J. STAT. ANN. § 56:8-8 (1964).

327. NCCUSL Act § 5.

328. NCCUSL Act §§ 5(b), (2)(b). This standard exempts innocent conduct from any sanction except the injunction.

329. *See* text accompanying note 16-33 *supra*. If the administrator does not have available sufficient clerical, legal, and investigative personnel, even his discovery and subpoena powers will often be insufficient to obtain the evidence needed to show intent. In addition, even in those cases in which the practice involved is blatant enough to allow a presumption of knowledge, there may be problems concerning the liability of a supplier for acts of his agents.

330. Of course, since these merchants are innocent, they should be exempt from punitive sanctions. *See* text accompanying notes 331-32 *infra*.

331. CSG Act § 15(c). A willful violation occurs when the merchant "knew or should have known his conduct was a violation of section 2 of this act." This standard is precisely the same as the one which the NCCUSL act establishes for obtaining any relief other than an injunction.

make restitution to the consumer, and not also imposing a separate fine for the violation, would have little deterrent effect upon the continuation of illegal practices by dealers, especially if the scope of the court's order is limited to the precise deceptive practice involved in the case.³³² In this regard the distinction between willful and negligent conduct is justified. A dealer intentionally committing deceptive practices and defrauding consumers should not be given a statutory guarantee that he faces no greater risks than that of the compelled termination of the particular practice in which he is found to have engaged, and that of the loss of the benefits which he has obtained through the violation.

The drafters of the model acts recognized that adjudication in a court is often a costly and lengthy process. Hence, they sought to provide some alternative means of resolving the many cases that might arise under the statute but do not involve serious infractions and do not necessarily require court action. The three acts adopt the same method for dealing with such cases: each provides that the attorney general can, at his discretion, accept an assurance of discontinuance from the dealer in lieu of further enforcement proceedings.³³³ The filing of an assurance by the dealer does not constitute an admission of guilt, and the assurance itself is not usable as evidence of the dealer's misconduct in any subsequent proceeding. Nevertheless, under the NCCUSL act, breach of an assurance is treated in the same manner as is breach of an injunction.³³⁴ The other two acts contain less stringent provisions which simply state that, if an assurance is breached, the attorney general has the opportunity to reopen the case closed by the acceptance of the assurance.³³⁵ Another provision unique to the NCCUSL act is its requirement that an assurance provide for the return of money to defrauded consumers.³³⁶ Such a provision is desirable, since it allows the attorney general to avoid the time and expense of litigation and at the same time does not sacrifice the interests of the complaining consumers.

All three acts require that, after an assurance is submitted, it must

332. See note 323 *supra*.

333. FTC UNIFORM ACT § 6; CSG ACT § 10; NCCUSL ACT § 5(d).

334. NCCUSL ACT § 5(d).

335. FTC UNIFORM ACT § 6; CSG ACT § 10.

336. NCCUSL ACT § 5(d). Section 4(c)(6) of the same act allows an investigation into the practices of a specific supplier to be terminated upon acceptance of an assurance of discontinuance. Under that section, the assurance may be conditioned upon return of money to the consumers damaged by the supplier's deceptive practices, but there is no requirement, as there is in § 5(d), that a determination be made concerning the appropriateness of restitution. In addition, court approval of an assurance is not required, as it is under § 5(d). The more logical approach seems to be to amend § 5(d) to include termination of investigations as well as enforcement proceedings, thus providing the same requirements for each. Obviously if the investigation determines only that a deceptive practice has been committed and does not reveal any defrauded consumers, no restitution would be necessary until such consumers are ascertained.

be filed with, and approved by, a court of general jurisdiction,³³⁷ presumably to ensure that the public interest is protected by the attorney general's disposition of the case. In practice, however, this approval procedure is likely to become nothing more than a clerical ritual. The acts should therefore be amended to permit interested parties to intervene if they are not satisfied with the terms of the assurance. Such a section would constitute a meaningful check upon less than vigorous administrative action.

A section providing for an assurance procedure is vital to the effective functioning of a comprehensive deceptive-practices statute. In light of the delays and costs that attend judicial proceedings, it would be virtually impossible for an attorney general to do an adequate job of enforcing such a statute if he were compelled to vindicate every legitimate complaint in a court of law. The assurance procedure allows the attorney general to deal with the bulk of the routine cases in a summary manner, and it reserves adjudicatory proceedings for particularly serious violators. Moreover, if the assurance provisions are strict—as they are in the NCCUSL model act—little is sacrificed in the way of deterrence of future conduct or in the way of relief to consumers. The use of the assurance procedure also adds vigor to the mediation procedure, which is already present in most states,³³⁸ but which by itself is not broad or forceful enough to curb all deceptive practices.³³⁹ The possibility that a merchant would be compelled to submit an assurance in order to avoid an injunction, and the stringent penalties for the violation of the assurance, provide a strong inducement for the merchant to agree to a settlement.³⁴⁰ The utility of having an assurance procedure in conjunction with mediation is exemplified by the experience in states which have already enacted comprehensive deceptive-practices legislation providing for both of these informal procedures. Although the attorney general in such states is given broad injunctive powers, very little

337. FTC UNIFORM ACT § 6; CSG ACT § 10; NCCUSL ACT § 5(d). Under the NCCUSL act, the court must determine that a provision for restitution has been made part of the assurance.

338. Mediation will probably be carried on in those states with consumer fraud bureaus even if the bureau is not charged with enforcing a deceptive-practices statute. See notes 265-75 *supra* and accompanying text. Saxbe, *The Role of the Government in Consumer Protection: The Consumer Frauds and Crimes Section of the Office of the Ohio Attorney General*, 29 OHIO ST. L.J. 897 (1968).

339. Mediation by itself is not effective to ensure that merchants desist from prohibited conduct, nor does it operate to return money to all defrauded consumers. No matter how persuasive the Attorney General may be, many habitually fraudulent dealers will refuse to settle. Platsis Interview, *supra* note 44.

340. The advantage of having several levels of activity, with greater sanctions at each, is that such flexibility provides needed leverage to the administrator. Habitual violators in Detroit do not settle because they do not fear any real sanctions unless their conduct is blatant enough to come under one of the criminal statutes; even then the possibility of penalty no more severe than a fine does not have much deterrent effect. Providing the administrator with considerable authority and discretion will make the less formal remedies, such as mediation, viable.

actual litigation takes place and most of the cases are settled either by mediation or by assurances.³⁴¹

In addition to granting to the attorney general a broad array of enforcement powers, a comprehensive deceptive-practices statute should grant a defrauded consumer effective private remedies that he can invoke without the approval or the cooperation of state law-enforcement officials. The defrauded consumer should not be forced to rely completely upon some governmental official in order to obtain relief; different officials have different attitudes about consumer affairs, and an attorney general unsympathetic to the plight of defrauded consumers could, by adopting a policy of inaction, enfeeble even the most stringent and pervasive deceptive-practices statute. Moreover, even if the attorney general is earnestly committed to a policy of attacking consumer fraud, it does not seem likely that the state legislature—in light of the usual scarcity of financial resources available for governmental expenditures—would provide the funds necessary for an effective antifraud effort. Thus, in order to make a deceptive-practices statute truly effective, a provision for private remedies must be included in the statute in order to complement the state enforcement provisions.³⁴²

The FTC proposed act does not grant any private remedies to the consumer. The NCCUSL act and the CSG act, on the other hand, provide that any dealer who violates the act is liable for damages to

341. The vast majority of cases in such states are settled informally, through mediation or administrative action. Litigation involves only about 5% of the disputes. See Mindel, *The New York Bureau of Consumer Frauds and Protection—A Review of Its Consumer Protection Activities*, 11 N.Y.L.F. 603-04 (1965); Rice, *supra* note 302, at 590 n.133.

342. A special committee of the Antitrust Section of the ABA has recently recommended that Congress enact legislation empowering the FTC to award damages to consumers after a successful prosecution by the Commission or the Justice Department. The ABA proposal would preclude private class actions by consumers both before and after governmental action. N.Y. Times, April 13, 1970, § C at 30, col. 1. An advantage of this proposal is that it avoids both lengthy litigation and large attorneys fees. However, the consumers' action is tied to two federal agencies that may or may not share the views of the low-income consumer concerning the need for the action. The proposed remedy would be viable only if the consumer possessed the right to maintain a class action independent of any government action. Both the NCCUSL and CSG acts permit consumer class actions. See note 354 *infra* and accompanying text. There should be a requirement, however, that the attorney general be informed of the institution of any private suit under the act; this requirement would help to minimize duplication of effort. The attorney general should also be allowed to intervene in private suits with the approval of the plaintiffs; such intervention would be warranted if a particularly large violator is the defendant or if the defendant's actions involve various parts of the state. The need for private remedial actions in the consumer protection field is reinforced by the financial inability of state enforcement to cope with the problem. This necessity can be illustrated by analogy to the enforcement of antitrust laws. It has been estimated that in order to obtain the current level of enforcement of antitrust legislation without private antitrust suits, the Justice Department Antitrust Division would have to increase its staff fourfold. See Barber, *Private Enforcement of the Antitrust Laws: The Robinson Patman Experience*, 30 GEO. WASH. L. REV. 181, 183-84 n.10 (1961); Spanogle, *The U3C—It May Look Pretty, But Is It Enforceable?*, 29 OHIO ST. L.J. 624, 627 n.14 (1968).

consumers injured by the violation.³⁴³ Furthermore, each of those two acts stipulates that any judgment against a dealer which is issued by a court in enforcement proceedings initiated by the administrator of the act, is prima facie evidence of the dealer's liability when that judgment is raised as evidence in a subsequent suit brought by a consumer whom the dealer has defrauded.³⁴⁴ Both the NCCUSL act and the CSG act provide for a very small minimum damage award which is to be granted to any successful plaintiff; one hundred dollars is the minimum award under the former act³⁴⁵ and two hundred dollars is the award under the latter.³⁴⁶ The CSG act authorizes the court in its discretion to award punitive damages as well.³⁴⁷

It is doubtful that the possibility of obtaining nominal minimum damages would by itself provide the needed incentive for attorneys and individual consumers to become involved in the lengthy and burdensome process of litigation.³⁴⁸ Most consumer fraud suits involve relatively small amounts of money. Thus there is little likelihood in most cases that compensatory damages will exceed the amount provided for by the minimum awards. As a result, the amount of remuneration obtainable by an attorney operating on a contingent-fee basis would in most cases probably not be sufficient to motivate trial attorneys to leave the more lucrative fields of personal-injury and products-liability litigation. Yet making the minimum award high enough to lure attorneys into the business of representing defrauded consumers would probably put too great a strain on commerce.

One way to make consumer fraud suits attractive to lawyers might be to include a provision in a deceptive-practices statute calling for the award of reasonable attorneys' fees to successful litigants. Both the CSG act and the NCCUSL act authorize such an award, but they do so under different circumstances. The CSG act simply states that the court may award such fees³⁴⁹ but it offers no guidelines to the judge concerning when such an award should be made. In light of the traditional reluctance of judges to award attorneys' fees without specific guidelines,³⁵⁰ this provision may not stimulate many lawyers to undertake suits on behalf of defrauded consumers.

343. NCCUSL Act § 7; CSG Act § 8.

344. NCCUSL Act § 7(d); CSG Act § 8(e).

345. NCCUSL Act § 7(a)(1).

346. CSG Act § 8(a).

347. CSG Act § 8(b).

348. See Kripke, *Gesture and Reality in Consumer Credit Reform*, 44 N.Y.U. L. REV. 1, 46-48 (1969).

349. CSG Act § 8(d).

350. Attorneys' fees have been traditionally regarded as extraordinary damages and have not been included in compensatory or punitive-damage awards. See Rice, *supra* note 302, at 570.

The NCCUSL act is more definitive and allows an award of attorneys' fees to a successful plaintiff if the defendant-dealer knew or should have known, at the time he committed the violation of the act, that his illegal conduct was deceptive, or if he knew at that time that his illegal conduct was unconscionable.³⁵¹ Under the NCCUSL act, therefore, every successful litigant is entitled to an award of attorneys' fees, since knowledge is an essential element of an offense under the act.³⁵² Ideally, a provision calling for an award of attorneys' fees should be broadly framed so as to afford plaintiffs the opportunity to recover fees in any successful action that arises under the statute. Such a provision would make legitimate consumer suits financially attractive to lawyers and would thus provide defrauded consumers with greater opportunity to undertake productive litigation against dishonest merchants.

Because of the inefficiency of having a separate action for each of a large number of consumer complaints against a particular merchant, it would be useful to provide some means by which consumers could join together in a single action against a merchant who had defrauded them. The method most often discussed is that of a consumer class action.³⁵³ Such a class action would offer several advantages: (1) it would allow consumers to combine claims so that the full extent of the defendant-dealer's wrongdoing is presented before the court; (2) it would enable consumers, particularly those with low incomes, to utilize scarce legal talent to their best advantage; (3) it would encourage attorneys to undertake consumer suits because of the possibility of significant remuneration; (4) it would enable neighborhood legal clinics and other groups concerned about consumer affairs to bring against flagrantly dishonest merchants suits alleging a multitude of violations; and (5) it would eliminate wasteful multiplicity of actions.

The NCCUSL act and the CGS act include provisions that permit consumer class actions.³⁵⁴ Under those two statutes, the court can give injunctive relief to the class even though the individual consumers in the class may have an adequate remedy at law.³⁵⁵ Some commentators feel that consumer class actions may be possible even without

351. NCCUSL Act § 7(c)(2). The standard for awarding attorneys' fees is the same as that for maintaining a successful action under the act. See note 320 *supra* and accompanying text.

352. See note 320 *supra* and accompanying text.

353. See Dole, *Consumer Class Actions Under Recent Consumer Credit Legislation*, 44 N.Y.U. L. REV. 80 (1969); Rice, *supra* note 302, at 579-83; Starrs, *The Consumer Class Action—Part I: Considerations of Equity*, 49 B.U. L. REV. 211 (1969); Starrs, *The Consumer Class Action—Part II: Considerations of Procedure*, 49 B.U. L. REV. 407 (1969).

354. CSG Act § 8(b); NCCUSL Act § 7(a)(2), (3).

355. CSG Act § 8(b); NCCUSL Act § 7(a)(2).

statutory change;³⁵⁶ but a true class action,³⁵⁷ at least in Michigan, is probably not possible without legislative authorization.³⁵⁸ There is a possibility that the availability of consumer class actions would encourage unethical attorneys to solicit claims or to encourage frivolous suits.³⁵⁹ But such unethical practices could be minimized through the use of adequate discovery devices and through supervision of the conduct of attorneys by courts and bar associations.

It would be a mistake to view the passage of a comprehensive deceptive-practices statute in Michigan as a panacea for the problem of fraud in the market place. If such a statute is enacted, it will then be necessary for the legislature to turn its attention to the matter of adequately funding the office of the Attorney General so that its Consumer Fraud Bureau may be staffed with enough attorneys to administer the statute effectively. In addition, the legislature will

356. Starrs, *supra* note 353; Comment, *Commercial Nuisance: A Theory of Consumer Protection*, 33 U. CHI. L. REV. 590 (1966) (dealing with consumer actions for injunctions).

357. A true class action is one in which the right to be enforced is joint or common, or in which the right is secondary "in that the owner of the primary right refuses to enforce that right and a member of the class thereby becomes entitled to enforce it." MICH. CR. R. 208.1(1). The advantage of this type of action is that nonparty members of the class are bound by the judgment and thus do not have to relitigate. *See* MICH. CR. R. 605-06. *International Typographical Union v. Macomb Co.*, 306 Mich. 562, 11 N.W.2d 242 (1943).

358. *See* Starrs, *supra* note 353. Professor Starrs deals with class actions both for injunctive relief and for damages. The problem which a class faces in obtaining injunctive relief is the same as that faced by individuals—the normal equity requirement that one seeking such an order be threatened with prospective injury and have no adequate remedy at law. The consumer who has already been injured does not face future fraudulent dealings by the same merchant, and he, at least in theory, has a common-law action for damages. There seems to be no question that in Michigan consumers can band together to seek injunctive relief [*see* Dole, *supra* note 353, at 107-09], but it seems unlikely they can present a suitable case, absent statutory reform, for enjoining future deceptive practices. It also seems unlikely that a group of consumers who are attempting to obtain damage awards based upon separate transactions with the same dealer will be successful in utilizing a true class action. When no common right is involved, but only common questions of fact or of law—as in the typical consumer fraud case—the class action will probably be considered "spurious." Dole, *supra* note 353, at 94. The "spurious" class action is thought to be merely a joinder device, binding only those members of the class who are parties to the litigation. J. HONIGMAN & C. HAWKINS, *MICHIGAN COURT RULES ANNOTATED* 605 (1962). There is the possibility that a spurious action could be converted into a true classification if the plaintiffs give notice of the suit to all the members of the class. MICH. CR. R. 208.4 provides that the court may order that notice be given to absent parties in order to protect the interests of the class. Since the plaintiffs will probably not have knowledge of all the consumers who have dealt with a merchant, it should also be possible under this rule to require the defendant to provide names and addresses of such individuals. Even if such a requirement is not possible, however, several consumers should be able to join as plaintiffs to facilitate suit against a single defendant. MICH. CR. R. 206 provides that parties may join as plaintiffs even when there are no longer questions of fact or law so long as the administration of justice will be facilitated and the defendant will not be prejudiced. In any event, it appears that lawyers for the poor, including those in Detroit, have not attempted in any significant way to use this potentially powerful tool. Starrs, *supra* note 356, at 509; Donnelly Interview, *supra* note 98.

359. Kripke, *supra* note 348, at 48; Starrs, *supra* note 356, at 409.

have to consider ways of implementing consumer education programs—particularly in inner-city areas—so that consumers will be able to utilize the increased protection afforded to them by the statute. Furthermore, it seems certain that, so long as poverty exists in society, there will be an inordinate number of unscrupulous merchants preying upon poor and ignorant consumers.

Nevertheless, the initial step is the enactment of a statute that provides the enforcement officials in the state with the legal armaments necessary to wage an effective battle against consumer fraud. The enactment of such a statute would significantly improve the stature of Michigan's consumer protection efforts and would be a welcome sign to those whom affluence has left behind, that government has not forgotten their plight.