

1972

## Comment: Consumerism's Forgotten Man

Follow this and additional works at: <https://ir.lawnet.fordham.edu/ulj>



Part of the [Housing Law Commons](#)

---

### Recommended Citation

*Comment: Consumerism's Forgotten Man*, 1 Fordham Urb. L.J. 226 (1972).

Available at: <https://ir.lawnet.fordham.edu/ulj/vol1/iss2/4>

This Article is brought to you for free and open access by FLASH: The Fordham Law Archive of Scholarship and History. It has been accepted for inclusion in Fordham Urban Law Journal by an authorized editor of FLASH: The Fordham Law Archive of Scholarship and History. For more information, please contact [tmelnick@law.fordham.edu](mailto:tmelnick@law.fordham.edu).

## CONSUMERISM'S FORGOTTEN MAN

Many writers have ably demonstrated that equal enforcement of statutes may work unequal hardships on people of different economic strata.<sup>1</sup> The failure to recognize that all people cannot be protected by the same laws has produced statutes that, though they treat all citizens equally, actually aid only a limited class and are almost useless, or even harmful, to those who most need protection.<sup>2</sup> New York's Home Solicitation Sales Act<sup>3</sup> of 1970 seems to be such a statute.

Designed as a means of protecting consumers against the overbearing and unscrupulous techniques notoriously associated with door-to-door sales,<sup>4</sup> the statute creates a three-day period in which a consumer may disavow specific types of contracts made during a door-to-door sales transaction.<sup>5</sup>

Although the act aids the consumer, it is useful only in limited circumstances. Partly because of the limited approach of the statute, but to a much greater degree because of the failure of its authors to recognize the special problems of different groups preyed upon in door-to-door sales, the statute does not sufficiently protect those most vulnerable to abuse.

---

1. "Fair-on-their face statutes, such as a levy of a poll tax as a condition of voting will not vary that result. Uniform bail schedules lay a heavier burden on the poor than on the well-to-do. . . . The same hardship results from use of a uniform fine schedule for traffic violations and other misdemeanors. Laws which penalize owners who are unable to secure and maintain public liability and property damage insurance on their automobiles hit the poor hard and fall with a heavy hand on proportionately more Negroes than whites. There are many situations in which classification does not seem to rest on poverty but in which economics intrudes. Thus it has been said that the application of juvenile delinquency statutes is 'heavily weighted against the poor family.'" L. Miller, *Race, Poverty, and the Law*, 54 Calif. L. Rev. 386, 395-96 (1966). See A. Downs, *Who Are the Urban Poor?* 42 (1968).

2. "The law in its majestic equality, forbids the rich as well as the poor to sleep under bridges, to beg in the streets, and to steal bread." Anatole France, *Le Lys Rouge*, as quoted in P.I. Birzon, R. Kasanof, and J. Forma, *The Right to Counsel and the Indigent Accused in Courts of Criminal Jurisdiction in New York State*, 14 Buff. L. Rev. 428 (1965).

3. N.Y. Pers. Prop. Law §§ 425-30 (McKinney Supp. 1972).

4. See D. Caplovitz, *The Problems of the Poor Consumer: A Sociologist's Viewpoint*, in Ohio State Legal Serv. Ass'n Course on Law and Poverty: *The Consumer 1.01-.06* (1968) [hereinafter cited as Caplovitz, *Problems*].

5. The Home Solicitation Sales Act, N.Y. Pers. Prop. Law § 427(1) (McKinney Supp. 1972).

This comment will analyse the Home Solicitation Sales Act in terms of the special needs of the low income consumer and will suggest an additional statutory approach to protect consumers of lower economic strata.

### The Low Income Consumer

The consumer movement is essentially characterized by "a history of sporadic responses to a broad need that has been met for the most part on a crisis rather than a sustained basis."<sup>6</sup> Statutes promulgated to date generally do not directly attack the abuses themselves, but instead give the consumer an opportunity to deal more knowledgeably with the abuses that exist.<sup>7</sup> These laws are predicated on the model of a careful, literate, sophisticated consumer in a free marketplace—in essence a rational man.<sup>8</sup> This model may assume a level of consumer education that often does not exist among those preyed upon in door-to-door sales.<sup>9</sup> In addition, the traditional economic structure of the low income consumer both causes and is reinforced by a dependence on credit—a vital prerequisite for many transactions entered into by such consumers<sup>10</sup> and a traditional means of financing door-to-door sales.<sup>11</sup>

---

6. Product Safety in Household Goods 2 (F.R. Dickerson ed. 1968). For example, "[e]nactment of legislation relating to credit arrangements has not followed the pattern of expansion of the market. Regulation has been devised on an ad hoc basis to take care of problems and abuses or to clarify relationships as the need for such regulation became apparent . . . ." B. Curran, *Trends in Consumer Credit Legislation* 3 (1965).

7. "The most significant new legislation proposals have been informational." Note, *Consumer Legislation and the Poor*, 76 *Yale L.J.* 745, 747 (1967) [hereinafter cited as *The Poor*]. "Of all the aims of the consumer movement, the one that I think can be of greatest benefit to competitive enterprise is the objective of more and better information for buyers. The reason is grounded in simple economics—the better informed the consumer, the more competitive business must be on price and quality." M. Stans, *The Issues and Challenges, The Challenge of Consumerism* 2 (1971).

8. "Devoid, in short, of any human weakness, with not one single saving vice, sans prejudice, procrastination, ill-nature, avarice, and absence of mind, as careful for his own safety as he is for that of others, this excellent but odious character stands like a monument in our Courts of Justice, vainly appealing to his fellow citizens to order their lives after his own example." A.P. Herbert, *Uncommon Law: Fardell v. Potts*, as quoted in M. Frances McNamara, *2,000 Famous Legal Quotations* 492 (1967).

9. See text accompanying notes 93-96 *infra*.

10. "The key to the marketing system in low-income areas lies in special adaptations of the institution of credit. The many merchants who locate in these areas and find it profitable to do so are prepared to offer credit in spite of the

Denied access to the middle-class institutions of the credit card, the charge account, and loans from banks, the underprivileged must rely on the credit established by interpersonal relationships and the willingness of merchants and door-to-door salesmen to extend credit to those thought by conventional lenders to be unsuitably high credit risks.<sup>12</sup> The merchants, of course, cover their risks by charging prices clearly higher than those found in the marketplace at large.<sup>13</sup>

At the same time, the poor are far more susceptible to the deceptive practices that flourish under a credit system. As David Caplovitz has stated:

The middle classes use installment credit even more frequently than the poor, but partly because they are financially more competent and partly because they are more sophisticated as consumers, they are not nearly as likely as the poor to encounter the merchant's fraud and deception and the oppressive biases in our laws which favor the rights of creditors over the rights of debtors.<sup>14</sup>

#### The Door-to-Door Sale—A Description

The door-to-door sale has had a long tradition in American economic life. It has contributed and continues to provide needed flexibility of distribution and ease of access in the economic structure. The realization that this type of sale needs strict regulation does not conflict with a recognition of the utility of the procedure. "Although the device of door-to-door selling is a well-accepted and bona fide method of merchandising, it is susceptible to abuses by unscrupulous persons."<sup>15</sup>

The abuses of door-to-door selling are numerous and widespread and have led legislators to strict regulation in the area.

The dogged, tenacious and sometimes pugnacious determination with which salesmen have literally flung themselves through residential portals

---

high risks involved. Moreover, their credit is tailored to the particular needs of the low-income consumer." D. Caplovitz, *The Poor Pay More* 15 (1963) [hereinafter cited as Caplovitz].

11. "The need for credit, and the restricted sales outlets available . . . often . . . work to turn sales and loan agreements into primarily contracts of adhesion, with all rights stacked in favor of the seller or creditor." Statement of Paul G. Bower, FTC National Consumer Protection Hearings 360-61 (1968).

12. D. Caplovitz, *Consumer Problems*, 23 *Legal Aid Brief Case* 144 (1965).

13. "This misuse of the door-to-door sales technique often results in unduly heavy credit burdens on persons who cannot afford them, particularly among residents of urban poverty areas." Exec. Memo. [1970] McKinney's Sess. Laws of N.Y., 2899.

14. Caplovitz, *Problems*, supra note 4, at 1.02.

15. Governor's Message [1970] McKinney's Sess. Laws of N.Y., 3092.

and at householders, the transient nature of their principal place of business, their financial irresponsibility in many instances, and an early and very general tendency to defraud the unwary must have borne considerable weight upon the minds of those who have been instrumental in putting such regulatory legislation upon the statute and ordinance books of our states and municipalities."<sup>16</sup>

The circumstances surrounding door-to-door sales give free rein to deceptive and unfair sales techniques. As Ronald C. C. Cuming noted, "none of these is necessarily peculiar to door-to-door selling; however, by its very nature, this type of selling provides unusually fertile ground for their development."<sup>17</sup>

The intrusion into a person's home in itself gives the seller an advantage. Once the salesman is inside the home, there is no way, barring the drastic and possibly dangerous step of throwing the man out or calling the police, that a housewife can get rid of an insistent salesman. A real element of compulsion therefore exists in the home sales transaction.<sup>18</sup> The security afforded by the possibility of escaping behind locked doors frequently provides a psychological uplift to a buyer's sales resistance. Once the salesman is behind the locked door and that retreat is no longer available, the buyer is less likely to be as clearly in control of the transaction, and decisions are thus more apt to be colored by a lowering of the security-based ability to resist.<sup>19</sup> Another major disadvantage to the consumer in transacting business through door-to-door sales is the lack of previous comparative shopping. The lack of mobility<sup>20</sup> and the paucity of discount stores in lower-class neighborhoods<sup>21</sup> generally give the

---

16. J.R. Sawyer, *Federal Restraint on the States' Power to Regulate House-to-House Selling*, 6 *Rocky Mt. L. Rev.* 85, 87 (1934).

17. R. Cuming, *Consumer Protection—The Itinerant Seller*, 32 *Sask. L. Rev.* 113, 114 (1967) [hereinafter cited as Cuming].

18. "This technique is very effective when used against housewives who are physically unable to assert their freedom from a seller and who are actually afraid that, if he is displeased, he may cause physical harm to them or their families." *Id.* at 115.

19. For an interesting explication of the desirability on the part of the salesman to achieve psychological dominance over the sales target, see E. Lifshy, *Door-to-Door Selling* (1948).

20. Caplovitz, *supra* note 10, at 53-56.

21. "The consumer who is able to shop near his home in chain stores in low-income neighborhoods in Washington, D.C. generally pays comparable prices for comparable items to those sold in medium income areas. . . . Large numbers of poor families have no supermarkets near them and can exercise no choice: they are obliged to buy in stores with limited supplies and high prices." M. Morris,

shopping poor little basis for comparison. In a door-to-door sale, moreover, no opportunity to compare prices presents itself since the buyer frequently does not expect the arrival of the salesman.<sup>22</sup> This destroys an important buyer defense.

Finally, there is the problem of the transient nature of the door-to-door sales transaction. An individual who sells door-to-door need have no fixed place of business, no ties in any community, no means of repairing products that do not work, and little need of enticing repeat business.<sup>23</sup> Thus there is little assurance of quality, and perhaps real detriment to the salesman who does provide quality goods, for the higher the price, the more resistance must be overcome. In addition, the transient character of the salesman's trade makes the establishment of a reputation unimportant. He acts without fear of damage to his business reputation and with the knowledge that fraud is at best difficult to prove.<sup>24</sup>

Even in those situations in which a seller does have ties to the buyer—as, for example, in the continuing relationships that grow up in a ghetto—these ties tend to be based on the economic requirements of the buyer who is often less concerned with the quality of the items he buys than in obtaining credit in order to buy them at all.<sup>25</sup>

---

Grocery Shopping in Washington, D.C., 1-2 (1966), as quoted in C. Bell, *The Economics of the Ghetto* 142 (1970). "In Harlem there is only one large department store. . . ." K. Clark, *The Social Dynamics of the Ghetto*, in *Aspects of Poverty* 59 (B. Seligman ed. 1968).

22. "The American housewife is an intelligent buyer, no matter what some folks say about her much-heralded extravagance. The greatest safeguard she has in buying—and she knows this very well—is in shopping around from store to store, comparing values and styles and all the other salient points.

This shopping impulse arises the moment she considers buying anything, and the house-to-house salesman must stifle it, if he can. He is giving his customer no opportunity to compare values or to postpone buying. 'Do it now,' he tells her, 'I won't be back this way for a couple of months.' She buys, when she buys, against an inner voice of discretion which tells her to wait until she can compare values." A.C. Fuller, *Where Are We Headed in House-to-House Selling?*, 52 *Magazine of Business* 703, 705 (1927), quoted in *The Poor*, supra note 7, at 781.

23. Cuming, supra note 17, at 116.

24. M. Shanker, *Consumer Protection Under Article 2 of the Uniform Commercial Code*, Ohio State Legal Serv. Ass'n Course on Law and Poverty: *The Consumer* 4.16 (1968).

25. ". . . [Merchants] can sell inferior goods at high prices because, in their own words, the customers are not 'price and quality conscious.' Interviews found that the merchants perceive their customers as unsophisticated shoppers. One merchant rather cynically explained that the amount of goods sold a customer depends not on the customer but on the merchant's willingness to extend him credit.

### Door-to-Door Sales Techniques

Among the most prevalent techniques used to take advantage of the consumer are the referral sale, the bait-and-switch sale, the "free" inducement and the "fear" or "hard" sell—all in addition, of course, to the usual guile and artifice found in the marketplace.<sup>26</sup>

The referral sale is a simple technique under which a salesman offers a victim a chance to make back the purchase price of the item bought by referring the salesman to other buyers. Strangely, the buyer never hears of any of the referrals becoming buyers—at least not from the salesman. If by some chance one of the referrals mentions his buying, the original buyer must still prove that his referral was the source of the sale—no mean feat, for most referrals involve neighbors who would usually be visited by the salesman in any event.<sup>27</sup>

Realizing that a neighborhood has a limited number of people and that multiple referral lists in the same neighborhood will produce overlaps, a New York court concluded that a referring buyer will have an impossible time producing a meaningful number of new customers. It further noted that referrals by others will make it close to impossible to prove that a particular buyer was the source of new sales. It concluded, therefore, that the use of referral sales as inducements to buyers is fraudulent in situations where the buyer is not told of his position in relation to other referring buyers.<sup>28</sup>

The bait-and-switch technique, however, is still in full blossom. The technique as used in home solicitation sales begins by advertising an article at a low price. When the customer responds to the advertisement, a salesman appears. He displays the article advertised which proves to be a rather shoddy product. The salesman suggests an alternative product of higher quality and price and then attempts to break down the consumer's resistance, having the advantage of knowing that the customer did want the type of product that the salesman is offering.

One of the more vicious techniques used is the "free" gift item. Often a salesman offers a product with an inducement in the form of a "bonus gift." The product itself tends to be so overpriced as to pay for the gift and still provide a handsome profit.

A variant on this technique is to have the consumer buy some sort of

---

If the merchant is willing to accept great risk, he can sell the customer almost as much as he cares to." Caplovitz, *supra* note 10, at 19.

26. See generally Cuming, *supra* note 19.

27. V. Morgan, *The Home Solicitation Sale*, Spring 1972 (unpublished consumer credit study on file in Fordham Urban L.J. office).

28. *State v. ITM, Inc.*, 52 Misc. 2d 39, 275 N.Y.S.2d 303 (Sup. Ct. 1966).

product and then allow him to rent storage or some sort of necessary accessory. Eventually he finds he has been tricked into buying the accessory as well. A well-known example is the meat supply service that allows the customer to rent freezers to store the meat. Sometimes when the customer decides he no longer wants the meat service or the freezer, he finds that when he agreed to buy the meat, he also contracted to buy the freezer.<sup>29</sup>

Instances of the "fear" and the "hard" sell are so varied in scope that any description would only scratch the surface. The fear technique is used most often in selling protection devices or alarm systems. The technique builds on an exaggerated fear induced by the salesman who exposes the customer to the possible catastrophes that may be averted by the purchase of the salesman's product. Faced with the full impact of this designedly terrifying presentation, the consumer tends to overcompensate by buying more protection than he needs—and paying less attention to the quality of the merchandise he obtains.

The "hard sell" is simply any device that interferes with the buyer giving full consideration to the various reasons for buying or not buying. The salesman introduces to whatever extent possible a sense of duty on the part of the buyer to reward the seller for his diligence. At the same time the seller endeavors to establish a pressure of time and concurring opinion of the part of others involved in the sale. Further, the seller exhibits a dogged persistence and often an outright refusal to leave, once inside, in an attempt to make agreement to the sale easier than not making the agreement.

### The Statutory Solutions

Faced with the abuses described above, the New York State Legislature created Article 10-A of the Personal Property Law. Entitled the Home Solicitation Sales Act, Article 10-A attempts to protect the consumer "subjected to high pressure door-to-door sales tactics."<sup>30</sup> It is designed "[t]o afford consumers who sign contracts arising out of door-to-door credit sales a three-day cooling-off period" to decide if they actually want the goods.<sup>31</sup>

First instituted in Great Britain, the idea of a cooling-off period has spread throughout the United States. New York was one of the first states

---

29. See *Frostifresh Corp. v. Reynoso*, 52 Misc. 2d 26, 274 N.Y.S.2d 757 (Dist. Ct. 1966), rev'd on other grounds, 54 Misc. 2d 119, 281 N.Y.S.2d 964 (App. Div. 2d Dep't 1967).

30. N.Y. Pers. Prop. Law § 425 (McKinney Supp. 1972).

31. Exec. Memo. [1970] McKinney's Sess. Laws of N.Y., 2899.



to provide for such a period of time to reconsider a sales agreement.<sup>32</sup> The National Consumers' Act (NCA)<sup>33</sup> and the Uniform Consumer Credit Code (UCCC)<sup>34</sup> have both included a provision allowing rescission of sales, and over 34 states have passed variants on the UCCC form.<sup>35</sup> It is, obviously, a readily acceptable idea.

The NCA differs in approach from both the New York act and the UCCC (which the New York statute closely resembles). It assumes that it is impossible for a consumer to make an independent decision when faced with the various techniques of persuasion specified above.<sup>36</sup> Thus it requires not only that the buyer have a chance to rescind once a transaction is made, but also that he be given a period of time in which to decide whether to buy.<sup>37</sup>

32. New York has been a leader in recent consumer legislation. The Council of State Governments, *Consumer Protection in the States* 23 (1970).

33. National Consumer Law Center, Boston College Law School, *National Consumer Act* §§ 2.501-505 First Final Draft (1970) [hereinafter cited as NCA]. The NCA is still in draft stage, but it already resulted in the promulgation of one statute. See Wis. Stat. §§ 423-101 to -302 (Supp. 1972). Its new approaches, however, appear to provide great creative impetus in the area of consumer protection.

34. Uniform Consumer Credit Code §§ 2.501-505 [hereinafter UCCC].

35. For those states which have adopted the UCCC, see Colo. Rev. Stat. Ann. §§ 73-1-101 to -9-103 (Supp. 1971); Idaho Code §§ 28-31-101 to -39-103 (Supp. 1971); Ind. Ann. Stat. §§ 9-1-101 to 6-202 (Supp. 1972); Okla. Stat. tit. 14A, §§ 1-101 to 9-103 (Supp. 1972); Utah Code Ann. §§ 70B-1-101 to 9-103 (Supp. 1972); Wyo. Stat. Ann. §§ 40-1-101 to 9-103 (Supp. 1971). In addition, for some variants on the Home Solicitation Sales Act based on the UCCC, see Alaska Stat. § 45.05.125 (Supp. 1970); Ariz. Rev. Stat. Ann. §§ 44-5001 to -5008 (Supp. 1972); Cal. Civ. §§ 1689.5 to -.13 (West Supp. 1972); Conn. Gen. Stat. Rev. §§ 42-134 to -143 (Supp. 1969); Del. Code Ann. tit. 6, §§ 4401-08 (Supp. 1971); D.C. Code Ann. § 28-3811 (Supp. 1971); Fla. Stat. §§ 501.021 to -.051 (1972); Ga. Code § 96-906 (Supp. 1972); Hawaii Rev. Laws § 476-5 (1968); Ill. Rev. Stat. ch. 121½, § 262B (1969); Ky. Rev. Stat. §§ 367.410 to -.990 (Supp. 1972); La. Rev. Stat. § 27:11 (Supp. 1972); Me. Rev. Stat. Ann. tit. 32, §§ 4661-69 (Supp. 1972); Md. Ann. Code art. 83, §§ 28-35 (Supp. 1972); Mass. Gen. Laws Ann. ch. 93, § 48 & ch. 255D, § 9 (Supp. 1972); Mich. Comp. Laws §§ 445-111 to -117 (Supp. 1972); N.H. Rev. Stat. Ann. §§ 361B:1-3 (Supp. 1971); N.J. Rev. Stat. §§ 17:16C-61.1 to -61.9 (Supp. 1972); N.Y. Pers. Prop. Law §§ 425-30 (McKinney Supp. 1972); N.C. Gen. Stat. §§ 25A-38 to -42 (Supp. 1971); Ore. Rev. Stat. §§ 83.710-.750 (1971); Pa. Stat. tit. 73, §§ 500-201 to -209 (Supp. 1971); R.I. Gen. Laws Ann. §§ 6-28-1 to -28-8 (Supp. 1972); S.D. Code §§ 37-24-3 to -5 (Supp. 1971); Vt. Stat. Ann. tit. 9, § 2454 (1971); Va. Code Ann. §§ 59.1-21.1 to -21.7 (Supp. 1972); Wash. Rev. Code § 63-14.154 (Supp. 1972).

36. NCA § 2.501, comment 1.

37. Id. §§ 2.501-.504.

### The Devices of Rescission

The difference in approach among the statutes manifests itself most sharply in the various devices used to affect the validity of a sale. Under the New York law,<sup>38</sup> if the sale is covered by the statute, the seller must give the buyer a perforated card which specifies the buyer's rights. The bottom half of the card must be usable as a postcard to notify the seller of the cancellation of the sale.<sup>39</sup> If the sale is made in a city of over one million people, the perforated card must be printed in both English and Spanish.<sup>40</sup>

Once a sale is made and the card is given to the buyer, the buyer or any other obligor<sup>41</sup> may cancel the sale by sending the card or any other<sup>42</sup> written notice<sup>43</sup> at any time "until midnight of the third business day after the day on which the buyer has signed an agreement or offer to purchase relating to such sale."<sup>44</sup> Such notice, if mailed, is presumed given "when deposited in a mailbox properly addressed and postage prepaid."<sup>45</sup> If the card is not provided at the time of the sale, the contract may be voided until three days after the card is given to the buyer.<sup>46</sup> Moreover, it is at least arguable that notice need not be written until the card is provided.<sup>47</sup>

The UCCC uses approximately the same device. The card specified in this proposal acts solely as a notice of rights.<sup>48</sup> In assisting the consumer to give notice the card simply gives the address of the seller, specifies that a mailed notice of cancellation must be sent to the seller, and that it "must say that you do not want the goods or services . . . ."<sup>49</sup> The UCCC is identical to the New York statute in its time requirements for cancellation,<sup>50</sup> the rule of mailing<sup>51</sup> and the necessity of written notice.<sup>52</sup>

38. N.Y. Pers. Prop. Law § 428(1) (McKinney Supp. 1972).

39. *Id.*

40. N.Y. Pers. Prop. Law § 428(2) (McKinney Supp. 1972).

41. ". . . the buyer or any other person obligated for any part of the purchase price may cancel a home solicitation sale . . . ." N.Y. Pers. Prop. Law § 427(1) (McKinney Supp. 1972).

42. *Id.* § 427(3)(i) (McKinney Supp. 1972).

43. *Id.* § 427(2) (McKinney Supp. 1972).

44. *Id.* § 427(1) (McKinney Supp. 1972).

45. *Id.* § 427(3) (McKinney Supp. 1972).

46. *Id.* § 428(3) (McKinney Supp. 1972).

47. *Id.*

48. UCCC § 2.503.

49. *Id.* § 2.503(2)(b).

50. *Id.* § 2.501(1).

51. *Id.* § 2.501(3).

52. *Id.* § 2.501(2).

The NCA, however, treats the consumer quite differently. It distinguishes between a contract made at the seller's place of business and one made at a buyer's home, place of work, or other area.<sup>53</sup> Unlike the New York statute or the UCCC, the NCA indicates that the buyer has a right to rescind a transaction made at the seller's place of business. It also contains a section requiring a notice specifying the buyer's right of the rescission in such a transaction.<sup>54</sup> The statute, however, appears not to be carefully drawn. Such details as the return of merchandise and the return of the consumer's money are left rather indefinite.<sup>55</sup> The notice, however, gives the consumer rights in a sale at the place of business of the merchant roughly equivalent to those given by the UCCC and the New York act for sales at home.<sup>56</sup> It allows the consumer to sign and date the notice itself, which, if mailed, acts as a notice of cancellation.<sup>57</sup> Once again, the three business day rule is used<sup>58</sup> as is the requirement of written notice for cancellation of the sale.<sup>59</sup> The proposal specifies the option of forwarding the notice by telegraph, mail or personal delivery.<sup>60</sup>

Both the UCCC<sup>61</sup> and the New York statute<sup>62</sup> apply solely to sales that are both personally solicited by the seller and accepted by the buyer at the residence of the buyer.<sup>63</sup> The NCA divides transactions into those occurring at the place of business of the seller and those occurring in other places.<sup>64</sup> With regard to sales at the merchant's place of business, the NCA provides the mechanisms of cancellation described above. For

---

53. NCA § 2.501.

54. *Id.* § 2.505(2).

55. *Id.* § 2.505(2)(b).

56. *Id.*

57. *Id.*

58. *Id.*

59. *Id.*

60. *Id.*

61. UCCC § 2.501.

62. N.Y. Pers. Prop. Law § 426(1) (McKinney Supp. 1972).

63. The UCCC, which also uses the language, "at a residence of the buyer," § 2.501, points out that the usual expression, "in the residence . . ." would allow the seller to have the buyer sign the contract outside thereby avoiding the strict terminology of the statute. See UCCC § 2.501, comment 2. The comment is noted herein to show the excruciating care that is needed in order to protect against the attempt at evasions that will inevitably occur. Certainly there is sufficient allowable variety in styles of doing business to permit the salesman, if he so desires, to evade the precise descriptions so far set up. Once again one must hope that the courts will not let the words of the statute obscure its intent.

64. NCA § 2.501.

contracts made outside of the seller's place of business, however, the NCA provides additional protection.<sup>65</sup> Predicated on the assumption that a consumer "has not exercised full volition when being pressured in his own home or away from a seller's place of business"<sup>66</sup> the NCA treats all such sales as "sales on approval"<sup>67</sup> and thus demands that the consumer affirm such a contract before he becomes obligated by it.

The seller must give the consumer written notice of the requirement of affirmation,<sup>68</sup> but the notice gives no form for the letter of affirmation. Once again, the notice must use language specifying the particular subject matter of transaction. Affirmation is effective only when received by the merchant.<sup>69</sup>

### The Scope of the Statutes

The transactions covered by the various laws and proposals are generally similar. The "Home Solicitation Sale" is confined, in the New York Act, to sales in which "the money, property, or service which is the subject of the transaction is primarily for personal, family or household purposes."<sup>70</sup>

The original UCCC is somewhat more specific. It does not include farm equipment, and many of the states using the UCCC model also exclude automobiles.<sup>71</sup> It also includes land interests bought with large credit charges.<sup>72</sup> New York ignores land sales. The NCA does not exclude any type of goods or service. It specifically includes travelling loanmen.<sup>73</sup>

The New York article does not apply if federal statutes would allow cancellation.<sup>74</sup> This provision applies primarily to the Federal Truth-in-Lending Law<sup>75</sup> and specifically to section 1635(a) of the Act.<sup>76</sup> Neither

---

65. *Id.* §§ 2.501-.504.

66. *Id.* § 2.501, comment 1.

67. *Id.*

68. *Id.* § 2.503.

69. *Id.* § 2.502(4).

70. N.Y. Pers. Prop. Law § 426(1) (McKinney Supp. 1972).

71. UCCC § 2.501. See, e.g., Cal. Civ. Code § 1689.5(c) (West Supp. 1972); N.C. Gen. Stat. § 25A-38(5) (Supp. 1971).

72. *Id.* § 2.104(2)(b).

73. NCA § 2.505, comment.

74. N.Y. Pers. Prop. Law § 426(2)(b).

75. 15 U.S.C. §§ 1601-81t (1970).

76. 15 U.S.C. § 1635(a) (1970) provides: "Except as otherwise provided in this section, in the case of any consumer credit transaction in which a security interest is retained or acquired in any real property which is used or is expected to be used as the residence of the person to whom credit is extended, the obligor shall have the right to rescind the transaction until midnight of the third business

the NCA nor the UCCC have such an exception. This exception deals with certain transactions in which a security interest on realty or on goods to be fixed to the realty, is given as collateral for a credit transaction. "Many items sold on retail installment sales agreements become a part of realty."<sup>77</sup>

The Home Solicitation Sales Act limits itself to sales payable in four or more instalments.<sup>78</sup> A lower court case<sup>79</sup> has interpreted this limitation to include those sales in which the buyer has the option of paying in four or more instalments—not simply those in which the customer must pay in that number.

The UCCC requires only that the transaction provide for instalments or a credit service charge,<sup>80</sup> and that the amount of the payment price that is financed is not greater than \$25,000.<sup>81</sup> The NCA does not require either credit sales or instalments in order for a sale to fall under its purview. It does, however, require that the total cost of a sale made at the merchant's place of business exceed fifty dollars.<sup>82</sup>

Since the criterion of four or more instalments is a prerequisite for a transaction to fall under the New York Act, it is a tempting loophole for those trying to avoid regulation. Moreover, there are many obvious possible evasions to circumvent the statutory criterion of instalment buying that may be easily discovered by those seeking to deprive the consumer of his rights. One obvious device would be to advance a "loan" to the buyer so that he may pay for the product in full. The buyer then pays off the loan in instalments. This artifice was anticipated by the legislature and was simply included as an alternative type of home solicitation sale.<sup>83</sup> There is no doubt that other means will be found by resourceful salesmen to circumvent the intent of the statute. A broad interpretation

---

day following the consummation of the transaction or the delivery of the disclosures required under this section and all other material disclosures required under this part, whichever is later, by notifying the creditor, in accordance with regulations of the Board of his intention to do so. . . . The creditor shall also provide, in accordance with regulations of the Board, an adequate opportunity to the obligor to exercise his right to rescind any transaction subject to this section."

77. P. Fargo, *Credit Insurance Gamesmanship*, 56 A.B.A.J. 1187, 1190 n.12 (1970).

78. N.Y. Pers. Prop. Law § 426(2) (McKinney Supp. 1972).

79. *De Rouville v. E.F.G. Baby Prods.* 67 Misc. 2d 508, 324 N.Y.S.2d 109 (Albany City Ct. 1971), *aff'd*, 69 Misc. 2d 252, 329 N.Y.S.2d 470 (Albany County Ct. 1972).

80. UCCC § 2.104(1)(d).

81. *Id.* § 2.104(1)(e).

82. NCA § 2.501(1).

83. N.Y. Pers. Prop. Law § 426(2) (McKinney Supp. 1972).

of the statutory language may be necessary to provide the consumer with the protection intended by the legislature.

The NCA wisely avoids the use of instalments as a criterion for regulation. Its sole interest is protecting the consumer against making purchases which he had not planned to make.<sup>84</sup> This type of purchase, of course, is almost invariably made in home solicitation sales, for if one plans a purchase, he tends to go to stores and compare prices. Since a travelling salesman is not anticipated (unless, of course, he is requested) the sales made by him are rarely planned.

The New York Act and the UCCC both specifically exclude transactions "made pursuant to a preexisting revolving charge account, or pursuant to prior negotiations between the parties at a business establishment at a fixed location where goods or services are offered or exhibited for sale. . . ."<sup>85</sup> There is no such limitation in the NCA.

#### The Effects of Cancellation

Within ten days after the card giving notice of cancellation prescribed by the New York statute is mailed, the seller must return all payments, notes or other evidence of debt, and any goods given to the seller as a down payment.<sup>86</sup> If the buyer's goods cannot be returned in substantially the same condition, the buyer may elect to take the monetary trade-in allowance given on the goods.<sup>87</sup>

Upon rescission, the seller is allowed to keep five per cent of the total cash price of the transaction or the down payment, whichever is less.<sup>88</sup> If the seller has not returned the appropriate portion of the down payment within the requisite ten days, he is not entitled to keep any fee.<sup>89</sup> Nor, of course, is he entitled to a fee under the act if the buyer's cancellation is not based on the statute.

If the buyer successfully sues in court for down payment money unlawfully retained by the seller in excess of the allowed five per cent fee, the major penalty clause in the Act<sup>90</sup> vitiates the seller's right to a fee and

---

84. NCA § 2.501(1).

85. N.Y. Pers. Prop. Law § 426(2) (McKinney Supp. 1972); See also UCCC § 2.501.

86. N.Y. Pers. Prop. Law § 429(1) (McKinney Supp. 1972).

87. Id. § 429(2) (McKinney Supp. 1972).

88. Id. § 429(3) (McKinney Supp. 1972).

89. Id.

90. Id.

allows the buyer to recover damages, a \$100 penalty and reasonable attorney's fees and costs.

Within a reasonable time after the notice of cancellation is mailed, the seller may pick up the goods sold if he tenders whatever money or property are owed to the buyer.<sup>91</sup> If, however, the seller has not fulfilled his obligation to return such money or property, the buyer has a lien on the goods in his possession and may retain them, but he must in all cases take reasonably good care of them.<sup>92</sup> If the seller has not picked up the goods within forty days after the card is sent, the buyer obtains title to them.<sup>93</sup> No additional fee may be had for services performed.<sup>94</sup> The UCCC in this area is identical in substantive content to the provisions of the Home Solicitation Sales Act.<sup>95</sup>

The NCA, however, differs in both the procedure to be followed by the parties and the sanctions to be applied if a party is delinquent in its duties. In the sale in which an affirmation is required (*i.e.* all eligible sales made outside of the merchant's place of business), a seller must abide by the terms of the transaction for three business days after the notice is given.<sup>96</sup>

Once the seller knows or can reasonably conclude that the buyer will not affirm the transaction, he must return whatever money and property have been advanced by the consumer before he may reclaim the goods sold.<sup>97</sup> If a seller fails to tender whatever property the buyer advanced for its trade-in value, the consumer will have the right to "elect to recover an amount equal to the greater of the trade-in allowance or fair market value."<sup>98</sup>

The NCA treatment of the right to cancel a transaction made in a store<sup>99</sup> is by no means as complete as either its treatment of sales made outside the merchant's place of business or the treatment given such sales in New York's Home Solicitation Sales Act. There is, for example, no specification of the procedure by which rescission is to take place. The NCA, however, does set out penalties for violation of its various sections. Predicated on a figure termed the transaction total—the sum of the cost

---

91. *Id.* § 430 (McKinney Supp. 1972).

92. *Id.* § 430(2) (McKinney Supp. 1972).

93. *Id.* § 430(1) (McKinney Supp. 1972).

94. *Id.* § 430(3) (McKinney Supp. 1972).

95. UCCC § 2.504.

96. NCA § 2.502(2).

97. *Id.* § 2.504(1).

98. *Id.* § 2.504(2).

99. *Id.* § 2.505.

of the goods or service plus the financing charge<sup>100</sup>—different violations incur liability for varying percentages of the total.<sup>101</sup> If the seller fails to notify the buyer of either the right of rescission or the need of affirmation, he acquires a liability, in addition to actual damages, of a penalty amounting to either ten per cent of the transaction total or one hundred dollars—whichever is the greater.<sup>102</sup> A failure to provide notice of the need of an affirmation also allows the consumer “to retain the goods, services or money received pursuant to the transaction without obligation to pay any part of the transaction total for violations to which this section applies. In addition, he is entitled to recover any sums paid to the creditor or merchant pursuant to the transaction.”<sup>103</sup>

A failure on the part of the seller to return any goods or money due a consumer after the latter’s refusal to affirm a transaction gives the customer a right to recover actual and punitive damages plus thirty per cent of the transaction total or \$300, whichever is greater.<sup>104</sup>

A major exception to the purview of the New York law,<sup>105</sup> the UCCC<sup>106</sup> and the NCA<sup>107</sup> is a provision exempting the seller from the requirements of notice and the consumer from the corresponding rights he normally would enjoy under the statutes in situations in which the seller receives a request of the consumer to perform immediately due to an “emergency” and the seller complies. Thus if a buyer demands that the seller provide a sewing machine immediately because the buyer’s old machine broke down and the buyer had to finish the sewing, the rescission period would not be available unless the goods could be returned in “substantially the same” condition as they were when received.<sup>108</sup> “Substantially the same” becomes a matter of factual interpretation and the burden of proof would more likely fall on the consumer requesting the goods than on the good faith supplier. With respect to services there is of course no opportunity for any return. It should be noted that the statutes contain no definition of the word “emergency.” It was the intent of the authors of the UCCC “to protect the seller who in

---

100. Id. § 5.301(3).

101. Id. § 5.302-.304.

102. Id. § 5.302.

103. Id. § 5.305.

104. Id. § 5.304.

105. N.Y. Pers. Prop. Law 427(5) (McKinney Supp. 1972).

106. UCCC § 2.502(5).

107. NCA §§ 2.502(6), 2.505(1).

108. N.Y. Pers. Prop. Law § 427(5)(b) (McKinney Supp. 1972).



good faith relies on the statement of the buyer that an emergency exists and who performs immediately at the request of the buyer."<sup>109</sup>

Given the undefined aspect of the "emergency" exception, there appears to be great danger of exploitation by the seller. It may prove necessary to provide that actual emergencies be evidenced by a written request from the buyer if the assertion of emergency appears to be unduly widespread. Certainly the section may be easily adapted to correct resultant inequities.

There are many problems to be faced with the present New York statute. Acting to cure a specific symptom of a much larger problem, the statute is so qualified as to invite evasion. Even to the most educated, literate and sophisticated consumer, the information presented as a result of this statute at best invites more questions than it answers.<sup>110</sup> To a less sophisticated low income consumer, however, the statute is even more upsetting. Not only is the notice insufficient and the concept confusing,<sup>111</sup> but the statute ignores the traditional style of marketing in which the poor do their business.

It must also be remembered that the alienation incurred by the poor could create an inability, and, to some extent, an unwillingness to make use of the lawyer and the legal system.<sup>112</sup> Moreover, the enforcement of law takes place during the day—often in itself an impossible burden

---

109. UCCC § 2.502, comment. A related question, beyond the scope of this comment to treat, concerns the respective positions of the buyer and seller should the goods be destroyed while in the possession of the buyer during the "cooling-off" period.

110. A Yale Law School study (Note, A Case Study of the Impact of Consumer Legislation: The Elimination of Negotiability and the Cooling-Off Period, 78 Yale L.J. 618 (1969)) of the Connecticut Home Solicitation Sales Act, which at the time gave only a one-day rescission period (Conn. Gen. Stat. Ann. §§ 42-134 to -143 (Supp. 1972-73)), reached the "firm conclusion . . . that a cooling-off period of such short length benefits consumers very little. . . . This conclusion is further corroborated by Legal Aid lawyers who say that since the Act was passed they have had no clients seek advice within the cooling-off period." 78 Yale L.J. at 628-29. The rescission period has subsequently been extended to three business days (Conn. Gen. Stat. Ann. § 42-135 (Supp. 1972-73)), "but this marginal increase is not likely to have a major effect on consumers or dealers." 78 Yale L.J. at 630.

111. P.G. Schrag, *Bleak House 1968: A Report on Consumer Test Legislation*, 44 N.Y.U. L. Rev. 115, 119-20 (1969) [hereinafter cited as Schrag]; see also Caplovitz, *supra* note 10, at 19.

112. In a test question to heads of poor households, 64% of the people asked did not know where to get help if cheated by a merchant. Caplovitz, *supra* note 10, at 175. See also note 101 and accompanying text *supra*.

for one whose salary is barely sufficient to provide a living for self and family.<sup>113</sup> The cost of an attorney may likewise be sufficiently prohibitive to make any recourse to the law unthinkable.<sup>114</sup>

We have already seen that the low income consumer is not the rational buyer as envisioned in economic texts. Unfortunately, however, a legislature often:

presupposes a consumer equipped to deal with the business community on at least equal terms. This consumer has three essential characteristics:

- (1) He knows that he should and wants to shop around for best buys when purchasing goods and services.
- (2) He is competent to decide which product offers the greatest value for the least money.
- (3) He knows his legal rights (and liabilities) in the event of a post-sale legal conflict with the seller, and is prepared to use all available tools in such a conflict.

Only such consumers can avoid repeated "bad buys" and insure the competition among businessmen which keeps prices at a reasonable level while assuring continued high quality.<sup>115</sup>

New York likewise views the consumer as a rational buyer:

In order to encourage buyers to be careful in signing contracts tendered by door-to-door salesmen the [New York statute permits] the seller to retain up to 5% of the sales price as a cancellation fee. While it is arguable that this provision might encourage sellers to require down payments, that result would not necessarily be undesirable. Requiring a buyer to put up some money may in itself force him to reflect upon the wisdom of the transaction.<sup>116</sup>

This reasoning, while applicable to the sophisticated consumer, bears little relation to actual patterns of buying of the low income consumer. Instead of looking for the best buy, the poor look for the dealer who will extend the most credit or provide in their repeated transactions a sense of security for the family.<sup>117</sup> There is no assurance that they will be able

113. Limited protection is available. See Schrag, *supra* note 111, at 133.

114. "The number of consumers having no redress because the amount lost is not commensurate with the attorney's fee constitutes the vast majority." Comment, *Translating Sympathy for Deceived Consumers into Effective Programs for Protection*, 114 U.Pa. L. Rev. 395, 409 (1966). ". . . even with virtually unlimited economic resources, a [consumer] test-case lawyer is in trouble in New York courts. . . . I have just spent an entire year working on six cases." Schrag, *supra* note 111, at 155.

115. *The Poor*, *supra* note 7, at 748 (footnote omitted).

116. Exec. Memo. [1970], McKinney's Sess. Laws of N.Y., 2899-2900.

117. See Bower, *FTC National Consumer Protection Hearings 360-61* (1968).

to engage in any transaction, and so there is no attempt to control the quality of the item. The only question is how can the consumer get the goods he wants; the cost will be considered later.<sup>118</sup>

It is difficult to establish overall norms for buyer behavior, for various groups have different goals in their buying. The low income consumer in a "traditional" marketplace attempts to foster a sense of security in his existence by buying from established "friends" rather than allowing the value offered by competing merchants to establish who the parties will be.<sup>119</sup> He accepts poor quality merchandise at exorbitant prices as the cost of attempting to make society appear stable by dealing with "friends" and of acquiring the goods that will allow him to achieve some degree of self-esteem through his purchases.<sup>120</sup> At the same time, legal expenses and the demands of litigation act as overwhelming obstacles to the poor contemplating a lawsuit.<sup>121</sup>

It is incumbent upon society, therefore, to insure that those with whom the poor choose to deal do not operate completely beyond the scope of proper entrepreneurial behavior.<sup>122</sup> One possible mechanism to that end is to license all individuals acting as sellers or agents of sellers in home solicitation sales. The Home Solicitation Sales Act does not eliminate the need for licensing of door-to-door salesmen primarily because the power to correct unwise transactions is, as has been seen, not useful to those who do not have the requisite training, background or financial resources.<sup>123</sup>

Licensing of door-to-door salesmen has fallen into disrepute, mainly because of the difficulty in defining the individuals to be licensed. Defining the individual in terms of the activity still leaves the activity subject to evasion, but the activity is at least more readily defined.

Finally, the failure to obtain a license need not result in criminal sanctions, for the law is loathe to prosecute a businessman doing what is

---

118. Caplovitz, *supra* note 10, at 173-74.

119. See note 25 *supra*.

120. Caplovitz, *supra* note 10, at 12-13, 19-20.

121. See note 114 *supra*.

122. In fact, "since Hammurabi's written code of law, organized societies have recognized the need to provide the consumer with legislative protection from the unscrupulous seller or lender." Note, *New Consumer Credit Reforms in Illinois*, 17 De Paul L. Rev. 194 (1967) (footnote omitted).

123. *Contra*, Opinions of the State Comptroller of the State of New York 71-164, in N.Y. Pers. Prop. Law § 425 (McKinney 1972), comment.

thought to be his job,<sup>124</sup> but failure to obtain a license might simply be treated as is the failure to give a card to a buyer—the buyer can always pull out.

It may be argued that the expense to sellers and government alike would be prohibitive. Certainly there would be a high cost of keeping information current, but the amount of money saved by the low income consumer, and thus by social welfare agencies throughout the state, might easily provide the funds, and a major weapon in the fight against poverty as well.

It is a well-known phenomenon that the poor do not trust the law. In fact, it has often been used to protect the seller.<sup>125</sup>

. . . Robert F. Kennedy . . . insist[ed] that the "poor man looks upon the law as an enemy. . . . For him the law is always taking something away." Nicholas deB. Katzenbach . . . puts it that, "To us, law and regulations are protections and guides, established for our benefit, and for us to use. But to the poor, they are a hostile maze, established as harassment, at all costs to be avoided."<sup>126</sup>

Thus, in a large sample of heads of black households taken in Newark, 87 per cent of those who felt they had been victims of illegal racial discrimination did not apply to any agency for redress. Leonard Zeitz notes:

Probes elicited these typical comments:

"You can't do nothing. Just hope men will change."

---

124. B. Sher, *The "Cooling-Off" Period in Door-to-Door Sales*, 15 U.C.L.A. L. Rev. 717, 779 (1968).

125. The Holder-in-Due-Course doctrine is one example of the unfair disadvantage to which an unsophisticated consumer may be subjected by the workings of a complicated law. Based on ancient principles of trade law, the doctrine states that the buyer of negotiable commercial paper is not liable for circumstances making its payment unfair if he is not warned of the circumstances before he buys the paper. N.O. Littlefield, *Good Faith Purchase of Consumer Paper: The Failure of the Subjective Test*, 39 S. Cal. L. Rev. 48 (1966). "The social evils flowing from negotiability in this circumstance have become manifest, and there has been a clear trend in both the courts and the legislatures toward amelioration of its consequences. In particular, the unfairness to the poorest members of the community of the law governing consumer instalment purchases has generated a reaction that is giving rise to a major alteration in it. This departure is being accomplished . . . by legislative action forbidding the use of negotiable instruments in consumer instalment transactions and by judicial attempts to stretch the facts to deny holder in due course status to finance companies." A. Rosenthal, *Negotiability—Who Needs It?*, 71 Colum. L. Rev. 375, 379-80 (1971) (footnotes omitted). By statute in New York, the holder in due course defense, in cases of consumer transactions not dealing with home improvements, was eliminated. N.Y. Pers. Prop. Law § 403 (McKinney Supp. 1972).

126. L. Miller, *supra* note 1, at 386.

"Mister, I don't go where I'm not wanted."

"You can't prove nothing, so why try."

"I just don't want no trouble."<sup>127</sup>

It is necessary, therefore, in order effectively to protect the poor consumer, that he be saved from the inequities that do result from the superior resources and expertise possessed by the salesmen. The day's pay that a consumer may lose testifying while defending himself against a claim might often be a greater proportionate drain on his income than a full day's attorney's fee on the company claiming the debt.

A desirable alternative, therefore, is to use the idea of the Home Solicitation Sales Act to protect a consumer by forcing a degree of education on him, and then giving him a chance to use this knowledge in evaluating, and to a degree controlling, his own transaction.

To this end, it is suggested that at the very least, an affirmation similar to that contained in the NCA be required—perhaps in the consumer's own handwriting—as one of the items to be pleaded and proved in any claim. The salient information may be included on the affirmation or as an additional part of the specified affirmation form. If no such affirmation exists, no claim would be allowed.

The draw of easy credit will not be so easily curbed, but will linger until the poor have equal access to the more conventional forms of credit. Until that time arrives when access to credit does occur, it is in the best interest of both the consumer and the state as well, to protect him from the abuses to which he is so prone.

A proposal for a licensing statute appears in the Appendix hereto. It will provide a view of the myriad constructive possibilities afforded the legislator in this area. Thus, sections of the proposed statute treat not only those problems specifically discussed herein, but also other related dissatisfactions with home solicitation sales as currently practiced.

#### APPENDIX

There shall be added to the Personal Property Law a new article to be numbered Article 10-B which reads as follows:

**§ 441. Short title; purpose.**

This act may be cited as the Consumer Transaction Protection Act. The purpose of this act is to afford consumers a more trustworthy marketplace in consumer transactions.

---

127. L. Zeitz, *Survey of Negro Attitudes Toward Law*, 19 Rutgers L. Rev. 288, 295 (1965).

*Comment:* Complete protection for the poor consumer cannot be obtained until he is fully integrated into the credit system and thereby into the more complex dynamics of the marketplace at large. This integration, however, is occurring at a very slow pace. It is necessary, therefore, to introduce palliative measures to lessen the impediments to this integration.

#### § 442. Definitions.

In this article:

1. "The subject of the transaction" means that money, property or service for which money or a promise therefor is given by a purchaser or borrower.

2. "Consumer transaction" means any transaction made outside of the seller's place of business wherein the subject of the transaction is primarily for personal, family or household purposes.

3. "Seller" means any person, copartnership or corporation which participates or intends to participate in over twenty-five consumer transactions per year or more than five consumer transactions per week as the performer of services or the previous owner of the subject of the transaction, or an agent, distributor or consignee of such owner or performer.<sup>128</sup>

4. "Buyer" means any natural person who participates in a consumer transaction with a seller and who is a recipient of the subject of the transaction.

5. "Consumer transaction format" means the parameters of the price, the terms and the financing methods to be used in a consumer transaction, the exact description of the subject matter of the transaction and the quantity thereof to be sold or loaned, and the dates of the beginning and the ending of the period during which the type of the consumer transaction will take place.<sup>129</sup>

6. "Unconscionable trade practice" means any act or practice in connection with the sale, lease, rental or loan or in connection with the offering for sale, lease, rental or loan of any consumer goods or services, or in the extension of consumer credit, or in the collection of consumer

---

128. This definition is derived from the definitions of "real estate broker" and "real estate salesman" found in New York statute law. N.Y. Real Prop. Law § 440 (McKinney 1968). The number of sales used as criteria for determining the seller is, of course, arbitrary and may easily be adjusted.

129. This concept is new. Since the proposal seeks to regulate activities rather than simply people, it must provide a mechanism for discovering exactly what are the activities planned by the seller.

debts which unfairly takes advantage of the lack of knowledge, ability, experience or capacity of a consumer; or results in a gross disparity between the value received by a consumer and the price paid, to the consumer's detriment; provided that no act or practice shall be deemed unconscionable under this act unless declared unconscionable and described with reasonable particularity in a state law, local ordinance, or in a rule or regulation promulgated by the Attorney General. In promulgating such rules and regulations, the Attorney General shall consider, among other factors: (1) knowledge by merchants engaging in the act or practice of the inability of consumers to receive properly anticipated benefits from the goods or services involved; (2) gross disparity between the price of goods or services and their value measured by the price at which similar goods or services are readily obtained by other consumers; (3) the fact that the acts or practices may enable merchants to take advantage of the inability of consumers reasonably to protect their interests by reason of physical or mental infirmities, illiteracy or inability to understand the language of the agreement, ignorance or lack of education, or similar factors; (4) the degree to which terms of the transaction require consumers to waive legal rights; (5) the degree to which terms of the transaction require consumers to jeopardize money or property beyond the money or property immediately at issue in the transaction; and (6) definitions of unconscionability in statutes, regulations, rulings and decisions of legislative or judicial bodies in this state or elsewhere.<sup>130</sup>

*Comment:* By promulgating precise definitions of unconscionable practices, both legislatively and administratively, a broader scope of consumer protection, freer from abuse by circumvention, may be afforded.

#### § 443. License required for sellers in consumer transactions.

No person, copartnership or corporation shall act as a seller in a consumer transaction without first procuring a license therefor as provided in this article.<sup>131</sup>

*Comment:* It is contemplated that it will most often be necessary for both a sales-

---

130. This definition closely parallels the definition found in the New York City Charter ch. 64, tit. A, § 2203-2.0(b) (Supp. 1971). The city statute is predicated upon the leadership of a Commissioner of Consumer Affairs. It would, of course, be possible to use an equivalent commissioner in New York State. There are certain advantages to be obtained in giving one department the option of taking effective legal action in court and exercising the powers of a licensing agency.

131. This section is derived from N.Y. Real Prop. Law § 440-a (McKinney 1968).

man and his employer to make application for licenses. It is not unusual to find that the salesman who declares himself an agent of a company on Monday morning as he sells his wares is no longer in the company's employ on Tuesday when his product is found to be defective. It is, therefore, necessary to insure stability on the part of both the salesman and the firm he represents.

**§ 444. Application for license.**

1. Any person, copartnership or corporation desiring to act as a seller in a consumer transaction on or after \_\_\_\_\_, shall file with the office of the Attorney General an application for a license to participate in consumer transactions with a specific consumer format.

2. A separate application shall be filed for each consumer transaction format to be used by the seller.

3. The application shall set forth, in such detail and in such form as the Attorney General shall prescribe, the following:

A. The name and residence of the applicant, and if an individual, the name under which he intends to conduct business. If the applicant is a copartnership the name and residence address of each member thereof and the name under which the business is to be conducted; or, if the applicant is a corporation, the name and address of the corporation and the name and residence address of each of its officers.

B. The places where the business is to be conducted. Each city, town or village is to be specified.

C. The business or occupation theretofore engaged in by the applicant, or if a copartnership, by each member thereof, or, if a corporation, by each officer thereof, for a period of two years immediately preceding the date of such application, setting forth the place or places where such business or occupation was engaged in and the name or names of employers, if any.

D. The prior criminal record, if any, of the applicant, or if a corporation, of each officer thereof, or, if a copartnership, of each member thereof.

E. A statement of each consumer transaction format to be used by the seller.

F. If the applicant is an agent, the names and addresses of the employer; if an employer, the names and addresses of all employees acting as sellers.

G. Each application for a license under this act shall be subscribed by the applicant, or an officer or a member thereof, and affirmed as true by the subscriber under the penalties of perjury.

H. Submitted with the application is to be a fee determined by the



Attorney General to be sufficient to cover the costs of processing and inspection.<sup>132</sup>

*Comment:* This section is the anchor of the proposed act. It is hoped that the Attorney General, armed with the information provided by this application and his own experience in the area, will be able to deduce the true nature of the transaction applied for and will be able to use his knowledge to eliminate the more blatantly unfair practices before they invade the marketplace.

#### § 445. Granting the license.

The Attorney General may at his discretion grant licenses for all consumer transactions of services and merchantable goods which are not unconscionable. The license will be valid, if issued, for the period of time requested, as long as all consumer transaction formats and other information are accurate.

*Comment:* It is to be stressed that the criteria of unconscionability established in Section 442(6) of this act are to be considered indicia of acceptability, but that the determination of the Attorney General need not be limited to such criteria. There is provided in the statute a means for the Attorney General, through use of his rule-making power, to eliminate unmerchantable products from the market. "Merchantability" is defined in N.Y. U.C.C. § 2-314 (McKinney 1964).

#### § 446. Affirmation.

1. In a commercial transaction initiated by the seller and consummated outside of the seller's place of business, in which the dollar amount the buyer pays, will pay, has paid or is obligated to pay exceeds fifty dollars, the buyer is not obligated under the transaction until he has affirmed the transaction in writing.

2. The seller is bound to the terms of the agreement reached until midnight of the third business day after the agreement is reached.

3. The seller must provide the consumer with a statement of his need to affirm the transaction. The statement must:

A. Appear under the caption: "BUYER'S NEED TO AFFIRM THE TRANSACTION" printed in eight point type;

B. read as follows: "If you were first contacted by the seller or if this agreement was completed by the seller at a place other than his place of business and you wish to go through with the transaction, you must tell the seller by a letter in order to be obligated. The seller may not change the terms or avoid the transaction for three business

---

132. This section is derived from N.Y. Real Prop. Law § 441 (McKinney 1968).

days after you receive this notice. The letter must be mailed to: (name and address of seller)."

C. If the agreement was consummated in a city of a population of over a million, the above statement must be in both Spanish and English.

D. Until the seller complies with subsection (3) of this section, any affirmation made by the buyer is revocable by him.

4. Affirmation occurs when the buyer gives or mails written notice of affirmation to the seller at the address stated in the notice required in subsection (3) of this section.

5. Notice of affirmation need not take a particular form and is sufficient if it indicates by any form of written expression the intention of the buyer to affirm the transaction.

*Comment:* This section is an adaptation of NCA §§ 2.502 and 2.503. It is envisioned in the operation of this section that sellers will not readily deliver goods without affirmation from the buyer. The \$50 amount is intended to qualify the transaction in terms of its importance to the buyer, so that his concern for the amount in question will overcome his predictable disregard due to inertia for the affirmation procedure. The possibility of creating a large residue of returned, used goods is such that consideration should be given to limiting the applicability of this section to transactions in which no delivery is scheduled within the three-day period.

#### § 447. Conformity with the consumer transaction format statement.

The Attorney General may, by appropriate means, insure that the consumer transactions conform to the statement of the consumer transaction format. Non-conforming transactions create no obligation on the part of the buyer. Any proposed change in the consumer transaction that would materially vary the registered consumer transaction format must be submitted to the Attorney General, together with a full justification and explanation of the proposed change, which must be approved by the Attorney General under the licensing procedures of this Act. Any change in the transaction format which is not approved shall be deemed non-conforming.

*Comment:* The requirement of an approval by the Attorney General provides a strict regulation for variances in the consumer transaction format as originally registered with the Attorney General. A transaction made in conformity with a new consumer transaction format for which an application has been made is not deemed conforming with a registered format until approval has been given by the Attorney General. It therefore creates no obligation for the buyer.

It may also be possible to achieve substantially the same protection while not

requiring express approval by the Attorney General by empowering him to issue rejections of proposed changes within a statutory period of time.

**§ 448. Revocation of the license by the Attorney General.**

The Attorney General may upon ten days' notice revoke a license for cause, including, but not limited to, material variations from the consumer transaction format, and may require a list of all buyers with whom the seller dealt from thirty days prior to the date of the revocation.

**§ 449. Pleading.**

In any suit filed against a buyer, a seller must allege upon knowledge and prove that the consumer transaction was licensed, that it conformed to the consumer transaction format as stated in the license application, and that, if required, it was affirmed.

**§ 450. Sanctions.**

1. An intentional deviation from the transaction format on the part of the seller, if material, entitles the buyer to triple damages.

2. Any material deviation from the statement of consumer format entitles the buyer to attorney's fees.

3. Any merchandise delivered to a buyer as a result of a transaction not conforming with the statement of consumer format is to be considered the property of the buyer without any claim on the part of the seller.

*Comment:* Sections 448, 449, and 450 act as the enforcement articles of the statute. It is not sufficient merely to allow the seller to settle those transactions which bring on litigation by doing what was promised in the first place. There is simply too little advantage to acting responsibly from the outset. At the same time, the opportunity to threaten legal involvement is not practicable for a buyer who is not versed in the law and who does not have the time or the resources to carry out his suit. It is hoped that these sections will, to some extent combine the best of both worlds; thus, the litigious may sue while those not so inclined may be protected from overreaching sellers.