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CONSUMER PROTECTION BY THE STATE ATTORNEYS GENERAL: A TIME FOR RENEWAL

The worst sin towards our fellow creatures is not to hate them, but to be indifferent to them, for that is the essence of inhumanity. George Bernard Shaw, *The Devil's Disciple*.

I. Introduction

Historically, governments have been concerned with protecting consumers from deceptive practices by merchants.¹ However, until recently in the United States, this concern has been overshadowed by a problem of simply producing enough consumables. With the solution of the production problem by means of technological advances, untold new problems have arisen with regard to unfair and deceptive merchandising practices.²

The Council of State Governments estimates that twenty percent of the gross national product reaches consumers at prices that are above standard and under terms that are misrepresented, and that careful consumers could buy the same amount for ninety percent of what they are presently spending, saving an estimated seventy billion annually for other purposes.³ Because we live in a society that advocates egalitarianism and extensive welfare programs, there is growing sentiment for government regulation.

The serious need for consumer protection has been pointed out by New York Attorney General Louis J. Lefkowitz:

The consumer is the star performer in America's economic picture. Yet, it is appalling to me to see reports almost every day detailing the shocking scope of the chicanery and deceit which are used to dupe the consumer and defraud him of his money—consumer spending each year for goods and services amount to hundreds of billions of dollars—when he is defrauded, he is inclined to retrench on his purchases, with the result that the economy suffers and even the businessman who carries on with integrity is a victim.⁴

Crimes against the consumer are sufficiently widespread and subtle enough to entrap people of all economic and educational backgrounds. The public's faith in the integrity of the law and private enterprise will be either eroded or reinforced accordingly as consumer grievances are either ignored by an overly

1 There is nothing really new in the concept of consumer protection laws. In 1481, for example, King Louis XI of France promulgated the following legislation by edict:

Anyone who sells butter containing stones or other things [to add to the weight] will be put into our pillory, then the said butter will be placed on his head and left until entirely melted by the sun. Dogs may come and lick him, and people offend him with whatever defamatory epithets they please without offence to God or the King. *Alabama Consumer Letter*, Vol. 1, No. 3, quoted in Breeden and Lovett, *Louisiana's New Unfair Trade Practice and Consumer Protection Law*, 20 LA. B. J. 307, n.4 (1973).

2 COUNCIL OF STATE GOVERNMENTS, CONSUMER PROTECTION IN THE STATES 2 (1970).

3 *Id.* at 3.

4 Louis J. Lefkowitz, Attorney General of New York, before the Executive and Legislative Reorganization Subcommittee on Government Operations, April 29, 1966. IOWA ATT'Y GEN., CONSUMER PROTECTION AT THE STATE LEVEL 13-14 (1970).

complacent business and government community or redressed through vigorous implementation of protective measures. Thus, consumer complaints must be recognized as a problem of national dimensions requiring swift legal remedy on behalf of all.⁵

Serious interest in consumer protection began to emerge at the state level of government in the late 1950's and early 1960's.⁶ At the present time, forty-four states have established consumer protection bureaus in their attorney general's or governor's offices and a few of these have also instituted a separate state department of consumer affairs.⁷ Some of the states operate under a specific statute while others, such as New York, function under a number of general statutes conferring certain powers of enforcement on the attorney general.⁸ The overall success of these bureaus depends not only upon their ability to enforce legislation but also upon their development of comprehensive programs dealing with other facets of consumer protection such as negotiation and mediation of consumer grievances and education of the public about possible dangers.

These bureaus enable the attorney general's office to hear complaints and mediate differences without resort to formal proceedings.⁹ Because these informal procedures are available without charge, consumers are encouraged to report fraudulent practices.¹⁰ Violations of consumer protection laws are thereby exposed and can be subjected to appropriate legal action by the attorney general.¹¹ In this way the use of informal procedures greatly enhances the effectiveness of state regulation.

The Federal Trade Commission can police no more than a fraction of deceptive practices, the great majority of which occur on the local level. Deceptive practices also have a tendency to vary with geographical conditions and

5 Mussehl, *The Neighborhood Consumer Center: Relief for the Consumer at the Grass-Roots Level*, 47 NOTRE DAME LAWYER 1093, 1098 (1972).

Deceptive trade practices are widespread, everyday occurrences in states where the law provides inadequate consumer remedies and law enforcement discipline. A very large literature has developed in recent years, documenting the problems of the consumer with deceptive trade practices. See D. AAKER & G. DAY, *CONSUMERISM: SEARCH FOR THE CONSUMER INTEREST* (1971); W. MAGNUSON & J. CARPER, *THE DARK SIDE OF THE MARKETPLACE* (1968); S. MARGOLIUS, *THE INNOCENT CONSUMER V. THE EXPLOITERS* (1967); G. McCLELLAN, *THE CONSUMING PUBLIC* (1968).

6 Lovett, *State Deceptive Trade Practice Legislation*, 46 TUL. L. REV. 724, 729 (1972).

New York and Rhode Island were the first states to begin their own deceptive trade practice enforcement in 1957, followed by Washington and Alaska in 1961. *Id.* at n.13. See generally P. CROWN, *LEGAL PROTECTION OF THE CONSUMER* (1963).

7 Forty-four states have enacted laws more or less like the Federal Trade Commission Act to prevent deceptive and unfair trade practices. The states not having such laws are Alabama, Georgia, Mississippi, Nebraska, Tennessee and West Virginia. However, such a bill has passed both houses of the West Virginia legislature and awaits approval by the Governor. Consumer complaints' clearinghouses have been established to facilitate action under existing laws, and possibly to recommend new legislation, in Alabama, Georgia, and Tennessee. Letter from Gale Gotschall, Counsel for Federal-State Cooperation, Federal Trade Commission, to Dick Howard, Special Assistant, The Council of State Governments, July 12, 1973, on file in Notre Dame Law Library.

8 IOWA ATT'Y GEN., *CONSUMER PROTECTION AT THE STATE LEVEL 1* (1970).

9 Note, *Developments in the Law—Deceptive Advertising*, 80 HARV. L. REV. 1005, 1124-28 (1967).

10 Note, *State Consumer Protection: A Proposal*, 53 IOWA L. REV. 710, 719 (1967).

11 In addition to the law enforcement function of these bureaus, many also engage in consumer educational activities and rule-making. *E.g.*, Mindell, *The New York Bureau of Consumer Frauds and Protection—A Review of Its Consumer Protection Activities*, 11 N.Y.L.F. 603, 604 (1965).

population densities. The primary responsibility of coping with deceptive trade practices has therefore devolved upon the states.¹² Although efforts on the state level have also encountered sizeable problems,¹³ consumer protection has generated more interest among state attorneys general in recent years than any other single area of activity.¹⁴ The National Association of Attorneys General recommends that each state's consumer protection agency should be located in the attorney general's office.¹⁵ Although persuasive arguments to the contrary have been voiced,¹⁶ there is a strong feeling among many who are intimately involved with state-level consumer protection that statutory enforcement is effective only when such power is given to the attorney general.¹⁷

This note will limit its scope to an analysis of state-level consumer protection by the individual attorneys general.¹⁸ The functions of such consumer protection bureaus will be identified, along with their strengths and weaknesses, and recommendations for future action will be made.

II. State Deceptive Trade Practice Legislation

The Federal Trade Commission stands as the premier governmental bulwark against the onslaught of commercial fraud. The commission has jurisdiction over "unfair methods of competition" and "unfair or deceptive acts or practices in commerce."¹⁹ The agency is empowered to issue cease and desist orders and to seek permanent injunctions against such fraud.²⁰ The sweeping language of the Federal Trade Commission Act delegates the responsibility of defining unfair and deceptive acts to the courts and the Federal Trade Commission. Sufficient authority to deal with new types of fraud is provided by the statute's broad language.

One might therefore be led to believe that the Federal Trade Commission Act is the legislative panacea for protecting the consumer from unfair or deceptive practices, but this is not the case. The limitation of jurisdiction to frauds "in commerce" rather than frauds "affecting commerce" is a critical weakness in the

12 Note, *supra* note 10, at 711. The FTC has therefore established an office to encourage federal-state cooperation. See Dixon, *Federal-State Cooperation to Combat Unfair Trade Practices*, 39 STATE GOV'T 37 (1966).

13 "Many of the state agencies lack adequate legislation; many of them have inadequate budgets; and probably it could be said that many of them lack adequate commitment or motivation." Letter from Gale Gotschall to the *Notre Dame Lawyer*, Sept. 17, 1973, on file in Notre Dame Law Library.

14 NATIONAL ASSOCIATION OF ATTORNEYS GENERAL, COMMITTEE ON THE OFFICE OF ATTORNEY GENERAL, REPORT ON THE OFFICE OF ATTORNEY GENERAL 395 (1971).

15 *Id.*

16 *E.g.*, Rice, *Remedies, Enforcement Procedures and the Duality of Consumer Transaction Problems*, 48 B. U. L. REV. 559, 605 (1968).

17 Letter from Robert P. Brady, Assistant Attorney General, State of North Dakota, to the *Notre Dame Lawyer*, Sept. 12, 1973, on file in Notre Dame Law Library.

18 Most of the attorneys general release annual reports outlining the activities of their consumer protection bureaus. These reports include statistics indicating the number of complaints received during a specified period (calendar or fiscal year), the amount of money recovered on behalf of these complainants, the most frequent areas of complaint, the number of lawsuits pending and completed, and the number of consent decrees and assurances of voluntary compliance obtained. Because not all of the attorneys general compile these statistics, and because those who do conform to no uniform reporting system or format, the data do not permit comparison.

19 15 U.S.C. § 45(a)(1) (1970).

20 15 U.S.C. § 45(b) (1970).

FTC Act; purely intrastate activities are thereby not subject to regulation.²¹ Also, the investigatory and litigative resources of the FTC are miniscule in comparison with the expenditure necessary for effective consumer protection.²² The restrictive scope of the Commission's enforcement powers, however, is the most serious limitation on its effectiveness.²³ Because it is not authorized to seek temporary injunctions, the Commission must rely on cease and desist orders, which may be appealed to the courts within sixty days of issuance.²⁴ The exhaustion of appeals may take several years if consent to the order is not obtained; during this period the seller is free to conduct business as usual.²⁵ The necessity for the enactment and utilization of more expeditious state laws is therefore apparent.

State deceptive trade practice legislation meets a growing need in the modern American marketplace.²⁶ As of July 12, 1973, forty-four states had enacted laws to prevent unfair and deceptive trade practices.²⁷ Such legislation falls within the scope of three basic models: (1) the Unfair Trade Practices and Consumer Protection Law, developed by the Federal Trade Commission and adopted by the Committee of State Officials on Suggested State Legislation, (2) the Uniform Deceptive Trade Practices Act, and (3) the Uniform Consumer Sales Practices Act, both promulgated by the National Conference of Commissioners on Uniform State Laws.

A. *Unfair Trade Practices and Consumer Protection Act*

The Federal Trade Commission proposal, modeled after laws already existing in the states of Washington, Hawaii, New Jersey and Connecticut, offers two alternative forms of coverage.²⁸ Alternative Form No. 1 utilizes the broad language of § 5(a)(1) of the Federal Trade Commission Act; "Unfair methods of competition in commerce and unfair or deceptive acts or practices in commerce are declared unlawful."²⁹ This form has been adopted in twelve states.³⁰ It is a far-reaching law, regulating not only deceptive practices but also restraints of trade which tend to create monopolies and raise prices.³¹ Because it adopts the wording of § 5 of the FTC Act, this "Little FTC Act" allows a state to take

21 *FTC v. Bunte Bros., Inc.*, 312 U.S. 349 (1949). In *Double Eagle Lubricants, Inc. v. Texas*, 248 F. Supp. 515 (N.D. Tex. 1965), it was held that since the Federal Trade Commission Act applies to practices used "in commerce" and the Act contains no clear statement of congressional intent to preempt the area, state and local enactments against deceptive and unfair trade practices are lawful if they are not inconsistent with the federal law to the extent that both cannot stand in the same area. *Id.* at 518.

22 2 CONSUMER LAW HANDBOOK 122 (1972).

23 Note, *Consumer Protection in Florida: Inadequate Legislative Treatment of Consumer Frauds*, 23 U. FLA. L. REV. 528, 542 (1971).

24 15 U.S.C. § 45(b) (1970).

25 Note, *supra* note 23, at 542.

26 For an excellent discussion of the development and effectiveness of such legislation, see Lovett, *supra* note 6.

27 The states not having such laws are Alabama, Georgia, Mississippi, Nebraska, Tennessee, and West Virginia. Letter from Gale Gotschall to Dick Howard, *supra* note 7.

28 Letter from Gale Gotschall to Dick Howard, *supra* note 7.

29 15 U.S.C. § 45(a)(1) (1970).

30 Connecticut, Florida, Hawaii, Louisiana, Maine, Massachusetts, Montana, North Carolina, South Carolina, Vermont, Washington and Wisconsin.

31 THE COUNCIL OF STATE GOVERNMENTS, 1970 SUGGESTED STATE LEGISLATION 141.

advantage of judicial interpretations of that Act and various trade regulations issued by the FTC.³²

Alternative Form No. 2, in which "false, misleading, and deceptive acts or practices in the conduct of any trade or commerce are hereby declared unlawful," has been adopted in fourteen states.³³ The Committee on Suggested State Legislation has recommended this form for states that have sufficient legislation to cope with anticompetitive practices.³⁴

B. *Uniform Deceptive Trade Practices Act*

This Act (UDTPA) has been adopted in sixteen states.³⁵ As originally proposed, it proscribed twelve specific, itemized practices.³⁶ The limited protection which such a list provides was soon recognized, and a thirteenth provision was added prohibiting a merchant from "engaging in any act or practice which is unfair or deceptive to the consumer."³⁷ However, even with the incorporation of the thirteenth clause, this type of statute is not as comprehensive as a "Little FTC Act" or a general statute because the "laundry list" of specifically proscribed practices tends to limit its application to those enumerated acts.³⁸ Because the human mind is ingenious enough to create novel and different forms of deception, no specific list can adequately cover the field.³⁹

32 Mussehl, *supra* note 5, at 1131.

33 Arizona, Arkansas, California, Delaware, Illinois, Iowa, Kansas, Kentucky, Maryland, Minnesota, Missouri, New Jersey, New York and North Dakota.

34 REPORT ON THE OFFICE OF ATTORNEY GENERAL, *supra* note 14, at 339.

35 Alaska, Colorado, Idaho, Indiana, Michigan, Nevada, New Hampshire, New Mexico, Oklahoma, Oregon, Pennsylvania, Rhode Island, South Dakota, Texas, Virginia and Wyoming.

36 The following methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce are hereby declared to be unlawful:

- (1) passing off goods or services as those of another;
- (2) causing likelihood of confusion of or misunderstanding as to the source, sponsorship, approval or certification of goods or services;
- (3) causing likelihood of confusion of or misunderstanding as to affiliation, connection, or association with, or certification by, another;
- (4) using deceptive representations or designs of geographic origin in connection with goods or services;
- (5) representing that goods or services have sponsorship, approval, characteristics, ingredients, uses, benefits, or quantities that they do not have or that a person has a sponsorship, approval, status, affiliation or connection that he does not have;
- (6) representing that goods are original or new if they are deteriorated, altered, reconditioned, reclaimed, used or secondhand;
- (7) representing that goods or services are of a particular standard, quality, or grade, or that goods are of a particular style or model, if they are of another;
- (8) disparaging the goods, services, or business of another by false or misleading representations of fact;
- (9) advertising goods or services with intent not to sell them as advertised;
- (10) advertising goods or services with intent not to supply reasonably expectable public demand, unless the advertisement discloses a limitation of quantity;
- (11) making false or misleading statements of fact concerning the reasons for, existence of, or amounts of price reductions;
- (12) engaging in any other conduct which similarly creates a likelihood of confusion or of misunderstanding.

UNIFORM DECEPTIVE TRADE PRACTICES ACT § 2.

37 2 CONSUMER LAW HANDBOOK 124 (1972).

38 *Id.*

39 Mussehl, *supra* note 5, at 1131.

C. *The Uniform Consumer Sales Practices Act*

Formulated by the National Conference of Commissioners on Uniform State Laws at its 1971 annual meeting, this act (UCSPA) is similar in coverage to the UDTPA. It extends coverage, however, to unconscionable consumer sales practices.⁴⁰ Thus far adopted in only two states,⁴¹ the UCSPA "represents an effort to crystallize the best elements of contemporary federal and state regulation of consumer sales practices in order to effectuate harmonization and coordination of federal and state regulation."⁴²

Under each of the several statutes discussed above, the administrator or enforcement official is authorized to conduct investigations and to issue cease and desist orders or obtain injunctions against the use of unfair or deceptive trade practices.⁴³ As of September 17, 1973, thirty-six states authorize such an official to obtain restitution on behalf of aggrieved consumers.⁴⁴ Civil penalties for an additional violation may be assessed in twenty-one states.⁴⁵ Class actions by consumers are authorized in twelve states.⁴⁶ Thirty-one states authorize private actions by consumers, sometimes including a minimum recovery of \$100 or \$200; sometimes including double, treble or punitive damages; and usually including costs and attorney fees.⁴⁷ Specific authority for the issuance of rules and regulations, having the force of law, to delineate deceptive, unfair, or unconscionable trade practices is provided for in the statutes of sixteen states.⁴⁸ The statutes of seven additional states authorize the attorney general to issue rules and regulations, having the force of law, in statutory sections that confer authority on him to issue subpoenas, conduct investigations and inquiries, and hold hearings.⁴⁹ Whether this type of legislation would allow the issuance of substantive as well as procedural rules may require judicial determination.⁵⁰

40 Letter from Gale Gotschall to Dick Howard, *supra* note 7.

41 Ohio and Utah.

42 THE COUNCIL OF STATE GOVERNMENTS, 1973 SUGGESTED STATE LEGISLATION 257.

43 Letter from Gale Gotschall to Dick Howard, *supra* note 7.

44 Alaska, Arizona, Arkansas, California, Colorado, Connecticut, Delaware, Florida, Idaho, Illinois, Indiana, Iowa, Kansas, Kentucky, Louisiana, Maryland, Massachusetts, Missouri, Montana, Nevada, New Jersey, New York, North Carolina, North Dakota, Ohio, Oregon, Rhode Island, South Carolina, South Dakota, Texas, Utah, Vermont, Virginia, Washington, Wisconsin, and Wyoming.

45 Alaska, Arizona, California, Connecticut, Hawaii, Kansas, Kentucky, Minnesota, Montana, Nevada, New Jersey, New Mexico, New York, North Carolina, Oregon, South Carolina, South Dakota, Texas, Vermont, Washington, and Wisconsin.

46 Alaska, California, Connecticut, Indiana, Massachusetts, Missouri, Ohio, Oregon, Rhode Island, Texas, Utah, and Wyoming.

47 Alaska, California, Colorado, Connecticut, Hawaii, Idaho, Indiana, Kansas, Kentucky, Louisiana, Maine, Maryland, Massachusetts, Minnesota, Missouri, Montana, New Hampshire, New Jersey, North Carolina, Ohio, Oregon, Rhode Island, South Carolina, South Dakota, Texas, Utah, Vermont, Virginia, Washington, Wisconsin, and Wyoming.

48 The rule-making authority in Alaska, Minnesota, and Ohio is the Department of Commerce; in Connecticut, the Department of Consumer Protection; in Florida, the Department of Legal Affairs (Attorney General) with concurrence of a majority of the cabinet; in Idaho, Maine, Massachusetts, New Hampshire, New Mexico, Oregon, and Vermont, the Attorney General; in Louisiana, the Director of Consumer Protection in the Governor's Office with concurrence of the Attorney General and the Consumer Advisory Board; in Montana and in Utah, the Department of Business Regulation; and in Wisconsin, the Department of Agriculture.

49 Illinois, Iowa, Kansas, New Jersey, North Dakota, South Carolina, and South Dakota.

50 Letter from Gale Gotschall to Dick Howard, *supra* note 7.

III. Functions of the Consumer Protection Bureau

In his 1969 message to Congress on consumer interests, President Nixon urged that each state adopt a strong consumer protection statute and initiate adequate means of enforcement. Further, he urged every state "to explore the need for an adequately financed Division of Consumer Protection as part of its State Attorney General's Office."⁵¹ The Bureau of Consumer Frauds and Protection in the New York Department of Law, established in 1957, was the first separate consumer bureau organized under the aegis of an attorney general.⁵² Since that time, forty-three other states have initiated consumer protection activities in the offices of their respective attorneys general.⁵³ In two states, enforcement of deceptive and unfair practice laws is exclusively vested in state agencies other than the attorney general.⁵⁴

There are a number of reasons for locating a state's consumer protection bureau in the attorney general's office. First, it provides for a centralization of consumer fraud activities in the files of the state's chief law enforcement officer. This allows the bureau to spot widespread problems that might appear minimal to local officials.⁵⁵ The centralization of record-keeping enables the bureau to alert local communities and other states of the movement of fraudulent activities.⁵⁶ Another reason is that the attorney general is the only state officer who presents the threat of imminent litigation to those who choose to engage in fraudulent practices.⁵⁷ Also, by placing the consumer protection bureau in the attorney general's office, consumer interests would be brought to the forefront of other state agencies as the attorney general is involved in every aspect of state government.⁵⁸ In many states, the attorney general performs related duties, such as representing the public before regulatory agencies and enforcing state antitrust

51 REPORT ON THE OFFICE OF ATTORNEY GENERAL, *supra* note 14, at 415, n.53.

52 1972 N.Y. Att'y Gen. Ann. Rep. 9.

53 Georgia, Mississippi, Nebraska, and Tennessee, states which have not enacted deceptive trade practice legislation, indicate no such consumer protection activity in the offices of their attorneys general. The attorneys general of West Virginia and Alabama, states which also have no deceptive trade practice statutes, do, however, allocate staff resources to consumer protection. In fact, the Alabama Attorney General's office attempts to resolve every consumer complaint that it receives, using many individual laws ranging from interest rate to mobile home construction statutes. During 1972 the Consumer Services Division received 2,777 complaints and recovered approximately \$242,000.00 on behalf of Alabama consumers. Letter from Tom Brassell, Consumer Services, Alabama Attorney General's Office, to the *Notre Dame Lawyer*, Sept. 13, 1973, on file in Notre Dame Law Library.

54 In Hawaii the enforcement officer is the Director of Consumer Protection in the Governor's Office. Montana confers such power in the Department of Business Regulation or the county attorneys.

In a number of states, the attorney general shares enforcement responsibilities with other state or local officers. Such responsibility is divided between the attorney general and the district, county, or city attorneys in Arizona, California, Colorado, Florida, Kansas, Kentucky, Michigan, Minnesota, New Mexico, Oregon, South Carolina, South Dakota, Texas, Virginia, and Wisconsin. In Louisiana the Attorney General shares this responsibility with the Director of Consumer Protection in the Governor's Office and with the district attorneys.

In Connecticut enforcement action is undertaken by the Attorney General or the Department of Consumer Protection; in Nevada by the Department of Commerce, the district attorneys, or the Attorney General.

55 IOWA ATT'Y GEN., *supra* note 8, at 17.

56 Note, *supra* note 10, at 718.

57 REPORT ON THE OFFICE OF ATTORNEY GENERAL, *supra* note 14, at 415.

58 *Id.*

laws.⁵⁹ Further, the attorney general normally has more legal expertise and greater access to hiring able legal staffs.⁶⁰ Most deceptive trade practice statutes allow the attorney general to accept an assurance of voluntary compliance with the state law from businessmen in lieu of instituting formal proceedings. This halts the deceptive practice, obtains restitution for the aggrieved consumers, and serves as prima facie proof of violation in future proceedings without the delay, cost or unpredictability of litigation.⁶¹ A final reason for vesting the attorney general with consumer protection authority is that such activities were initiated there in most states.⁶² Some attorneys general have accumulated years of maturity and experience in the consumer fraud area.

Most attorneys general place their consumer protection bureau under the direction of an assistant attorney general. Consumer protection activities, however, are generally short of both staff and funds.⁶³ A 1971 survey by the National Association of Attorneys General Committee on the Office of Attorney General revealed that the average staffing of such consumer protection efforts was composed of three attorneys (one part time), two investigators, three secretaries (one part time) and a student aide.⁶⁴ Some of the larger states were able to procure federal and state grants for the purpose of staff increases in 1972. For example, in Pennsylvania, Attorney General Israel Packel's Bureau of Consumer Protection was awarded three grants which increased the number of attorneys from five to eighteen and the number of investigators from thirteen to thirty-one.⁶⁵ Most attorneys general's offices report that the amount included in their budget for consumer protection cannot be identified separately.⁶⁶

In spite of these limitations, most attorneys general indicate that the number of complaints processed is increasing monthly.⁶⁷ Typically, half or more of the complaints result in money saved or restored to the consumer; estimates of the amount vary from moderate to extreme.⁶⁸ For evaluating the effectiveness of consumer protection bureaus, more important than a simple compendium of

59 *Id.*

60 Lovett, *supra* note 6, at 735.

61 Note, *supra* note 10, at 719-20.

62 REPORT ON THE OFFICE OF ATTORNEY GENERAL, *supra* note 14, at 416.

63 Letter from Gale Gotschall to the *Notre Dame Lawyer*, *supra* note 13.

64 REPORT ON THE OFFICE OF ATTORNEY GENERAL, *supra* note 14, at 417.

65 1972 Pa. Att'y Gen. Bureau of Consumer Protection Ann. Rep. 16.

66 REPORT ON THE OFFICE OF ATTORNEY GENERAL, *supra* note 14, at 418. The only state that reported its budget to the *Notre Dame Lawyer* was Minnesota, which allocated an estimated \$75,000 in fiscal year 1972 and an estimated \$80,000 in fiscal year 1973 to the Attorney General's consumer protection activities. This budget supports a staff of four attorneys, one investigator, four secretaries, three summer student aides, and one paralegal assistant.

67 *E.g.*, Rhode Island Attorney General Richard J. Israel reports that complaints processed by his Consumer Affairs Unit increased during fiscal year 1973 to 2,582 from 1,227 received in fiscal year 1972, a rise of over 100 percent. 1973 R.I. Att'y Gen. Consumer Affairs Unit Ann. Rep. 1.

68 The following attorneys general reported the amount of money recovered for the period indicated: Alabama, \$242,000.00 in calendar year 1972; Alaska, \$56,451.04 in fiscal year 1973; California (Governor's Department of Consumer Affairs), \$514,865.00 in the first quarter of fiscal year 1973; Illinois, \$4,833,941.00 since January 1, 1969; Indiana, \$78,547.79 in calendar year 1972; Iowa, \$331,487.93 in first four months of 1973; Kansas, \$163,933.11 in calendar year 1972; Michigan, \$249,331.43 in calendar year 1972; Minnesota, \$200,000.00 in calendar year 1972; Nevada, \$25,660.28 in calendar year 1972; New York, \$2,845,418.20 in calendar year 1972; New Mexico, \$54,886.04 in calendar year 1972; North Dakota, \$1,194,139.29 in fiscal year 1973; Oklahoma, \$2,973.99 in fiscal year 1973; Pennsylvania, \$1,105,146.00 in calendar year 1972; Rhode Island, \$170,765.23 in fiscal year 1973; Virginia

statistics is a thorough understanding of the primary functions of such bureaus—mediation of consumer complaints, litigation, and educational activities.⁶⁹

A. Mediation of Consumer Complaints

Most jurisdictions follow essentially the same procedures in the processing of complaints. The attorneys general receive complaints by personal visit, mail, or telephone only at their central offices although there is a trend towards the establishment of branch offices especially in the larger states.⁷⁰ In addition to receiving complaints directly from the consumer, most attorneys general cooperate with the local Better Business Bureaus, Chambers of Commerce, police, and welfare departments, which forward to the attorney general their more egregious complaints. According to the Director of Consumer Affairs in the Rhode Island Attorney General's Office "organizations such as the Better Business Bureau serve most effectively as front line investigators in that they screen through to our office those complaints which involve a violation of the Deceptive Trade Practices Act."⁷¹

After a complaint is received, whether by mail, telephone, or in person, the complainant is sent a consumer complaint form. When the complainant mails the form back, it is assigned to an attorney or an investigator. A determination is made as to whether or not the complaint is well-founded, and if so, whether or not it falls within the attorney general's jurisdiction. If the complaint is well-founded but outside of the attorney general's jurisdiction, the complainant is advised to contact a private attorney or referred to the appropriate state or federal agency.

The next step in the process, provided the complaint falls within the attorney general's jurisdiction, is to contact the businessman-respondent. Depending upon the particularities of the situation, the respondent is notified of the complaint against him by form or individual letter. It is usually requested that his position with regard to the complaint be forwarded to the office in writing. If the respondent refuses to cooperate, a subpoena may issue in the form of a civil investigative demand ordering him to appear with relevant documentary material. When the respondent's information is received, the complaint is again reviewed.

(Consumer Affairs Office in Department of Commerce and Agriculture), \$142,857.00 in fiscal year 1973; Wisconsin, \$351,730.00 in calendar year 1972; Wyoming, \$8,349.72 (through enforcement of the Uniform Consumer Credit Code) in calendar year 1972.

69 These three functions have been selected because most of the information provided by the states categorically fits very neatly into them. The Director of Consumer Protection in the Hawaii Governor's Office succinctly outlines these functions:

We believe that we are providing the following services to the consumers of this state: (1) mediating complaints between consumers and merchants (only when no "deception" or "unfairness" is detected); (2) giving timely warnings to consumers on potential fraudulent operations; (3) educating consumers as to their basic rights against merchants; (4) bringing fraudulent operators into court.

Letter from Ronald Y. Amemiya to the *Notre Dame Lawyer*, Sept. 17, 1973, on file in Notre Dame Law Library.

70 E.g., the Pennsylvania Attorney General's Bureau of Consumer Protection has seven locations throughout the state: Erie, Harrisburg, Lehigh Valley, Philadelphia, Pittsburgh, Scranton, Wilkes-Barre. 1972 Pa. Att'y Gen. Bureau of Consumer Protection Ann. Rep. 29.

71 Interview with Sandy Alessandro, Director of Consumer Affairs in the Rhode Island Attorney General's Department, in Providence, Rhode Island, Aug. 1, 1973.

If it is determined that evidence sufficient to support a successful action has been compiled, the respondent is notified that he should settle the matter or legal action will be commenced. Sometimes both parties are called into the office for a hearing at which time this determination is disclosed and argued. At this point, the vast majority of complaints are settled.

Most of the attorneys general in their consumer protection bureaus' annual reports emphasize the amount of money recovered on behalf of complainants by means of mediation:

The first and most important function [of the consumer division]—from the consumer's point of view—may be that of "mediation." Loosely translated, the term means to "get money back as promptly as possible for the citizen who has been cheated or defrauded."⁷²

There is, however, no uniform criterion or method by which these monetary figures are determined.⁷³ This renders comparison among the states, even states of comparable population, virtually impossible. Some bureaus, such as North Carolina's, realize that this statistic is not a guaranteed measure of the true savings to citizens, and therefore do not report the amount of money recovered.⁷⁴

It cannot be doubted that these efforts to secure restitution are having at least some beneficial effect. The concentration of a bureau's limited staff resources on informal refund adjustments, however, impairs its ability to initiate broader and more meaningful regulatory proceedings.⁷⁵ Some of the attorneys general have discerned this flaw, responding with policy changes in their consumer protection activities. Since 1969 the focal point of the Washington Attorney General's Consumer Protection Division has been to shift emphasis from complaint processing to litigation, "because the primary goal of the division is effective enforcement of the laws."⁷⁶ In this state during the past two years, a staff funded by the Office of Economic Opportunity has assisted private attorneys in developing an additional remedy in the area of consumer law.⁷⁷ In Missouri, new legislation is encouraging private attorneys and citizens to make their own claims for restitution and damages. Harvey Tettlebaum, Chief Counsel in the Missouri Attorney General's Consumer Protection Division observes that "to involve the state in that pursuit creates unwieldy bureaucracy which has a tendency to become an ombudsman."⁷⁸

⁷² Burch, *Maryland's "Action" Program in Consumer Protection*, 42 STATE GOV'T 161, 162 (1969).

⁷³ E.g., in North Dakota, the statistic is based on the total money recovered for the complainant. This includes any cash down payment plus the cancellation of the remainder of any legal obligation to pay. In other words, any cash recovered or obligation to pay that is cancelled is calculated in these totals. BUREAU OF GOVERNMENTAL AFFAIRS OF THE UNIVERSITY OF NORTH DAKOTA, THE CONSUMER FRAUD DIVISION OF THE NORTH DAKOTA ATTORNEY GENERAL'S OFFICE: AN EVALUATION 9-10 (1973) [hereinafter cited as EVALUATION].

⁷⁴ Letter from Eugene Hafer, Assistant Attorney General, North Carolina Consumer Protection Division, to the *Notre Dame Lawyer*, Sept. 12, 1973, on file in Notre Dame Law Library.

⁷⁵ Note, *supra* note 9, at 1127.

⁷⁶ Letter from Anthony E. White, Assistant to the Division Chief, Consumer Protection Division, to the *Notre Dame Lawyer*, Sept. 19, 1973, on file in Notre Dame Law Library.

⁷⁷ *Id.*

⁷⁸ Letter from Harvey Tettlebaum to the *Notre Dame Lawyer*, Sept. 19, 1973, on file in Notre Dame Law Library.

Reliance on consumer complaints has its disadvantages. Although it provides a service for individual consumers, this is often at the expense of more comprehensive enforcement programs.⁷⁹ Further, since few complaints come from low-income citizens who are the most victimized, a bureau does not receive a completely realistic picture of the marketplace.⁸⁰

B. Litigation

In most states more than ninety percent of the complaints received are either mediated, settled by assurance of voluntary compliance, referred to other agencies, referred back to the complainant for private action, or dismissed.⁸¹ However, if voluntary or consent procedures fail to resolve a jurisdictionally sound complaint, or would be too lenient due to the flagrancy of the violation, an action is filed seeking injunctive relief.⁸² Accordingly, litigation by the bureaus usually falls into one of three categories: (1) court enforcement of a subpoena ignored by a businessman, (2) injunctive action to restrain prohibited practices, and (3) contempt proceedings for violations of an injunction.⁸³

According to the information provided by the various attorneys general, the most pervasive consumer problems throughout the country appear to be automobile dealer sales and service, home repair/improvement contractors, mail order merchandise, pyramid franchising-distributorships, and mobile home sales.⁸⁴ Therefore, as might well be expected, most litigation generally falls within the limits of these categories. With regard to automobile dealers, the great bulk of court action has dealt with odometer turnback cases, leading a number of states

79 Note, *supra* note 9, at 1126.

80 Letter from Robert W. Herr, Assistant Attorney General and Chief, Consumer Division, Minnesota, to the *Notre Dame Lawyer*, Sept. 19, 1973, on file in Notre Dame Law Library.

81 See REPORT ON THE OFFICE OF ATTORNEY GENERAL, *supra* note 14, at 420-21.

82 Those jurisdictions reporting and the periods in question were: Iowa, 33 actions in calendar year 1972; Minnesota, 40 actions in calendar year 1972; Pennsylvania, 64 actions in calendar year 1972 (69 in first six months of 1973); Rhode Island, 25 actions in fiscal year 1973; Washington, 19 actions in calendar year 1972; Wisconsin, 51 actions in calendar year 1972.

83 E.g., 1972 Pa. Att'y Gen. Bureau of Consumer Protection Ann. Rep., 2-3.

84 The following jurisdictions reported their most frequent areas of complaint: *Alabama*: mail order frauds, pyramid franchising, mobile home sales, loans and interest rates; *Florida*: automobiles, food, home repair-improvement, mobile homes; *Hawaii*: nondelivery of merchandise, repairs and services, landlord-tenant controversies, misrepresentation; *Idaho*: automobiles, mobile homes, home repair-improvement, business practices, mail order frauds; *Illinois*: automobiles, furniture and appliances, home repair-improvement, radio-TV repair, books and magazines; *Indiana*: mail order frauds, automobiles, furniture and appliances, home repair-improvements; *Iowa*: automobiles, magazines, subdivided land sales, mail order frauds, pyramid franchising; *Maryland*: automobiles, furniture and appliances, mail order frauds, landlord-tenant controversies; *Michigan*: automobiles, mobile homes, landlord-tenant controversies, appliance repair, advertising; *Minnesota*: automobiles, mail order frauds, mobile homes, home repair-improvement, pyramid franchising; *Montana*: automobiles, mobile homes; *Nevada*: land sales, automobiles, credit, mobile homes, stock promotion; *New Mexico*: automobiles, mobile homes, contractual agreements, auto repairs; *North Dakota*: automobiles, failure to deliver merchandise, home solicitation sales misrepresentations; *North Carolina*: automobiles; *Rhode Island*: home repair-improvements, automobiles, furniture and appliances, pyramid franchising, mail order frauds; *Virginia*: automobiles, home repair-improvement, appliances, food, mail order frauds; *Washington*: mail order frauds, retail operations, automobiles, home repair-improvement; *Wisconsin*: automobiles, home repair-improvement, books and magazines, auto body repair, appliances.

to proscribe this practice with specific legislation.⁸⁵ Most litigation in the pyramid franchising area has centered around the country's two largest such operations, Dare To Be Great, Inc. and Koscot Interplanetary, Inc., parts of the empire of Orlando Florida promoter Glenn W. Turner.⁸⁶ Over thirty states have obtained injunctions against Dare To Be Great and Koscot, usually prohibiting all operations of the pyramid scheme except for the purpose of selling Koscot products at retail prices. In a number of states, Koscot has been held in contempt of court for violating these injunctions.⁸⁷

Other fertile areas of litigation include violations of retail installment sales acts, usury statutes,⁸⁸ and home solicitation sales acts.⁸⁹ In one ironic case, it was a consumer-protection magazine which found itself being sued by the New York Attorney General's Bureau of Consumer Frauds and Protection after the Bureau discovered that the advertised price of ten dollars for a yearly subscription was in fact *not* the price of the magazine.⁹⁰

Because bureaus move only after they have accumulated an impressive body of evidence, most suits for injunction never get to trial; rather than contest the suit in court and risk unfavorable publicity, the defendant businessman will usually accept a consent decree.⁹¹ Most bureaus wish to avoid litigation because they publicize the speed with which their consumer protection staffs are able to effect restitution for an aggrieved constituent. But if a quick settlement is not obtained, the consumer may be forced to wait months for a court decree ordering the return of his money, and perhaps many more months before the judgement is satisfied, if ever. This does not leave the consumer with a favorable impression of the elected official who promised the speedy return of his money with a minimum of red tape. It is the "avoid litigation at all costs" attitude, however, that results in ineptness at expediting litigation when it is necessary, and hence, unpopular delay. Moreover, because a bureau typically will not proceed with the injunctive remedy until it has received a number of complaints against an offender, the public stands to lose a good sum of money before an injunction is even sought. The bureaus must therefore become more adept at litigation. This will require allocating less time to mediating consumer complaints, but it

85 The Rhode Island Attorney General's Consumer Affairs Unit barraged the courts with suits against odometer spinbacks, thereby promoting publicity which induced the General Assembly to proscribe the practice.

86 Most companies using the pyramid franchising or "multilevel distributorship" scheme require the customer to purchase certain amounts of the product they are selling in order to become part of the organization. Each person buying into the organization pays a fee to become a "distributor." The company usually misrepresents the earning potential of the distributors by advising them that they can make large amounts of money by signing up other people as distributors. The company thus emphasizes the sale of positions with the company rather than the product itself. The result is similar to a chain letter in that those who buy in at the lower levels may get their money back or even make a profit, but the people who buy in at the end of the scheme, just before the saturation level is reached, all stand to lose their money. IOWA ATT'Y GEN., *supra* note 8, at 24.

87 *E.g.*, 1972 Pa. Att'y Gen. Bureau of Consumer Protection Ann. Rep. 8-9.

88 *E.g.*, [1971-1972] Mich. Att'y Gen. Consumer Protection and Charitable Trusts Division Biennial Rep. 2.

89 *E.g.*, the seller must cancel any contract signed in the buyer's home if the buyer notifies the seller of such cancellation by registered letter within three business days. R.I. GEN. LAWS ANN. § 6-28-3 (Supp. 1972).

90 1972 N.Y. Att'y Gen. Ann. Rep. 14.

91 *See, e.g.*, Mindell, *supra* note 11, at 612.

will go further towards the eventual elimination of the source of consumer complaints.

C. Education

Only recently have most attorneys general realized the great potential of consumer education as a preventive device. Virtually all of the attorneys general are now engaged in a vigorous program of consumer education. Such education is increasingly being viewed as a primary, not ancillary, function of their consumer protection activity.

These efforts cover a broad spectrum of activities. A number of bureaus publish monthly, and in some cases weekly, newsletters containing information on subjects ranging from nutrition to funeral home frauds.⁹² Many publicize their court actions by means of news releases, thereby placing the public on notice and warning businessmen engaged in similar activities that such will not be tolerated.⁹³ Public appearances by staff members allow the bureaus to reach a wide audience. Groups addressed include labor unions, high school students, women's clubs, service organizations, and poverty groups.⁹⁴ The Maryland Attorney General's consumer bureau conducts credit counseling services at storefront locations throughout Baltimore.⁹⁵ A number of bureaus have prepared a series of spot announcements, about three minutes each, for radio broadcast which suggest that the listeners contact the attorney general's office about consumer problems.⁹⁶

In the state of Washington, a full-time "Consumer Education" staff has been added to Attorney General Slade Gorton's Consumer Protection Division by means of a federally funded grant.⁹⁷ In addition to the above-mentioned activities, this office prepares a weekly column for a number of state newspapers; participates in a biweekly, half-hour television program, "Law in Action"; contributes to local news telecasts on a regular basis; and assists local police departments in establishing procedures for dealing with low-income consumer problems.

In following Washington as a model in the field of consumer education, other attorneys general should take note of the fact that utilization of the media by the Washington Attorney General has involved no cost to the taxpayers of that state. Thousands of dollars of free broadcasting time have been obtained as a result of the sophisticated rapport created with the commercial radio and television stations by the Consumer Protection Division.

IV. Recommendations

Eugene Hafer, Assistant Attorney General in North Carolina Attorney General Robert Morgan's Consumer Protection Division, observes: "[I]t would

92 *E.g.*, the New Mexico Attorney General's Consumer Protection Division publishes a monthly newsletter, *Consumer Protection*, in both English and Spanish.

93 *See, e.g.*, EVALUATION, *supra* note 73, at 87-92.

94 *E.g.*, 1972 Pa. Att'y Gen. Bureau of Consumer Protection Ann. Rep. 19.

95 Burch, *supra* note 72, at 163.

96 REPORT ON THE OFFICE OF ATTORNEY GENERAL, *supra* note 14, at 421.

97 1972 Wash. Att'y Gen. Consumer Protection Division Ann. Rep. 2-6.

appear obvious that these [consumer protection bureaus] are performing a useful service to citizens, and citizens are responding favorably to these new government services."⁹⁸ The mere existence of these bureaus has exerted a revolutionary effect upon the marketplace, overthrowing the once-pervasive tyranny of "caveat emptor." Accepting the fact that consumer protection activities have evolved into an established and legitimate function of state attorneys general, it now remains to inquire into the future of these efforts. As has been seen, many of the attorneys general are hampered by inadequacies in legislation, budget, and staff. The legislatures must render immediate attention to such deficiencies. However, there must be more than these short-term reforms if consumer protection is to remain in the legitimate focus of state government concern. The attorneys general themselves must realize that a more sophisticated mechanism is called for if consumer protection is to achieve equity for any significant proportion of the victims of consumer fraud.

A. Decentralization

Legal aid officials have found that their clients are most responsive to the facilities and services offered by their programs when the offices are conveniently located for the easy access of the low-income individual.⁹⁹ As long as poverty exists, there will be unscrupulous merchants preying upon the poor and ignorant. Realizing that the failure to solve this problem is a significant cause of the defrauded consumer's disenchantment with the total legal system, a number of attorneys general have responded by establishing consumer protection bureau branch offices in every city of substantial size throughout the state. In May of 1972 Wisconsin Attorney General Robert W. Warren opened two neighborhood consumer protection offices by means of an Office of Economic Opportunity grant in order to service the low-income residents of Milwaukee's inner city.¹⁰⁰ By the end of 1972, the two offices were receiving an average of 150 to 200 complaints each month, mostly by personal visit. These complaints were indigent to a neighborhood consumer office and would most probably not have been registered with a distant agency.¹⁰¹ In addition to the Wisconsin effort, Maryland Attorney General Francis B. Burch has established a number of storefront locations in Baltimore.¹⁰² Missouri Attorney General John C. Danforth has a branch office in Kansas City and a federally funded office in the inner city of St. Louis.¹⁰³ The Pennsylvania Attorney General's Bureau of Consumer Protection has seven offices throughout the state,¹⁰⁴ while the New York Attorney General's Bureau of Consumer Frauds and Protection has nine offices in major metropolitan areas of that state.¹⁰⁵

98 Letter from Eugene Hafer to the *Notre Dame Lawyer*, *supra* note 74.

99 Comment, *Public and Private Consumer Remedies in New York*, 34 ALBANY L. REV. 326, 330-31 (1970).

100 1972 Wis. Att'y Gen. Consumer Protection Ann. Rep. 5.

101 Most of the complaints involved "easy credit" and other unconscionable credit practices, fictitious comparative pricing by furniture retailers, and deceptive advertising by automobile dealers. *Id.*

102 Burch, *supra* note 72, at 162.

103 Letter from Harvey Tittlebaum to the *Notre Dame Lawyer*, *supra* note 78.

104 See note 70, *supra*.

105 Albany, Auburn, Buffalo, Binghamton, New York City, Plattsburgh, Poughkeepsie, Rochester, and Syracuse.

It may be contended, however, that this decentralized, grass-roots approach to the state's regulation of deceptive trade practices is "too little, too late." It has been suggested that an elected official such as an attorney general may be subjected to influences that are antithetical to effective consumer protection. "[T]he strong political aura which inevitably surrounds an elected attorney general encourages an overemphasis on consumer refunds and may occasionally discourage action against the questionable practices of 'respectable businessmen.'"¹⁰⁶ Alternative models of dispute-solving mechanisms have been advocated that would remove protection of the individual consumer from the ambit of governmental overseers. Ostensibly these models are to provide a speedy yet adequate remedy without the statutory, procedural, political, or discretionary constraints that have thus far encumbered the efforts of state law enforcement officials.

B. A.B.A. Model—*The Neighborhood Consumer Information Center*

The Consumer Affairs Committee of the American Bar Association's Young Lawyers' Section has concluded that certain conditions must be met for the successful implementation of such a dispute-solving mechanism: (1) the location should not require the consumer to travel beyond his usual area of familiarity, thereby reducing his lost working time to a minimum; (2) the consumer's faith in the decision must be obtained through the use of indigenous personnel and prudent application of the power of appointment; (3) the procedure must be informal and the complainant may be represented by an agent who is not an attorney; (4) the remedy must involve no cost to the consumer; (5) the decision must be enforceable without resort to legal formalities.¹⁰⁷ With these conditions in mind, the Committee has collaborated with the founders of the Neighborhood Consumer Information Center in Washington, D.C., established by students from the Howard University Law School.¹⁰⁸ The Center is not only engaged in an exhaustive program of consumer information, but it provides direct legal assistance where needed. Just as the consumer protection bureaus of the attorneys general, the Center designates swift redress as its first priority. To that end, it attempts to negotiate and mediate complaints.¹⁰⁹ Unlike the bureaus, however, if investigation indicates that formal legal action is appropriate, the Center does not wait to compile a number of complaints against an offender, but initiates litigation immediately by assigning the case to a cooperating local attorney on a voluntary or minimal fee basis.¹¹⁰

The revolutionary aspects of this model lie both in its fundamental concept—maintaining the complainant's faith in the integrity of the process and in the means of implementing that concept—employment of indigenous non-attorneys who know the neighborhood residents, leaders, opinion-makers, and merchants, and who understand the beneficial possibilities of interaction among these individuals upon the local consumer climate.

106 Note, *supra* note 9, at 1133.

107 Mussehl, *supra* note 5, at 1138.

108 *Id.* at 1134.

109 *Id.* at 1136.

110 *Id.*

C. Arbitration

Because state officials cannot possibly investigate or prosecute every consumer complaint but must concentrate on the worst marketplace offenders, another suggestion has been put forward that would likewise remove a significant proportion of consumer protection activity from the sphere of state government. This model consists of arbitration mechanisms sponsored by consumer and industry groups.¹¹¹ It is based at least in part on the philosophy that total reliance on the government to remedy essentially individual grievances involves a paternalism that conflicts with normative social values.

Arbitration is gaining increased acceptance as an alternative to the courts in commercial disputes between merchants, the closest analogue to the consumer complaint situation.¹¹² There are many advantages to arbitration: the parties themselves participate in selecting the arbitrators; the arbitration proceeding is a private one, and is not subject to the formal rules of evidence; and decisions are based entirely on the equities of the particular dispute.¹¹³

The national Better Business Bureau and individual business groups have formulated arbitration proceedings for resolving disputes between their members and customers. The problem is that industry sponsorship can result in a credibility gap with customers who suspect a probusiness bias, an apprehension well-founded in some respects.¹¹⁴ Still, there is reason to believe that the Better Business Bureau's national organization is genuinely committed to improving the Bureau's credibility with the public, and that a successful arbitration program, with provisions for consumer representatives on the arbitration panels and consumer participation in the selection of arbitrators, will establish an equitable and efficient complaint-resolving mechanism.¹¹⁵

D. The Rhode Island Model

Notwithstanding the increased attention that these "non-government" proposals are receiving, more sophisticated consumer protection activities continue to be pursued by the states. Rhode Island Attorney General Richard J. Israel has recently applied for a federal grant that would incorporate a number of the novel approaches discussed above into the scheme of his Consumer Affairs Unit.¹¹⁶ This demonstrator program would build greatly upon the present structure of the Consumer Affairs Unit, expanding its present office staff from three

111 Jones and Boyer, *Improving the Quality of Justice in the Marketplace: The Need for Better Consumer Remedies*, 40 GEO. WASH. L. REV. 357, 369 (1972).

112 *Id.* at 374-75.

113 *Id.* at 375.

114 *Id.* at 376.

The Better Business Bureaus are by definition organizations of responsible businessmen, and thus offer scant hope of resolving the substantial number of disputes between consumers and dishonest or marginally ethical businessmen. Even when the company complained of is a member of the Bureau, and the complaint appears well-founded, the Bureau lacks formal power to compel redress. The chief sanction of the Bureaus is publicity. How vigorously they wield this weapon is open to question. *Id.* at 377.

115 *Id.* at 377-78.

116 State of Rhode Island, Department of the Attorney General, Office of Economic Opportunity Grant Application, Sept. 1, 1973.

to ten persons, adding an editor to assist with consumer publications, and creating a radically new system of eight neighborhood consumer representatives from low-income areas of Rhode Island who would operate as a part of the Attorney General's Department.

According to this proposal, eight "out-reach" workers would be selected from and located in eight OEO Community Action Program target areas throughout Rhode Island:

In hiring persons to fill these positions, emphasis will be placed upon practical ability rather than formal qualifications. If possible, it will always be an objective to select personnel from the low-income neighborhoods concerned, or from persons who have extensive experience in dealing with these low-income areas. . . .

Each of the eight neighborhood representatives will be primarily responsible for the education of members of his or her community in the area of consumer rights and protection, and for assisting the low-income consumer with a complaint in the proper course of action to recover for his damages. These positions will be filled by persons with an intimate knowledge of and a working relationship with the people of the community in which they will be assigned. It is expected that they will be residents of the affected community for an extended period of time prior to their assignments. The Neighborhood Representatives must be persons with the ability and desire to get out into the community and relate on an inter-personal basis with the members of the neighborhood concerned.¹¹⁷

The core group of staff members, indeed the entire Consumer Affairs Unit, will be physically moved out of the Attorney General's Department and relocated within a low-income area of the city of Providence. In addition to this new main office, the Unit's attorneys will maintain offices in the Attorney General's building in order to be in contact with their immediate superior, the Chief of the Civil Division, and others who might be of assistance. The Neighborhood Representatives will each be located within the designated target areas throughout the state, with offices in the Community Action Program Headquarters of that area or the neighborhood organizations with community contacts.

Complaints will be processed where they are registered, either in the main office in Providence or in one of the neighborhood offices. Mediation of justifiable complaints will follow, again by the personnel of the office in which the complaint was registered. Complaints involving violations of the Rhode Island Deceptive Trade Practices Act that cannot be settled will be forwarded by the Neighborhood Representatives to the main office for immediate court action. This procedure will enable the main office personnel to concentrate upon litigation, while mediation will be handled almost exclusively by the neighborhood offices.

In addition to this proposal by Attorney General Israel, the Rhode Island Better Business Bureau announced on May 29, 1973, that it had established a binding arbitration program for the settlement of consumer complaints.¹¹⁸ The program provides that both the consumer and the involved businessman will

¹¹⁷ *Id.*, Narrative Project Description 14-17 (emphasis added).

¹¹⁸ BNA ANTITRUST & TRADE REG. REP. (May 29, 1973), No. 615, A-22.

have the option of submitting the complaint to one of the arbitration volunteers and will agree in writing to be bound by the decision. An arbitrator acceptable to both parties will be selected and his written decision will be binding on all parties. This mechanism could be utilized in cooperation with the Attorney General's Consumer Affairs Unit. If a complaint falls outside of the Attorney General's statutory jurisdiction, the consumer may submit his grievance to the Better Business Bureau's arbitration structure for adjudication as an alternative to lengthy and costly court action.

If Rhode Island's experiment proves successful, it would deserve the serious consideration of the other states. Because of Rhode Island's high population density and small size, the program could be applied to a smaller governmental subdivision, such as a county or metropolitan area, rather than an entire state. But the particular significance of this proposal is that it shows that state government need not abdicate its preeminent position in the field of consumer protection. With imagination and boldness, the attorneys general should be able to provide a remedy that cuts across the barriers of economic and educational disparity, ultimately establishing justice in the marketplace.

IV. Summary

Consumer protection is a complicated problem in a technological society. Deceptive trade practices are found everywhere, and yet they differ in form and substance from one locale to another. In response to this problem, state governments have created agencies in the offices of their attorneys general which perform three basic functions: (1) informal mediation and negotiation of consumer complaints, (2) litigation of complaints indicating a violation of the state deceptive trade practice statute, and (3) education of the consuming public. To date mediation and negotiation of complaints have received by far the most attention from officials although the attention devoted to education is increasing. In order to develop truly comprehensive programs of enforcement, the bureaus should allocate more time to, and acquire more expertise in, their performance of the litigation function.

Many of the state consumer protection bureaus operate under the constraints of inadequate legislation, budgets, and staffing. Some have taken on the appearance of tokenism for the sake of short-term political gains. This situation has led to proposals for private solutions of consumer grievances. However, the possibilities of state government leadership in the field of consumer protection should not be dismissed without a more penetrating inquiry. The proposed Rhode Island experiment not only indicates that government does have the capacity to adopt the novel approach of the Neighborhood Consumer Information Center and work alongside privately sponsored arbitration programs, but also suggests that *only* government can truly fashion various socioeconomic interests into a workable, enforceable program for the elimination of deceptive practices. Authentic progress in consumer protection by state governments would serve as positive reinforcement of the citizenry's confidence in their elected officials, at a time when that confidence is rapidly waning.

John H. Kazanjian