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## Deceptive Practices in the Marketplace: Consumer Protection by New York Government Agencies

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# COMMENTS

## DECEPTIVE PRACTICES IN THE MARKETPLACE: CONSUMER PROTECTION BY NEW YORK GOVERNMENT AGENCIES

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The past several years have witnessed considerable growth in the power and number of New York governmental consumer protection agencies. New and potent statutory powers have been granted to the Attorney General.<sup>1</sup> At the local level, cities,<sup>2</sup> counties,<sup>3</sup> and towns<sup>4</sup> have created consumer agencies and granted many of them enforcement and rulemaking powers.<sup>5</sup> Legislation on all levels of state government regulates an increasing number of commercial activities for the protection of consumers.<sup>6</sup> That legislation has likewise led to greater cooperation among state and local consumer agencies.<sup>7</sup> This Comment will examine the structures and powers of the various New York State government agencies which protect consumers from deceptive acts and practices,<sup>8</sup> and evaluate the effectiveness of these agencies in combatting consumer deceptions.

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1. See, e.g., N.Y. EXEC. LAW § 63(12) (McKinney 1972); N.Y. GEN. BUS. LAW § 349 (McKinney Supp. 1974). See also text accompanying notes 45-119 *infra*.

2. See, e.g., NEW YORK, N.Y., CHARTER ch. 64, §§ 2201-04 (1972); Yonkers, N.Y., Ordinance 2, Jan. 12, 1971.

3. See, e.g., NASSAU COUNTY, N.Y., ADMIN. CODE tit. D, § 21-10.0 (Supp. 1973) (enacted June 9, 1967); Erie County, N.Y., Ordinance 20 (1973); Rockland County, N.Y., Ordinance 5, Oct. 19, 1970.

4. See, e.g., Huntington, N.Y., Ordinance 8, Oct. 19, 1971; Ramapo, N.Y., Ordinance 1, March 22, 1972.

5. See, e.g., NASSAU COUNTY, N.Y., ADMIN. CODE tit. D, § 21-10.2 (Supp. 1973); NEW YORK, N.Y., ADMIN. CODE ANN. ch. 64, tit. A, §§ 2203d-2.0 to -7.0 (Supp. 1974); Huntington, N.Y., Ordinance 8, Oct. 19, 1971.

6. See, e.g., N.Y. AGRIC. & MKTS. LAW § 193-h (McKinney Supp. 1974) (requiring unit pricing of consumer commodities in food stores); Suffolk County, N.Y., Ordinance 17, Nov. 9, 1971 (providing for the licensing of certain occupations); East Greenbush, N.Y., Ordinance 2, Nov. 8, 1971 (regulating hawking and peddling).

7. The New York State Consumer Protection Board was established in part to facilitate communication and cooperation among state and local consumer agencies. See notes 120-37 *infra* and accompanying text. The Regional Consumer Council, a non-governmental consumer organization consisting of many federal, state, and local consumer agencies in the New York City area, is active in fostering cooperation among its members. See 1974 N.Y. REGIONAL CONSUMER PROTECTION COUNCIL, PRO BONO PUBLICO LEGAL COUNSEL PROGRAM ANN. REP. [hereinafter cited as 1974 N.Y. REGIONAL COUNCIL REP.]; note 136 *infra* and accompanying text.

8. The phrase "deceptive acts and practices" originated in the Federal

## I. Introduction—Governmental Approaches to the Problem of Consumer Deception

Sellers hold great advantages<sup>9</sup> in dealing with consumers, and in most instances,<sup>10</sup> it is simply not practical for a defrauded consumer to seek redress.<sup>11</sup>

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Trade Commission Act of Sept. 26, 1914, ch. 311, § 5, 38 Stat. 719 (codified at 15 U.S.C. § 45(a)(1) (1970)). It has been adopted in both state and local legislation. See text accompanying notes 29-119, 150-221 *infra*. For a general discussion of the inadequacy of the doctrine of "caveat emptor" in the marketplace, see W. MAGNUSON & J. CARPER, *THE DARK SIDE OF THE MARKETPLACE: THE PLIGHT OF THE AMERICAN CONSUMER* (1969) [hereinafter cited as MAGNUSON].

9. Where the consumer is poor and uneducated, the seller's advantages reach the point of dominance. See D. CAPLOVITZ, *THE POOR PAY MORE* 12-30 (1963); FTC, *ECONOMIC REPORT ON INSTALLMENT CREDIT AND RETAIL SALES PRACTICES OF DISTRICT OF COLUMBIA RETAILERS*, IN *THE GHETTO MARKETPLACE* 76-107 (F. Sturdivant ed. 1968).

10. The enforcement of state antitrust laws is beyond the scope of this Comment. The present inquiry is directed toward state and local governmental agencies dealing with those consumer deceptions that do not involve any violation of state or federal antitrust laws. Magnuson lists and describes those schemes the Federal Trade Commission says are most responsible for fleecing the public. They include bait and switch advertising, chain-referral selling, free gimmicks, charity swindles, business opportunity swindles, unsolicited merchandise, phony home improvements, substandard correspondence and vocational schools, and land-fraud sales. MAGNUSON 31.

11. Comment, *Translating Sympathy for Deceived Consumers into Effective Programs for Protection*, 114 U. PA. L. REV. 395, 409 (1966) [hereinafter cited as *Effective Programs*]; see Driscoll, *De Minimis Curat Lex—Small Claims Courts in New York City*, 2 FORDHAM URBAN L.J. 479 (1974). Reasons for the unfeasibility are that the sum involved is too little to hire an attorney and the indigency requirements of legal aid services make that source of free counsel unavailable to all but the poorest consumers. Note, *Developments in the Law—Deceptive Advertising*, 80 HARV. L. REV. 1005, 1127 (1967) [hereinafter cited as *Deceptive Advertising*]. Small claims court is a viable source of redress, but its availability is limited. See N.Y. CITY CIVIL CT. ACT §§ 207, 1801 (McKinney Supp. 1974). In addition, many consumers will avoid the use of small claims court either because of their fear of the legal process or because they reason that the time spent in court and away from employment would prove more costly than any possible recovery. See MAGNUSON 31, 52-53.

Government has attacked these problems<sup>12</sup> on several fronts. State statutes seek to protect the consumer by prescribing particularized courses of dealings in the marketplace,<sup>13</sup> establishing beneficial court procedures, and providing civil remedies to correct abuses that have traditionally existed.<sup>14</sup> However, the statutes do little to

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12. It has been estimated that consumers lose several billion dollars each year due to deceptive acts of sellers. MAGNUSON 8.

13. See *e.g.*, N.Y. PERS. PROP. LAW §§ 302 (Motor Vehicle Retail Instalment Sales Act), 402 (Retail Instalment Sales Act) (McKinney 1962), *as amended*, (McKinney Supp. 1974). Under relevant sections of the Retail Instalment Sales Act, N.Y. PERS. PROP. LAW § 413(10)(b) (McKinney Supp. 1974), and the Motor Vehicle Retail Instalment Sales Act, *id.* § 302(13)(b), assignment of wages is prohibited. Compare the N.Y. BANKING LAW § 356 (McKinney 1971), *as amended*, § 356(3) (McKinney Supp. 1974). An assignment of earned or future wages given to secure a small loan from a licensed lender is invalid unless the loan is paid simultaneously with the execution of an assignment, the assignment is in writing signed by the borrower and his spouse if married, and the assignor's employer receives a verified copy of the assignment and a verified statement of the unpaid amount. *Id.* See also N.Y. C.P.L.R. § 5231(b) (McKinney Supp. 1974) (exempting ninety percent of wages from income execution for instalments therefrom, and one hundred percent if earnings are eighty-five dollars or less per week).

14. For example, section 407(7) of the N.Y. PERS. PROP. LAW gives a buyer an unconditional right to rescind a transaction when the seller has not disclosed interest rates as an annual percentage figure in complete conformity with the Federal Truth in Lending Act, 15 U.S.C. §§ 1601-81 (1970), *as amended*, 15 U.S.C. §§ 1601, 1609 (Supp. III, 1973), at the time of the sale or within ten days thereafter. Section 427 permits the consumer to cancel a contract entered into at his home at any time before midnight of the third business day after signing. Notice of cancellation must be in writing, and may be delivered by mail. Pressure sales by home solicitors have led to the enactment of numerous hawker and peddler laws at the local level. See note 305 *infra* and accompanying text. With regard to creditors obtaining default judgments by fraudulent or unconscionable means, see N.Y. REGIONAL OFFICE, FTC, STAFF REPORT ON DEBT COLLECTION HEARINGS (1973). Legislation has also provided other forms of relief. Consumer collection cases may now be brought only in the county where the consumer lives or where the transaction took place. N.Y. C.P.L.R. § 503 (f) (McKinney Supp. 1974); N.Y.C. CIVIL CT. ACT § 301(a) (McKinney Supp. 1974). The clerk of the court is empowered to reject collection suits *sua sponte* where venue requirements have not been satisfied, even without

prevent the wide range of consumer deceptions that exist, and they often do not provide relief when the amount the victimized consumer seeks to recover is not sufficiently large to make litigation worthwhile. They afford negligible protection unless other regulatory acts co-exist with them.

## II. State Jurisdiction Over Deceptive Acts and Practices<sup>15</sup>

### A. Enforcement of Criminal Laws

For many years, the district attorneys and the Attorney General shared jurisdiction in the enforcement of virtually the only general deceptive practices statute<sup>16</sup> in New York. The statute made false advertising a misdemeanor; its violation required only an intent to dispose of or sell the falsely advertised merchandise.<sup>17</sup> Knowledge of the falsity was not an element of the crime.<sup>18</sup> This absence of intent to deceive made the statute one of strict liability.<sup>19</sup> While its modern

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the consumer's presence in court to request the transfer. N.Y.C.P.L.R. § 513 (McKinney Supp. 1974). A growing number of statutes require disclosure of weight and volume measures in specified consumer transactions. See, e.g., N.Y. AGRIC. & MKTS. LAW § 193-h (McKinney Supp. 1974) (requiring unit pricing of consumer commodities in food stores); New York City Truth in Pricing Law, NEW YORK, N.Y., ADMIN. CODE ANN. ch. 64, §§ B64-1.0 to -17.0 (Supp. 1973).

15. This section does not deal with those agencies that regulate specified industries, professions, and activities; this subject is discussed in text section IV *infra*.

16. Law of May 10, 1915, ch. 569, [1915] N.Y. Laws 1760 (repealed 1967). This statute was New York's version of the "Printer's Ink Statute." The original model statute was drafted in 1911 by Printer's Ink Magazine, and was enacted thereafter with some variation by most states. The statute made any advertised representation that was "untrue, deceptive, or misleading" a misdemeanor. See *Deceptive Advertising* 1018-19; Note, *The Regulation of Advertising*, 56 COLUM. L. REV. 1018, 1098-1111 (1956) for a compilation of these statutes.

17. Law of May 10, 1915, ch. 569, [1915] N.Y. Laws 1760 (repealed 1967).

18. *Id.*

19. *People v. Richter's Jewelers, Inc.*, 291 N.Y. 161, 165-66, 51 N.E.2d 690, 691 (1943). See also *United States v. Andreadis*, 366 F.2d 423, 433 (2d Cir. 1966), *cert. denied*, 385 U.S. 1001 (1967); *People v. Glubo*, 5 N.Y.2d 461, 468-72, 158 N.E.2d 699, 704-05, 186 N.Y.S.2d 26, 34-36 (1959); *People*

day counterpart (Penal Law section 190.20)<sup>20</sup> continues this strict liability feature, it contains "an affirmative defense that the allegedly false or misleading statement was not knowingly or recklessly made or caused to be made."<sup>21</sup> The statute is broad enough to encompass a wide variety of deceptive advertising,<sup>22</sup> but it has not provided adequate protection for the consumer because of problems inherent in enforcing it. These include the unwillingness of prosecutors to institute criminal proceedings against businessmen, the hesitancy of juries to convict under so-called "white collar" penal laws, and the prosecutors' lack of time to prosecute these cases since they are considered less serious than those involving physical injury.<sup>23</sup>

Other criminal statutes prohibit particularized deceptive acts and practices, but these statutes are even less useful than Penal

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v. Garten, 235 App. Div. 641, 255 N.Y.S.2d 823 (2d Dep't 1932); *People v. Kelly*, 204 Misc. 145, 147, 122 N.Y.S.2d 248, 250 (Magis. Ct. 1953). However convictions under former N.Y. PENAL LAW § 421 (Law of May 10, 1915, ch. 569, [1915] N.Y. Laws 1760 (repealed 1967)) and the present N.Y. PENAL LAW § 190.20 (McKinney Supp. 1974) have been difficult to achieve in the absence of proof of larcenous intent. See *Dole, Merchant and Consumer Protection: The New York Approach to the Regulation of Deceptive Trade Practices*, 53 CORNELL L. REV. 749, 759 n.63 (1968).

20. N.Y. PENAL LAW § 190.20 (McKinney Supp. 1974).

21. *Id.* Defendant has the burden of establishing his affirmative defense at trial by a preponderance of the evidence. *Id.* § 25.00(2) (McKinney 1967).

22. N.Y. PENAL LAW § 421 (Law of May 10, 1915, ch. 569, [1915] N.Y. Laws 1760 (repealed 1967)), the predecessor of present section 190.20, had been held to encompass "bait advertising," *People v. Glubo*, 5 N.Y.2d 461, 467, 153 N.E.2d 699, 703, 186 N.Y.S.2d 26, 31-32 (1959), and the advertisement of fictitious price cuts, *People v. Minjac Corp.*, 4 N.Y.2d 320, 151 N.E.2d 180, 175 N.Y.S.2d 16 (1958). A number of other statutes providing for criminal penalties prohibit false advertising in specific fields of commercial activity. See, e.g., N.Y. AGRIC. & MKTS. LAW § 202-a (McKinney 1972) (false advertising of any food product); N.Y. GEN. BUS. LAW §§ 117 (deceptive advertising by travel agents), 187(2) (deceptive advertising by employment agents) (McKinney 1968).

23. See *Effective Programs* 425-27. See also 1968 N.Y. ST. B. ASS'N, ANTITRUST LAW SYMPOSIUM 114-32 [hereinafter cited as 1968 SYMPOSIUM] (discussing proposed New York State statute dealing with deceptive business practices).

Law section 190.20 because they require an intent to deceive.<sup>24</sup> In addition, the statutes do not cover the entire range of deceptive acts and practices confronting consumers.<sup>25</sup>

Of greater benefit to consumers are statutes which provide both criminal and civil penalties for either the commission of specifically prohibited activities<sup>26</sup> or for failure to comply with statutory and other regulatory standards.<sup>27</sup> The existence of both civil and criminal penalties in these instances gives the supervising agency flexibility in its efforts to secure compliance. While major use is made of civil penalties, criminal proceedings are initiated where serious violations occur.<sup>28</sup>

## B. Consumer Protection Agencies

### 1. Bureau of Consumer Frauds and Protection

New York State's best known consumer protection agency is the Bureau of Consumer Frauds and Protection, established in 1957 by executive order of Attorney General Louis J. Lefkowitz.<sup>29</sup>

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24. See, e.g., N.Y. GEN. BUS. LAW §§ 392-b (misdemeanor for placing certain false descriptions upon an article of merchandise or its label with intent to deceive), 395 (misdemeanor for offering, with intent to deceive, used, rebuilt, reconditioned or repossessed television sets, radios, phonographs or major household appliances without so tagging the merchandise), 533 (misdemeanor to knowingly distribute, sell or install reactivated or second-hand radio or television tubes without clearly disclosing the nature of the tube) (McKinney 1968).

25. See 1968 SYMPOSIUM 117.

26. A new statute declaring chain distributorship schemes to be unlawful is of this type. See N.Y. GEN. BUS. LAW § 359-fff (McKinney Supp. 1974). Subdivision 3 of this law states that "[a] chain distributor scheme shall constitute a security within the meaning of this article and shall be subject to all of the provisions of this article." This includes a misdemeanor penalty, among others, for violation of any section of the article. *Id.* § 352-c (McKinney 1968).

27. A new state law requiring unit pricing in retail food stores is N.Y. AGRIC. & MKTS. LAW § 193-h (McKinney Supp. 1974). Violation of any section of the Agriculture and Markets Law is a misdemeanor. *Id.* § 41 (McKinney 1972).

28. See, e.g., N.Y. AGRIC. & MKTS. LAW § 41 (McKinney 1972); N.Y. BANKING LAW § 358 (McKinney 1971).

29. No specific statutory mandate exists for either the creation or oper-



a. The Bureau in Operation

The Bureau's aim is to protect consumers in New York State, consumers outside of New York State who deal with the New York business community, and New York consumers who purchase goods and/or services from out-of-state concerns.<sup>30</sup> Staff members resolve many problems through mediation,<sup>31</sup> which accounts for most of the funds recovered by the Bureau.<sup>32</sup> Ethical businesses have proven most cooperative in this regard.<sup>33</sup> Where accommodation has either not been reached or is deemed inappropriate, formal legal proceedings are initiated.<sup>34</sup> The Bureau also publishes extensive consumer literature and conducts various educational programs to assist the public to avoid victimization by fraudulent dealers.<sup>35</sup> It likewise recommends consumer legislation, and staff members frequently appear before various federal, state, and local government depart-

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ation of the bureau. Mindell, *The New York Bureau of Consumer Frauds and Protection—A Review of Its Consumer Protection Activities*, 11 N.Y.L.F. 603, 603 n.4 (1965) [hereinafter referred to as Mindell]. The Bureau has grown to a staff of over thirty people. THE 1973 BUREAU OF CONSUMER FRAUDS AND PROTECTION, N.Y. ST. DEP'T OF LAW ANN. REP. [hereinafter cited as 1973 CONSUMER FRAUDS REP.]. It has recovered over 17 million dollars in money, goods, and services for consumers during its existence. *Id.* at 2. The Bureau recovered some \$2,465,390 for the public as a result of mediation and court action. *Id.* at 4. In addition, statutory costs assessed and turned over to the state treasury amounted to \$105,374, and Agriculture and Markets Law penalties recovered totaled \$17,170. *Id.* at 26.

30. 1973 CONSUMER FRAUDS REP. 5.

31. In 1973, 26,589 consumer fraud complaints were received. *Id.* at 26.

32. *Id.* The very presence of the Bureau in the dialogue promotes the settlement of claims. The merchant's awareness that a "bad faith" refusal to settle may result in the initiation of formal action by the Bureau, which in turn could lead to unfavorable publicity, weighs heavily in favor of accommodation of the consumer's claim. Settlement, by contrast, is informal; no court records are published, and there is usually little or no resulting publicity. Rice, *Remedies, Enforcement Procedures and the Duality of Consumer Transaction Problems*, 48 BUFFALO U.L. REV. 559, 589-90 (1968) [hereinafter cited as Rice].

33. *Id.* at 5.

34. See text accompanying notes 58-61 *infra*.

35. 1973 CONSUMER FRAUDS REP. 11.

ments advising them as to proposed legislation and specific consumer problems.<sup>36</sup>

## b. Statutory Powers

In recent years numerous enactments of the state legislature have increased the powers of the Attorney General to proceed against deceptive acts and practices in the marketplace. Those statutes, utilized primarily by the Bureau of Consumer Frauds and Protection, are discussed immediately below:

### i. General Business Law Section 350

Sections 350-a to 350-e of article 22-A of the General Business Law<sup>37</sup> were enacted in 1963 because of the conceded ineffectiveness of the Penal Law in combatting false advertising.<sup>38</sup> Section 350 forbids "[f]alse advertising in the conduct of any business, trade or commerce or in the furnishing of any service."<sup>39</sup> Section 350-c empowers the Attorney General to bring an action<sup>40</sup> to recover a civil penalty of five hundred dollars for each violation. The recovery

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36. *Id.* at 23-25.

37. N.Y. GEN. BUS. LAW §§ 350-a to 350-e (McKinney 1968).

38. See text accompanying notes 24-25 *supra*. See also 1959 N.Y. ST. B. ASS'N ANTITRUST LAW SYMPOSIUM 186-199 [hereinafter cited as 1959 ANTITRUST LAW SYMPOSIUM].

39. "The term 'false advertising' means advertising, including labeling, which is misleading in a material respect; and in determining whether any advertising is misleading, there shall be taken into account (among other things) not only representations made by statement, word, design, device, sound or any combination thereof, but also the extent to which the advertising fails to reveal facts material in the light of such representations with respect to the commodity to which the advertising relates under the conditions prescribed in said advertisement, or under such conditions as are customary or usual." N.Y. GEN. BUS. LAW § 350-a (McKinney 1968).

40. *Id.* § 350-b provides that after receiving such notice of contemplated action by the Attorney General, the person receiving the notice is given the opportunity to show either orally or in writing why the proposed action should not be brought. Among other things, such person may show "that the advertisement is subject to and complies with the rules and regulations of, and the statutes administered by the Federal Trade Commission or any official department, division, commission or agency of the state of New York." *Id.*

accrues to the state.<sup>41</sup> In such actions, it is a complete defense that the "advertisement is subject to and complies with the rules and regulations of, and the statutes administered by the Federal Trade Commission or any official department, division, commission or agency of the state of New York."<sup>42</sup> This defense evidences a legislative intent to maintain harmony with federal law and subject commercial dealings to uniform standards of conduct.<sup>43</sup> Article 22-A affects neither the rights of parties in private litigation<sup>44</sup> nor the remedies available to the Attorney General under section 63(12) of the Executive Law.<sup>45</sup> The article exempts from its application media and press broadcasters and publishers or printers of advertisements.<sup>46</sup> The Bureau of Consumer Frauds and Protection has seldom resorted to court action under these sections. Most advertisers present their case to the Bureau before court action is commenced, and this often results in the advertiser's entering into a voluntary administrative consent decree known as an Assurance of Discontinuance.<sup>47</sup>

Where litigation has been commenced,<sup>48</sup> courts have held that

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41. *Id.* § 350-c. Although a defendant is subject to a civil penalty for "each violation," there is no statutory definition of what constitutes a separate violation within the meaning of the article. The Attorney General's position is that each separate insertion of an advertisement in a publication constitutes a separate violation. Mindell 616 n.72 (1965).

42. N.Y. GEN. BUS. LAW § 350-c (McKinney 1968).

43. See Governor Rockefeller's Approval Message, N.Y. Sess. Laws 2066 (McKinney 1963). The whole body of federal case law and administrative decisions thus become guides to the application of the state statute. *Id.* In fact, the definition of false advertising found in N.Y. GEN. BUS. LAW § 350-a (McKinney 1968) is in substance a reformulation of the definition in section 15 of the Federal Trade Commission Act, 15 U.S.C. § 55-a(1) (1970). See Mindell 617. The Federal statute, however, does exclude labeling in its definition. 15 U.S.C. § 55-a(1) (1970). The intent of the state legislature was to make the substantive standards of the Federal Act applicable to state law.

44. N.Y. GEN. BUS. LAW § 350-d(1) (McKinney 1968).

45. *Id.* § 350-d(2).

46. *Id.* § 350-e.

47. N.Y. EXEC. LAW § 63(15) (McKinney 1972) authorizes the Attorney General to enter into these voluntary consent decrees.

48. Proceedings under the statute have been infrequent. The five hundred dollar civil penalty is in many cases too small an amount to act

section 350 of the General Business Law adopts standards identical to those established by the Federal Trade Commission under section 5 of the Federal Trade Commission Act.<sup>49</sup> "The capacity to deceive" or the "likelihood of the deception" on the public is the criterion for violation.<sup>50</sup> Actual deception is not an element of the offense.<sup>51</sup> Since intent to deceive is not required to find a violation,<sup>52</sup> the good or bad faith of the advertiser is irrelevant.<sup>53</sup> Defenses such as abandonment of the deceptive practice,<sup>54</sup> industry-wide use of the practice in ques-

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as a deterrent, and the Attorney General, prior to the enactment of N.Y. GEN. BUS. LAW § 349 (McKinney Supp. 1974) in 1970, had to show persistent fraud or illegality in order to obtain an injunction. See N.Y. EXEC. LAW § 63(12) (McKinney 1972). Only six successful actions were prosecuted in the Civil Court of the City of New York under the statute from 1963 to July 1967. 1968 SYMPOSIUM 119. With the passage of N.Y. GEN. BUS. LAW § 349 (McKinney Supp. 1974) in 1970, however, the Bureau of Consumer Frauds and Protection may now bring actions to enjoin false advertising, seek restitution for defrauded consumers, and obtain the civil penalty under N.Y. GEN. BUS. LAW § 350-c (McKinney 1968) for a single proven incident of false advertising.

49. *State v. Colorado State College*, 76 Misc. 2d 50, 53-54, 346 N.Y.S.2d 482, 486-87 (Sup. Ct. 1973); *Metropolitan N.Y. Retail Merchants Ass'n v. City of N.Y.*, 60 Misc. 2d 805, 807, 303 N.Y.S.2d 612, 614 (Sup. Ct. 1969).

50. *Montgomery Ward & Co. v. FTC*, 379 F.2d 666, 670 (7th Cir. 1967).

51. *Id.*

52. *FTC v. Sterling Drug, Inc.*, 317 F.2d 669, 674 (2d Cir. 1963); *Gimbel Bros. v. FTC*, 116 F.2d 578-79 (2d Cir. 1941).

53. *Doherty, Clifford, Steers & Shenfield, Inc. v. FTC*, 392 F.2d 921, 924 (6th Cir. 1968); *Koch v. FTC*, 206 F.2d 311, 317 (6th Cir. 1953). The civil penalty is regarded as a more appropriate remedy for false advertising than a criminal sanction. See 1959 ANTITRUST LAW SYMPOSIUM 190-92. The fact that the action is not prosecuted by the district attorney and that the stigma attached to a civil penalty is less than that of a criminal conviction makes it an easier statute to enforce. But the civil penalty does have limitations: the statute gives no relief to consumers, there is no dollar deprivation to the seller that is measured by the injuries sustained on account of the false advertisement, and society as a whole, rather than individual consumers, is vindicated. Rice 584-85.

54. In *Goodman v. FTC*, 244 F.2d 584, 593 (9th Cir. 1957), the court held that since there was no guarantee that the defendant would not begin the deceptive practice anew, the Commission was entitled to issue a cease and desist order after the practice had stopped.

tion,<sup>55</sup> uncontrollable salesmen,<sup>56</sup> and proof that the false advertising would not have deceived the reasonable man<sup>57</sup> have all been rejected by federal courts in cases involving violation of the Federal Trade Commission Act. Section 350 should be similarly construed.

ii. Executive Law Section 63(12)

The general grant of power to the Attorney General under section 63(12) has traditionally been his most potent resource. On five days notice, the Attorney General may seek an order enjoining "persistent fraud or illegality in the carrying on, conducting or transaction of business . . . ."<sup>58</sup> "Fraud" is defined to include "any device, scheme or artifice to defraud and any deception, misrepresentation, concealment, suppression, false pretence, false promise or unconscionable contractual provisions."<sup>59</sup> In addition to injunctive relief, the Attorney General is now explicitly authorized to seek restitution for defrauded consumers.<sup>60</sup> Further, he is authorized to seek an order cancelling the business certificate of any sole proprietorship or partnership.<sup>61</sup>

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55. This defense is rejected for the reason that the practice does not cease to be unfair because others in the industry also engage in it. *Heavenly Creations, Inc. v. FTC*, 339 F.2d 7, 8 (2d Cir. 1964), *cert. denied*, 380 U.S. 955 (1965); *see Moog Indus., Inc. v. FTC*, 355 U.S. 411 (1958); *FTC v. Winsted Hosiery Co.*, 258 U.S. 483 (1922).

56. The issue is whether the misrepresentation by the salesman was made within his actual or apparent authority. *Goodman v. FTC*, 244 F.2d 584, 590 (9th Cir. 1957). *But see* 2A HULL, AGENCY 617 (1974); *cf.* F. MEECHEM, AGENCY 106 (1967).

57. The reasonable man test has been rejected for the reason that a consumer should not have to suspect the integrity of a businessman. *FTC v. Standard Educ. Soc'y*, 302 U.S. 112, 116 (1937).

58. N.Y. EXEC. LAW § 63(12) (McKinney 1972).

59. *Id.*

60. The legislature granted the Attorney General authority to seek restitution by amending the Executive Law in 1970. *See* Law of March 3, 1970, ch. 44, § 1, [1970] N.Y. Laws 104 (McKinney 1972). Numerous authorities had recommended the enactment of such a provision. *See, e.g.*, Wade & Kamenshine, *Restitution for Defrauded Consumers: Making the Remedy Effective Through Suit by Governmental Agency*, 37 GEO. WASH. L. REV. 1031 (1969) [hereinafter cited as Wade & Kamenshine]; Rice, *supra* note 32.

61. N.Y. GEN. BUS. LAW § 130(1) (McKinney Supp. 1974) requires

Courts have broadly construed section 63(12). In *Lefkowitz v. ITM, Inc.*,<sup>62</sup> a chain referral commission scheme<sup>63</sup> for the sale of household appliances was declared an illegal lottery<sup>64</sup> and fraudulent<sup>65</sup> within the meaning of this section. Purchasers of the appliances paid exorbitantly high prices relying on the representation that they would realize high commissions on the referrals they made to the seller. Customers were told that six to seven purchases would result for every ten referrals submitted, and they were guaranteed three hundred dollars if they referred at least twenty names to the company. In fact, the number of sales resulting from the referrals was lower than represented. The court, noting the mathematical impossibility of referring prospects beyond a certain point in the chain of referrals, enjoined the scheme.

Though the question of what constitutes "persistent fraud or illegality" has not been clearly answered, there are indications of a flexible interpretation. In an earlier proceeding in the *ITM* case, the court stated that an injunction lies "where a substantial number of single acts of fraud form a pattern of proscribed behavior."<sup>66</sup> In *People v. Compact Associates*,<sup>67</sup> the court enjoined a sales scheme

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persons conducting business under assumed names or as partners to "file in the office of the clerk of each county in which such business is conducted or transacted a certificate . . . ."

62. 52 Misc. 2d 39, 275 N.Y.S.2d 303 (Sup. Ct. 1966).

63. Chain referral sales schemes are now statutorily prohibited in New York. See N.Y. GEN. BUS. LAW § 359-fff (McKinney Supp. 1974).

64. 52 Misc. 2d at 57-60, 275 N.Y.S.2d at 324-28.

65. The court found fraud in the defendants' failure to inform customers that the goods were not available at lower prices elsewhere. *Id.* at 48, 275 N.Y.S.2d at 316. "The rule is clear that where one party to a transaction has superior knowledge, or means of knowledge not open to both parties alike, he is under a legal obligation to speak and his silence constitutes fraud." *Id.* (citations omitted). In addition, the court found that because of the excessively high prices charged the contracts were unconscionable within the meaning of N.Y. EXEC. LAW § 63(12) (McKinney 1972) and N.Y. U.C.C. § 2-302(1) (McKinney 1964). 52 Misc. 2d at 54, 275 N.Y.S.2d at 322.

66. *Lefkowitz v. ITM, Inc.*, 155 N.Y.L.J. 17, col. 1 (Sup. Ct. Feb. 28, 1966) (a previous disposition granting a temporary injunction against ITM).

67. 22 App. Div. 2d 129, 254 N.Y.S.2d 265 (1st Dep't 1964) (per curiam), *aff'd mem.*, 17 N.Y.2d 758, 217 N.E.2d 143, 270 N.Y.S.2d 420 (1966).

that created an "atmosphere conducive to fraud,"<sup>68</sup> after instances of actual fraud were proven at trial.<sup>69</sup> Similarly, courts have construed section 63(12) to apply to all business activity accompanied by repeated acts of illegality.<sup>70</sup> This approach of looking to the totality of the seller's scheme and its effect seems appropriate.

The section 63(12) action is a special proceeding, and the Attorney General must establish his case by a fair preponderance of the evidence.<sup>71</sup> He is entitled to summary judgment unless substantial issues of fact are raised by the pleadings.<sup>72</sup> Where issues of fact are raised, and the case is put down for trial, the Attorney General may seek a temporary injunction for the duration of the proceeding. In deciding whether to grant a temporary injunction, the court weighs the possible injury to the public against the economic hardships to the defendant.<sup>73</sup>

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68. 22 App. Div. at 131, 254 N.Y.S.2d at 267.

69. The defendants' practice of paying five dollars for the privilege of demonstrating vacuum cleaners, presentation of a so-called "Bond of Friendship," and concealment of the nature of the product until the sales talks started created this "atmosphere conducive to fraud." *Id.* at 130, 254 N.Y.S.2d at 267. This factor, plus the proof at trial of some thirty instances of fraud (out of an estimated twenty thousand sales), were deemed to constitute persistent fraud within the meaning of N.Y. EXEC. LAW § 63(12) (McKinney 1972).

70. *People v. E.F.G. Baby Prods. Co.*, 40 App. Div. 2d 364, 368, 340 N.Y.S.2d 352, 354 (3d Dep't 1973).

71. N.Y. C.P.L.R. §§ 401-11 (McKinney 1972) governs special proceedings under N.Y. EXEC. LAW § 63(12) (McKinney 1972).

72. See *State v. Lobel*, 154 N.Y.L.J. 16, col. 5 (Sup. Ct. Nov. 9, 1965); *People v. Willensky*, 153 N.Y.L.J. 16, col. 5 (Sup. Ct. Mar. 15, 1965). The proceeding is triable without a jury. See N.Y. C.P.L.R. § 410 (McKinney 1972). The Attorney General must prove fraud by a fair preponderance of the evidence. *People v. Silinsky*, 217 App. Div. 247, 216 N.Y.S. 637 (2d Dep't 1926), *aff'd*, 244 N.Y. 524, 155 N.E. 882 (1926); *People v. Levinson*, 23 Misc. 2d 483, 199 N.Y.S.2d. 265 (Sup. Ct. 1960). *But see People v. Compact Associates*, 22 App. Div. 2d 129, 134, 254 N.Y.S.2d 265, 271 (1st Dep't 1964) (dissenting opinion) (proof of fraud must be clear and convincing).

73. *People v. Biochemical Procedures, Inc.*, 68 Misc. 2d 753, 755, 327 N.Y.S.2d 804, 807 (Sup. Ct. 1971), *modified*, 38 App. Div. 2d 925, 329 N.Y.S.2d 878, *aff'd mem.*, 31 N.Y.2d 792, 291 N.E.2d 293, 339 N.Y.S.2d 115 (1972); *People v. Levinson*, 23 Misc. 2d 483, 199 N.Y.S.2d 625 (Sup.

The subpoena powers granted the Attorney General pursuant to section 63(12) of the Executive Law<sup>74</sup> have been upheld by courts.<sup>75</sup> A witness subject to a nonjudicial subpoena may move to quash or modify it<sup>76</sup> on the ground that it calls for irrelevant or immaterial documents or subjects the witness to harassment.<sup>77</sup> To sustain the subpoena, the Attorney General must show both the basis for the inquisitorial action<sup>78</sup> and the reasonable relationship of the documents to the subject matter under investigation.<sup>79</sup> Whether such reasonable relationship can be shown depends upon the scope of materials sought and the status of the investigation when the subpoenas are issued.<sup>80</sup> The showing need not amount to "probable cause" that a violation of law will be disclosed,<sup>81</sup> but at the same time "no agency of government may conduct an unlimited and general inquisition into the affairs of persons within its jurisdiction

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Ct.). See *Metzger Co. v. Fay*, 4 App. Div. 2d 436, 439, 166 N.Y.S.2d 87, 90 (1st Dep't 1957); *People v. Wickersham Women's Medical Center*, 69 Misc. 2d 196, 198, 329 N.Y.S.2d 627, 630 (Sup. Ct.), *aff'd* 39 App. Div. 2d 1020 (1st Dep't 1972).

74. N.Y. C.P.L.R. § 2302(a) (McKinney 1972) authorizes the Attorney General to issue subpoenas without a court order.

75. *La Belle Creole Int'l S.A. v. New York*, 10 N.Y.2d 192, 176 N.E.2d 705, 219 N.Y.S.2d 1 (1961).

76. The witness cannot make the motion, however, until the Attorney General has first been requested to withdraw or modify it. N.Y. C.P.L.R. § 2304 (McKinney 1974).

77. *Myerson v. Lentini Bros. Moving & Storage Co.*, 33 N.Y.2d 250, 256, 306 N.E.2d 804, 807-08, 351 N.Y.S.2d 687, 693 (1973).

78. *Id.* at 256, 306 N.E.2d at 807-08, 351 N.Y.S.2d at 693; *A'Hearn v. Committee on Unlawful Practice of Law*, 23 N.Y.2d 916, 918, 246 N.E.2d 166, 167, 298 N.Y.S.2d 315, 316 (1969). In *Myerson, supra*, the requirement of showing some basis for the investigation is set up to prevent administrative abuses against innocent parties. 33 N.Y.2d at 260, 306 N.E.2d at 810, 351 N.Y.S.2d at 696-97.

79. *La Belle Creole Int'l S.A. v. New York*, 10 N.Y.2d 192, 196, 176 N.E.2d 705, 707, 219 N.Y.S.2d 1, 4 (1961); *Carlisle v. Bennett*, 268 N.Y. 212, 217, 197 N.E. 220, 222 (1935).

80. *A'Hearn v. Committee on Unlawful Practice of Law*, 23 N.Y.2d 916, 918, 246 N.E.2d 166, 167-68, 298 N.Y.S.2d 315, 316-17 (1969).

81. See *Myerson v. Lentini Bros. Moving & Storage Co.*, 33 N.Y.2d 250, 256, 306 N.E.2d 804, 808, 351 N.Y.S.2d 687, 693 (1973).



solely on the prospect of possible violations of law being discovered.”<sup>82</sup>

The Business Corporation Law authorizes the Attorney General to seek dissolution of domestic corporations<sup>83</sup> and to enjoin foreign corporations from doing business in New York<sup>84</sup> where such corporations have done business in a “persistently fraudulent or illegal manner.”<sup>85</sup> The action is triable by jury as of right.<sup>86</sup> The Attorney General has utilized these dissolution powers to complement his powers under section 63(12). The courts have been liberal in determining what constitutes operating in a “persistently fraudulent or illegal manner.”<sup>87</sup>

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82. *A'Hearn v. Committee on Unlawful Practice of Law*, 23 N.Y.2d 916, 918, 246 N.E.2d 166, 167, 298 N.Y.S.2d 315, 316 (1969). In *Myerson v. Lentini Bros. Moving & Storage Co.*, 33 N.Y.2d 250, 306 N.E.2d 804, 351 N.Y.S.2d 687 (1973) a “non-judicial” subpoena duces tecum was quashed where all the books and records of defendant’s company were sought in relation to an investigation initiated after the receipt of numerous complaints. Because of the great scope of the subpoena, the showing to support it was deemed insufficient and was outweighed by the “risks and possible fact of unjustified harassment.” *Id.* at 260, 306 N.E.2d at 810, 351 N.Y.S.2d at 696.

83. N.Y. BUS. CORP. LAW §§ 1101(a)(2), 1303 (McKinney 1963).

84. *Id.* § 1303 empowers the Attorney General to enjoin or annul the authority of any such foreign corporation which does any act within New York which would constitute grounds for corporate dissolution if done by a domestic corporation. *Id.* §§ 109(c), (d) designates the Secretary of State for service of process for the purpose of establishing jurisdiction in a proceeding brought by the Attorney General against a foreign corporation which, though unauthorized to do business in New York pursuant to section 1301 of the Business Corporation Law, does any fraudulent act in New York.

85. *Id.* § 1101(a)(2). Leave of court is no longer required to bring a dissolution action under the New York Business Corporation Law. *Id.* § 1101.

86. *Id.* § 1101(b). A receiver may be requested and appointed at any stage of the proceedings. *Id.* §§ 1113, 1202. Similarly, a restraining order may be sought at any stage in the proceedings. *Id.* § 109(b)(3). Subpoena authority is granted by N.Y. EXEC. LAW § 63(12) (McKinney 1972) and N.Y. BUS. CORP. LAW § 109(b)(6) (McKinney 1963). The paramount consideration in dissolution cases brought by the Attorney General is the “interest of the public.” *Id.* § 1111(b)(1).

87. *See, e.g., People v. Abbott Maintenance Corp.*, 11 App. Div. 2d

## iii. General Business Law Section 349

In 1970 the New York Legislature amended article 22-A of the General Business Law by adding section 349,<sup>88</sup> which makes unlawful: "[d]eceptive acts or practices in the conduct of any business, trade or commerce or in the furnishing of any service in this state . . . ."<sup>89</sup> The phrase "deceptive acts or practices" is identical to the phrase used in section 5 of the Federal Trade Commission Act; the intent of section 349 is "to make the federal law and its interpretation of deceptive acts and practices applicable to state enforcement."<sup>90</sup> This intent is made clear by the provisions of section 349(d) which make compliance "with the rules and regulations of, and the statutes administered by, the federal trade commission" a complete defense in an action brought under the statute.<sup>91</sup>

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136, 201 N.Y.S.2d 895 (1st Dep't 1960) (per curiam), *aff'd mem.*, 9 N.Y.2d 810, 175 N.E.2d 341, 215 N.Y.S.2d 761 (1961) (sustaining false advertising as grounds for corporate dissolution); *State v. Remedial Educ., Inc.*, 70 Misc. 2d 1068, 335 N.Y.S.2d 353 (Sup. Ct. 1972) (corporation falsely promising its customers to arrange admissions to medical and dental schools); *State v. Saksnit*, 69 Misc. 2d 554, 332 N.Y.S.2d 343 (Sup. Ct. 1972) (corporation selling term papers).

88. N.Y. GEN. BUS. LAW § 349 (McKinney Supp. 1974). In 1970 the legislature substituted "Consumer Protection From Deceptive Acts Practices" for "False Advertising; Civil Penalty" as a heading for N.Y. GEN. BUS. LAW art. 22-A (McKinney Supp. 1974).

89. *Id.* § 349(a). The statute is meant to include all economic activity concerning consumer protection. 1968 SYMPOSIUM 121. The Committee authored N.Y. GEN. BUS. LAW § 349 (McKinney Supp. 1974) and its report accompanied the bill through the legislature. *See State v. Colorado State Christian College of the Church of the Inner Power*, 76 Misc. 2d 50, 53, 346 N.Y.S.2d 482, 486 (Sup. Ct. 1973). The Committee on New York Antitrust Law rejected a proposal that the statute prohibit "unfair methods of competition" in addition to "deceptive acts or practices," since it would have made the whole body of federal antitrust law applicable in cases prosecuted under the statute. *See* 1968 SYMPOSIUM 127-29.

90. 1968 SYMPOSIUM 124.

91. "Section 349-d . . . is drawn from section 350-b of the General Business Law. The Committee believes such a provision is necessary in order to protect businessmen from conflicting standards . . ." 1968 SYMPOSIUM 123-24. Because of the legislative intent to establish a uniform standard as to the meaning of "deceptive act or practice," cases construing

Section 349(b) provides that preliminary and permanent injunctive relief may be awarded when the Attorney General believes "from evidence satisfactory to him that any person, firm, corporation or association or agent or employee thereof has engaged in or is about to engage in any of the acts or practices stated to be unlawful . . . ." <sup>92</sup> Restitution of "any moneys or property obtained directly or indirectly by any such unlawful acts or practices" <sup>93</sup> may also be ordered. The Attorney General need not wait for evidence of persistent fraud before bringing a proceeding under the statute. This remedies the major shortcoming of section 63(12) of the Executive Law which requires a showing of persistent fraud before an injunction will lie. <sup>94</sup> The injunctive remedy of section 349(b) may be invoked

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section 350 of the General Business Law (false advertising) are also relevant. *State v. Colorado State Christian College of the Church of the Inner Power*, 76 Misc. 2d 50, 346 N.Y.S.2d 482 (Sup. Ct. 1973), the leading case interpreting section 349 of the General Business Law, agrees with the rationale for following the rulings of the Federal Trade Commission and the federal case law with respect to the interpretation of deceptive acts and practices outlawed in section 5 of the Federal Trade Commission Act, 15 U.S.C. § 45(a)(1) (1970). 76 Misc. 2d at 54-56, 58, 346 N.Y.S.2d at 487-89, 491.

92. N.Y. GEN. BUS. LAW § 349(b) (McKinney Supp. 1974). The procedural requirements are contained in section 349(c). Section 349(c) requires the Attorney General to give the person against whom proceedings are contemplated five days notice by certified mail before bringing the action and an opportunity to show in writing within five business days thereafter why such proceedings should not be brought against him. Such notice may be dispensed with where the Attorney General determines such notice would not be in the public interest and the action brought seeks preliminary relief. *Id.* § 349(c). Subpoena powers are granted, *id.* § 349(f), and the Attorney General is authorized "to take proof and make a determination of the relevant facts . . ." *Id.* The statute does not apply to broadcasters or newspapers, magazines, and other publications. *Id.* § 349(e).

93. *Id.* § 349(b).

94. 1968 SYMPOSIUM 121-22; see Governor's Memoranda, N.Y. Sess. Laws 3074 (McKinney 1970). "[T]he injunction method is deemed essential in order to effectively combat fraudulent claims in areas where existing laws are less than adequate for full consumer protection." Memoranda of Attorney General, 1970 N.Y. ST. LEG. ANN. 92, 96; see 1968 SYMPOSIUM 118 ("statutes based upon persistent fraud do not provide adequate consumer protection since they leave the public open to repeated fraud before the remedy, by its own terms, can be invoked").

only as to the deceptive act or practice.<sup>95</sup> The more drastic remedies of business ouster and corporate dissolution still require a showing of persistent fraud or illegality.<sup>96</sup> Finally, section 349(b) authorizes the Attorney General to seek restitution for consumers who have been directly or indirectly victimized by the deceptive act or practice. Section 63(12) permits restitution only in cases of persistent illegal activity.

#### iv. Miscellaneous Statutes

Numerous statutes empower the Attorney General to seek preliminary and permanent injunctions. They include statutes prohibiting bait advertising,<sup>97</sup> the use of a false name or address with intent to deceive,<sup>98</sup> and certain other deceptive practices.<sup>99</sup> Alternatively, the

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95. 1968 SYMPOSIUM 121. Violation of a court order forbidding future violations can result in the application of sanctions by the court. *Id.*

96. N.Y. BUS. CORP. LAW § 1101(a)(2) (McKinney 1963); N.Y. EXEC. LAW § 63(12) (McKinney 1972). Section 349 of the General Business Law does not appear to apply to "illegal acts" unless the act in question amounts to a deceptive act or practice. For instance, a violation of section 350 of the General Business Law (false advertising unlawful) is a deceptive practice. *See State v. Colorado State Christian College of the Church of the Inner Power*, 76 Misc. 2d 50, 346 N.Y.S.2d 482 (Sup. Ct. 1973). However, it is doubtful that a violation of N.Y. GEN. BUS. LAW § 386 (McKinney Supp. 1974) (requiring the tagging of articles of bedding) would be considered a deceptive act or practice. On the other hand, a strong argument can be made that all violations of statutes enacted to protect consumers are deceptive acts within the meaning of section 349 of the General Business Law. The answer to this question acquires significance when restitution is sought in an action brought under the statute and/or an injunction is sought where the violated statute contains no such provision.

97. N.Y. GEN. BUS. LAW § 396 (McKinney 1968).

98. *Id.* § 133.

99. *See id.* §§ 395(1) (sale of used, rebuilt, reconditioned or repossessed television or radio receiving sets, phonographs, or major household appliances without appropriate markings), 399-g (fraudulent acts and practices in relation to theatrical syndications), 533 (sale of reactivated or second-hand radio and television tubes without markings). *See also id.* §§ 141 (unauthorized use of the name "United Nations"), 135 (use of the name of benevolent, humane or charitable corporations with intent to acquire personal or business advantages, enforced by the Charities Frauds Bureau of the Department of Law), 353 (fraudulent practices in respect to stocks,

Attorney General may choose to proceed against these violations pursuant to section 63(12) of the Executive Law when a persistent illegality is involved, or under section 349 of the General Business Law when the violation concerns consumer deception. Thus, fraudulent activity may violate a variety of statutes and subject the violator to injunction, restitution, and business ouster.<sup>100</sup>

In lieu of commencing an action, section 63(15) of the Executive Law authorizes the Attorney General to accept an Assurance of Discontinuance—an administrative document, drawn by the Attorney General, providing that the violator will desist from the objectionable act or course of conduct.<sup>101</sup> The Assurance is the most common solution to cases brought before the Bureau of Consumer

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bonds and other securities, enforced by the State Antitrust Enforcement and Compliance Section Bureau of the Department of Law).

100. See, e.g., *id.* §§ 532-37 (McKinney 1974) (Radio and television tubes); N.Y. PERS. PROP. LAW §§ 301-15 (McKinney 1962), *as amended*, (McKinney Supp. 1974) (Motor Vehicle Retail Instalment Sales Act); *id.* §§ 401-22, *as amended*, (McKinney Supp. 1974) (Retail Instalment Sales Act). The Bureau of Consumer Frauds and Protection also collects penalties under the Agriculture and Markets Law. See N.Y. AGRIC. MKTS. LAW §§ 189 (false labels), § 202-a (false advertising) (McKinney Supp. 1974). In 1973, the Bureau of Consumer Frauds and Protection recovered \$17,170 in penalties. 1973 CONSUMER FRAUDS REP. 26.

101. The concept of the Assurance of Discontinuance finds its source in the Cease and Desist Order issued by the Federal Trade Commission. 15 U.S.C. § 21(b) (1970); see Mindell 621. There is no standard form Assurance, as each must be tailored to the particular case. *Id.* Section 63(15) of the Executive Law permits inclusion in the Assurance of a stipulation for voluntary payment of the costs of the investigation not exceeding two thousand dollars per defendant. See N.Y. C.P.L.R. § 8303(a)(6) (McKinney Supp. 1974). A provision may also be made for the creation of an escrow account with the Attorney General for ultimate distribution to aggrieved consumers. N.Y. STATE FIN. LAW § 121(2)(o) (McKinney 1974) exempts “[t]he monies received by the department of law, intended to be held in escrow pending the outcome of an action or proceeding, or as restitution, in whole or in part, to persons who have filed complaints with such department” from payment to the state treasurer. Until 1970, when section 63(12) of the Executive Law was amended, and section 349 of the General Business Law was enacted, the anomalous situation existed where restitution could be obtained in assurance cases but not in an action for a permanent injunction, business ouster, or corporate dissolution.

Frauds.<sup>102</sup> In a civil action commenced by the Attorney General, violation of an Assurance is prima facie evidence of violation of the applicable law.<sup>103</sup>

c. Critique

The Attorney General's injunctive and restitutionary powers are now statutorily complete.<sup>104</sup> The requirement of proving "persistent fraud or illegality" for business ouster and corporate dissolution is appropriate, considering the radical nature of those remedies.<sup>105</sup> The use of civil penalties for deceptive acts and practices, however, should be resurrected and molded into a substantial penalty and deterrent. This could be done by amending section 349 of the General Business Law and section 63(12) of the Executive Law to provide a sliding scale of civil penalties.<sup>106</sup>

The existence of a realistic civil penalty would fill the void left by injunctive and restitutionary relief. Restitution simply returns to victimized consumers that which was wrongfully taken from them; an injunction prevents the wrongdoer from continuing his deceptive

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102. Mindell 603-04.

103. N.Y. EXEC. LAW § 63(15) (McKinney 1972). In an appropriate case, however, the Attorney General may agree to the inclusion in the assurance of an exculpatory clause indicating that the violator enters into the agreement without admitting violation of the law and for settlement purposes only. Mindell 621.

104. The Attorney General must of course follow the letter of the statutes. See *State v. Alexanders Dep't Stores, Inc.*, 42 App. Div. 2d 532, 344 N.Y.S.2d 719 (1st Dep't 1973) (affirming dismissal of action brought by Attorney General under section 249 of the General Business Law where the notice provisions thereof were not satisfied and the act complained of occurred seven months previous to the commencement of the action).

105. Rice 595 n.3.

106. The scaled penalties can take one of two forms. The penalty imposed upon conviction may be an amount no less than a stated minimum nor more than a stated maximum. See, e.g., N.Y. AGRIC. & MKTS. LAW § 41 (McKinney 1972) (violation subjects the violator to a fine of not less than twenty-five nor more than two hundred dollars). Alternatively, an amendment may provide for a civil penalty up to a stated maximum. See, e.g., *id.* § 201-d (providing for a fine of not more than five hundred dollars). The first of these two alternatives is more favorable, as it would provide flexibility and, in addition, have greater effect as a deterrent than would the latter alternative, because of the existence of a minimum penalty.

practice. Unless realistic monetary penalties are imposed, an unscrupulous dealer may conclude that the risk is worthwhile considering the possibility of non-discovery and the likelihood that he will not lose any of his own property even if he is discovered.<sup>107</sup>

As a practical matter, most cases must be handled by Assurances of Discontinuance. Section 63(15) of the Executive Law should be amended to permit inclusion in the Assurance of a stipulation providing for the payment of a civil penalty when the Assurance admits a violation.

The Bureau of Consumer Frauds is hampered by the budgetary problems which plague many government agencies.<sup>108</sup> Although the Bureau has considerable depth of personnel in its New York City office, there is significantly less strength in the other six district offices of the Department of Law. The result is that the Bureau has inadequate resources to protect the consumer statewide.<sup>109</sup> This has led to the creation of a number of local consumer protection offices with which the Bureau cooperates.<sup>110</sup>

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107. Exceptions to this statement are the small and ineffective civil penalty for false advertising, N.Y. GEN. BUS. LAW § 350-c (McKinney 1968), and the possible loss of goodwill, a factor that the wrongdoer may consider worth the risk.

108. The executive budget for the fiscal year ending March 31, 1974 submitted by Governor Rockefeller provided \$3,226,000 for the protection of consumers and investors, which funds all of the following Department of Law Bureaus: the Consumer Frauds and Protection Bureau; the Anti-Monopolies Bureau; the State Antitrust Enforcement and Compliance Section; the Building, Home Improvement & Miscellaneous Frauds Bureau; the Charity Frauds Bureau; the Securities and Public Financing Bureau, and the Education Bureau.

109. In 1973, Auburn reported receiving 86 consumer cases and effected recovery of \$1,542.64. 1973 DEP'T. OF LAW ANN. REP. 75. Buffalo reported 1,627 complaints and the recovery of \$85,925.43. *Id.* at 77. Plattsburgh did not report the number of complaints received or any effected recovery. *Id.* at 79. Rochester reported 931 formal complaints and recovered approximately \$20,998.76. *Id.* at 83. Syracuse reported recovering \$181,243 for consumers but did not specify the number of complaints received. *Id.* at 85. The district office in Albany did not report on its activities.

110. The Bureau is a member of the Regional Consumer Council, a coordinating group which facilitates communication among some forty consumer-related agencies in the New York metropolitan area. 1974 N.Y. REGIONAL COUNCIL REP., app. A.

## 2. Other Bureaus Involved in Consumer Protection

Two other bureaus within the Attorney General's Office have limited jurisdiction over deceptive practices. The Building, Home Improvement and Miscellaneous Frauds Bureau (Building Bureau), established in 1971,<sup>111</sup> is principally concerned with fraudulent practices in the construction of swimming pools and home improvements.<sup>112</sup> Although the majority of its cases are informally settled through mediation,<sup>113</sup> the Building Bureau may utilize the powers of the Attorney General.<sup>114</sup>

The Charity Frauds Bureau is charged with protecting consumers from fraudulent sales under the guise of charity.<sup>115</sup> Such a sale involves a misrepresentation that profits will go to a charity.<sup>116</sup> Injunctive relief<sup>117</sup> and Assurances of Discontinuance<sup>118</sup> are the primary weapons of this bureau.<sup>119</sup>

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111. 1971 DEP'T OF LAW ANN. REP. 3.

112. *Id.* at 3; see N.Y. GEN. BUS. LAW § 369-g (McKinney Supp. 1974). The Charity Frauds Bureau had jurisdiction over these activities prior to the creation of this Bureau. 1971 DEP'T OF LAW ANN. REP. 5.

113. In 1973, some 3,581 matters were concluded through informal mediation, while only 14 matters involved either court proceedings or assurances of discontinuance. 1973 REPORT OF THE DEP'T OF LAW 7. In 1973 the Bureau recovered \$586,172.62 for consumers. *Id.*

114. See *State v. Parker*, 30 N.Y.2d 964, 287 N.E.2d 618, 335 N.Y.S.2d 827 (1972) (standing denied under section 63(12) of the Executive Law); *State v. Parkchester Apts. Co.*, 28 N.Y.2d 842, 270 N.E.2d 920, 322 N.Y.S.2d 74 (1971).

115. 1973 REPORT OF THE DEP'T OF LAW 11. The Bureau has other functions. See *id.*

116. *Id.* at 7.

117. *Id.* See also *People v. Signarino*, 171 N.Y.L.J. 2, col. 2 (Sup. Ct. Feb. 21, 1974). In that case the court, under section 63(12) of the Executive Law, enjoined the defendants from selling advertising space to the business community in various booklets entitled "Drug Prevention Program," from conducting business in a fraudulent and deceptive manner, and soliciting funds for alleged charitable causes. The donors and advertisers believed defendants' "Drug Prevention Program" was a charitable organization when in fact it was carried on for profit. Restitution was also granted and the business certificate was annulled. See also 1972 DEP'T OF LAW ANN. REP. 7.

118. 1972 DEP'T OF LAW ANN. REP. 7.

119. In 1972 the Charity Frauds Bureau handled over 10,000 items,



### C. State Consumer Protection Board

The Consumer Protection Board (Board) was created by the legislature<sup>120</sup> in 1970 to ensure coordination of the numerous consumer programs of various state agencies,<sup>121</sup> and to perform other consumer-related tasks.<sup>122</sup> Its members are the chairman of the public service commission,<sup>123</sup> the superintendents of banking and insurance, the Secretary of State, and the commissioners of agriculture and markets, environmental conservation, and commerce and health. Its executive director,<sup>124</sup> who is appointed by the governor,<sup>125</sup> administers the Board and is empowered to make recommendations to the governor relating to consumer problems, and otherwise "encourage the protection of the legitimate interests of consumers within the state."<sup>126</sup> As directed by the Board, he may acquire other listed powers and duties, which include conducting investigations and assisting consumers in class actions.<sup>127</sup>

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recovered \$13,850 in costs and \$1,699 as restitution for the public. *Id.* at 8.

120. N.Y. EXEC. LAW § 550 (McKinney 1972).

121. See Governor's Annual Message to the Legislature, N.Y. Sess. Laws 3037, 3048 (McKinney 1970).

122. N.Y. EXEC. LAW § 553 (McKinney 1972) enumerates the powers and duties of the board and the executive director.

123. Several recent amendments to the Public Service Law give the Consumer Protection Board some influence in that field. See N.Y. PUB. SERV. LAW §§ 24(a)(1) (requiring notice by the Public Service Commission or a directed utility to the Consumer Protection Board prior to any rate increase), 71 (requiring the Public Service Commission to investigate written complaints by the Consumer Protection Board); 84 (requiring an investigation by the Public Service Commission upon a complaint, in writing, by the Consumer Protection Board, as to the service and price of steam heat), 96(3) (authorizing the State Consumer Protection Board to make complaints, in writing, concerning acts done or omitted by a telegraph or telephone corporation alleged to be in violation of the terms of its franchise or charter, or any order of the Commission) (McKinney Supp. 1974).

124. N.Y. EXEC. LAW § 550 (McKinney 1972).

125. "[W]ith the advice and consent of the senate . . ." *Id.* § 551.

126. *Id.* § 553(2)(b).

127. These powers and duties are enumerated in N.Y. EXEC. LAW § 553(3) (McKinney 1972) and include the power to "a. conduct investigations, research, studies and analyses of matters affecting the interests of consumers; b. cooperate with and assist the attorney general in the carry-

The Board promotes legislation,<sup>128</sup> publicizes available government services,<sup>129</sup> coordinates intergovernmental surveys,<sup>130</sup> advises local governments on establishing consumer offices,<sup>131</sup> undertakes a variety of consumer education activities,<sup>132</sup> and performs numerous other functions.<sup>133</sup> Although it is without subpoena and enforcement powers, it is authorized to refer complaints to the appropriate government agency.<sup>134</sup> The Board also compiles<sup>135</sup> monthly complaint reports showing total number of complaints, types of complaints, number of complaints resolved, and amounts recovered or saved by state consumer protection agencies.<sup>136</sup> Patterns of deception are thus

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ing out of his legal enforcement responsibilities for the protection of consumers; c. cooperate with and assist consumers in class actions in proper cases; d. represent the interests of consumers of the state before federal, state and local administrative and regulatory agencies; e. study the operation of consumer protection laws and recommend to the governor new laws and amendments of laws for consumer protection; f. conduct product research and testing and, where appropriate, contract with private agencies and firms for the performance of such services; g. initiate and encourage consumer education programs; h. cooperate with and assist local governments in the development of consumer protection activities; i. establish advisory councils to assist in policy formulation on specific consumer problems; and j. undertake activities to encourage business and industry to maintain high standards of honesty, fair business practices, and public responsibility in the production, promotion and sale of consumer goods and services.”

128. 1973 STATE CONSUMER PROTECTION Bd. ANN. REP. 5-9.

129. *Id.* at 10.

130. In 1973 the Board coordinated a state-wide survey of hazardous toys as part of a national program. *Id.*

131. *Id.* at 11.

132. *Id.* at 18-19.

133. The Board is New York State's liaison with the new United States Consumer Product Safety Council. *Id.* at 11. In addition, the Board served on a number of advisory and planning committees. *Id.* at 12.

134. N.Y. EXEC. LAW § 553(2)(a) (McKinney 1972).

135. During the first nine months of 1971 the Board handled more than 7,500 complaints, with the resultant refunding of approximately \$40,000 for consumers. 1971 DEP'T OF LAW ANN. REP. 2.

136. *Id.* at 17. This information is pooled with the complaint data of all the members of the Regional Consumer Protection Council. See note 163 *infra*.

more easily discovered by the appropriate agency.<sup>137</sup>

### III. Jurisdiction By Local Consumer Offices Over Deceptive Practices

The failure of the state to cope adequately with the full range of consumer deceptions has led to the creation of local consumer protection offices.<sup>138</sup> These offices are of two types: those that are educational, investigatory, and referral; and those that also possess broad enforcement powers.

#### A. Educational and Referral Offices

The first local consumer offices to make their appearance were educational and referral offices.<sup>139</sup> The enacting statutes provide broad investigatory, research, educational, and coordinating powers similar to the New York State Consumer Protection Board.<sup>140</sup> Like the Board, these local offices have no enforcement powers, and upon discovery of a deceptive practice they must either conclude the matter informally or refer it to a proper forum.<sup>141</sup> However, unlike the Board, the director or head of the local office often has authority to conduct hearings, compel the attendance of witnesses, administer oaths, take testimony under oath, and compel the production of

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137. 1973 STATE CONSUMER PROTECTION Bd. ANN. REP. 17.

138. N.Y. MUN. HOME RULE LAW § 10(1)(i)(McKinney 1969) permits all local governments "to adopt and amend local laws not inconsistent with the provisions of the constitution or not inconsistent with any general law relating to its property, affairs, or government . . . ." *Id.* § 10(1)(ii)(a) (11) permits local governments to enact local laws for the protection, order, conduct, safety, health, and well-being of persons or property therein even when the laws do not relate to the property, affairs or government of such municipality. *See also* N.Y. GEN. CITY LAW § 20(23) (McKinney 1968) (authorizing cities to enact local ordinances); N.Y. TOWN LAW § 130(15) (McKinney 1965) (authorizing the enactment of town ordinances promoting the health, safety, morals or general welfare of the community).

139. *See, e.g.*, NASSAU COUNTY, N.Y., ADMIN. CODE tit. D, § 21-10.0 (Supp. 1973)(enacted June 9, 1967); NEW YORK, N.Y., CHARTER ch. 64 (1972)(enacted Sept. 10, 1968).

140. *See* note 127 *supra*.

141. *Compare* N.Y. EXEC. LAW §§ 553(3)(a)-(j) (McKinney 1972) with NASSAU COUNTY, N.Y., ADMIN. CODE § 21-10.0 (Supp. 1973).

evidence.<sup>142</sup> Furthermore, he is typically authorized<sup>143</sup> to receive and investigate complaints, initiate his own investigations, represent

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142. See, e.g., Orange County, N.Y., Ordinance 5, § 18.06(A), Sept. 25, 1970; Long Beach, N.Y., Ordinance 1, Mar. 3, 1970; Ramapo, N.Y., Ordinance 1, § 4(a), Mar. 22, 1972. See also N.Y. C.P.L.R. § 2302(a) (McKinney 1974). Not all of these laws enable the director of consumer protection to conduct investigations into all kinds of deceptive practices. Yonkers, N.Y., Ordinance 2, §§ 2(b)-(c) Jan. 12, 1971, limits the consumer protection officer's power to conduct investigations to matters involving weights and measures and existing statutes relating to the advertising, labeling, packaging, and offering for sale and the sale of all commodities, goods, wares, and services. The director is often authorized to perform or supervise the duties of the sealer of weights and measures under the Agriculture and Markets Law. N.Y. AGRIC. & MKTS. LAW § 182 (McKinney 1972) (counties); *id.* § 183 (McKinney Supp. 1974) (cities). Alternatively, some of the laws extend the powers of the sealer by making him the director of consumer protection. See, e.g., Mount Vernon, N.Y., Ordinance 8, art. X-B, § 126-(c)(6), Nov. 23, 1971 (superintendent of weights and measures designated the coordinator of consumer protection); Schenectady, N.Y., Ordinance 4, § 33-1, June 1, 1971 (sealer of weights and measures designated the chief administrator of the Bureau of Weights and Measures and Consumer Protection). In either situation the new consumer office is benefited in that it begins its life with a staff core already familiar with numerous consumer problems. Where the new powers of the consumer protection office are not supplemented with new personnel, existing workloads may prevent their effective utilization.

143. See, e.g., Orange County, N.Y., Ordinance 5, § 18.06A, Sept. 25, 1970; Long Beach, N.Y., Ordinance 1, § 29, Mar. 3, 1970; Yonkers, N.Y., Ordinance 2, § 2, Jan. 12, 1971. *But see* Erie County, N.Y., Ordinance 20, §§ 1630, 1632 (1973) (specifically placing all statutory powers in the Consumer Protection Committee). Several local ordinances empower already existing administrative officers to perform the enumerated tasks of the office of consumer protection. See Rockland County, N.Y., Ordinance 5, §§ 1-2, Oct. 19, 1970 (making the sealer of weights and measures the coordinator of consumer protection); Schenectady, N.Y., Ordinance 4, § 33-1, June 1, 1971 (powers are lodged in the Bureau of Weights and Measures and Consumer Protection, through the sealer of weights and measures). Differences in the statutory wording in the aforementioned statutes appear insubstantial except in the case of the Erie County law, which gives the Consumer Protection Committee substantially more power in the running of the office than do the other statutes. See Erie County, N.Y., Ordinance 20, § 1630 (1973).

the interests of consumers before administrative committees, refer complaints, prepare educational material, and deal with numerous other matters relating to consumer affairs.<sup>144</sup>

There is usually an advisory committee to assist the director.<sup>145</sup> Its members<sup>146</sup> are appointed<sup>147</sup> for specific terms<sup>148</sup> and generally represent a cross-section of business and consumer interests.<sup>149</sup>

## B. Offices With Enforcement Powers

Unfair trade practices laws, which grant potent enforcement powers to a number of local consumer offices,<sup>150</sup> grew out of the laws that

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144. See ordinances cited in notes 142-43 *supra*. A practical limitation on the exercise of these powers is that the appropriation for such offices is usually small.

145. Where the powers of the consumer offices are placed in a consumer protection committee, its chairman cannot act on most matters without committee authorization. See, e.g., Erie County, N.Y., Ordinance 20, § 1630 (1973); Ramapo, N.Y., Ordinance 1, § 3, March 22, 1972.

146. The committees vary in membership. See, e.g., Erie County, N.Y., Ordinance 20, art. 16B, § 1632 (1973) (nineteen members); Rockland County, N.Y., Ordinance 5, § 4, Oct. 19, 1970 (nine members); Mount Vernon, N.Y., Ordinance 8, art. X-B, § 126(d), Nov. 23, 1971 (five members); Yonkers, N.Y., Ordinance 2, § 3, Jan. 12, 1971 (thirteen members).

147. On the county level, members are appointed by the County Executive. See, e.g., Erie County, N.Y., Ordinance 20, art. 16B, § 1632 (1973). On the city level they are appointed by the mayor. See, e.g., Mount Vernon, N.Y., Ordinance 8, art. X-B, § 126-d, Nov. 23, 1971. On the town level they are appointed by the town board. See, e.g., Ramapo, N.Y., Ordinance 1, § 3, Mar. 22, 1972.

148. See, e.g., Rockland County, N.Y., Ordinance 5, § 4, Oct. 19, 1970, which reads in pertinent part: "Of the nine members first appointed, three (3) shall be appointed for a term of three (3) years, three (3) for a term of two (2) years and three(3) for a term of one (1) year; thereafter, all appointments shall be for a term of three (3) years."

149. See, e.g., Yonkers, N.Y., Ordinance 2, § 1, Jan. 12, 1971; Rockland County, N.Y., Ordinance 5, § 4, Oct. 19, 1970; Orange County, N.Y., Ordinance 5, § 1806B, Sept. 25, 1970. Members serve without compensation except for reimbursements for expenses incurred in the performance of committee duties. See, e.g., Yonkers, N.Y., Ordinance 2, § 1, Jan. 12, 1971; Rockland County, N.Y., Ordinance 5, § 4, Oct. 19, 1970; Orange County, N.Y., Ordinance 5, § 1806B, Sept. 25, 1970.

150. This type of legislation, which has the effect of setting up a power-

created the referral-type office,<sup>151</sup> and are a marked improvement in concept and practice. "Deceptive or unconscionable trade practice[s]" are made unlawful,<sup>152</sup> and rulemaking<sup>153</sup> and enforcement powers<sup>154</sup> are granted to a Commissioner of Consumer Affairs.<sup>155</sup>

### 1. Statutory Analysis<sup>156</sup>

The rulemaking and enforcement provisions in unfair trade practices laws supplement the powers and duties granted to the agency under the less comprehensive consumer protection laws.<sup>157</sup> Advisory

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ful administrative agency, has been enacted by several local governments. See Onondaga County, N.Y., Ordinance 2, (1973); Suffolk County, N.Y., Ordinance 22, Sept. 11, 1973. These laws, with some variations, contain the same provisions as NASSAU COUNTY, N.Y., ADMIN. CODE tit. D, § 21-10.2 (Supp. 1974).

151. The first comprehensive consumer protection law enacted at the local level was the New York City Consumer Protection Law of 1969. NEW YORK, N.Y., ADMIN. CODE ANN. ch. 64, tit. A, §§ 2203d-1.0 to -8.0 (Supp. 1974). Similarly, Nassau County enacted its own comprehensive section in 1970. NASSAU COUNTY, N.Y., ADMIN. CODE tit. D, § 21-10.2 (Supp. 1974).

152. See, e.g., NASSAU COUNTY, N.Y. ADMIN. CODE tit. D, § 21-10.2(1) (Supp. 1974); NEW YORK, N.Y., ADMIN. CODE ANN. ch. 64, tit. A, § 2203d-1.0 (Supp. 1974).

153. See NASSAU COUNTY, N.Y., ADMIN. CODE tit. D, § 21-10.2 (Supp. 1974) (requiring the commissioner to hold a public hearing upon at least seven days public notice before adopting rules and regulations effectuating the purposes of the section, including regulations defining specific deceptive or unconscionable trade practices); NEW YORK, N.Y., ADMIN. CODE ANN. ch. 64, tit. A, § 2203d-3.0 (Supp. 1974).

154. See NASSAU COUNTY, N.Y., ADMIN. CODE tit. D, § 21-10.2(4) (Supp. 1974); NEW YORK, N.Y., ADMIN. CODE ANN. ch. 64, tit. A, § 2203d-4.0 (Supp. 1974).

155. These comprehensive consumer protection laws generally place the enumerated statutory powers in a commissioner of consumer affairs, and not a committee on consumer protection. See NASSAU COUNTY, N.Y., ADMIN. CODE tit. D, § 21-10.2(3)-(5) (Supp. 1974).

156. For a discussion of the New York City Consumer Protection Law of 1969, see Morgan, *New York City Consumer Protection Law of 1969*, 4 J.L. REFORM 244 (1970) [hereinafter cited as Morgan]; Comment, *New York City's Alternative To The Consumer Class Action: The Government as Robin Hood*, 9 HARV. J. LEGIS. 301 (1972).

157. See, e.g., NASSAU COUNTY, N.Y., ADMIN. CODE tit. D, § 21-10.0

committees,<sup>158</sup> which exist in most localities with consumer protection laws,<sup>159</sup> have no administrative responsibilities under the more comprehensive statutes.

a. Statutory Prohibitions

"Deceptive" practices typically include any representations that have the "capacity, tendency or effect of deceiving or misleading consumers."<sup>160</sup> The standard for violation is the same as under section 5 of the Federal Trade Commission Act and article 22-A of the General Business Law. An intent to deceive is not necessary to establish a violation; nor is it necessary to show actual injury.<sup>161</sup> The

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(Supp. 1974); NEW YORK, N.Y., ADMIN. CODE ANN. ch. 64, tit. A (Supp. 1974); Suffolk County, N.Y., Ordinance 21, tit. A (Supp. 1974).

158. See notes 145-49 *supra* and accompanying text.

159. See NASSAU COUNTY, N.Y., ADMIN. CODE tit. D, § 21-10.0 (Supp. 1974); NEW YORK, N.Y., ADMIN. CODE ANN. ch. 64, § 2204 (Supp. 1974); SUFFOLK COUNTY, N.Y., CHARTER, art. XXXII, § 3203. See also Onondaga County, N.Y., Ordinance 2 (1973) (creating an Office of Consumer Affairs with enforcement powers, with no provision for an advisory committee on consumer affairs). However, the town of Huntington, which has established the only comprehensive consumer protection ordinance at the town level in the state, Huntington, N.Y., Ordinance 8, ch. 27, § 27-1(b), Oct. 19, 1971, has located rule making and enforcement powers in a nine member consumer protection board. See Huntington, N.Y., Ordinance 2, Feb. 1, 1972, amending Ordinance 8, ch. 27, §§ 27-5(1), (2), Oct. 19, 1971.

160. See, e.g., NASSAU COUNTY, N.Y., ADMIN. CODE tit. D, § 21-10.2(2)(b) (Supp. 1974); NEW YORK, N.Y., ADMIN. CODE ANN. ch. 64, tit. A, § 2203d-2.0(a) (Supp. 1974). In the following textual discussion of the statutory provisions in these laws, the Nassau County and New York City laws will be primarily relied upon. Huntington, N.Y., Ordinance 8, Oct. 19, 1971 is similar in most respects to the New York City Consumer Protection Law of 1969. Suffolk County, N.Y., Ordinance 21, Sept. 9, 1973 is similar to the Nassau County law. Onondaga County, N.Y., Ordinance 2 (1973) contains provisions found in both the New York City and Nassau County acts, as well as several unique provisions. For instance, in Onondaga County, the Unfair Trade Practices Law is promulgated in the form of a code of rules and regulations by the county legislature. Onondaga County, N.Y., Ordinance 2, Res. 1, (1973). Rules and regulations under the Code of Consumer Protection are promulgated by the county legislature, and not by the director of consumer affairs. *Id.*

161. See, e.g., NEW YORK, N.Y., ADMIN. CODE ANN. ch. 64, tit. A, §

laws often label certain specific practices deceptive,<sup>162</sup> but state that the enumeration is not exclusive.<sup>163</sup> This open-endedness makes the laws a potent weapon against unscrupulous merchants.<sup>164</sup>

An "unconscionable" practice has been defined as "any . . . practice . . . which unfairly takes advantage of the lack of knowledge, ability, experience or capacity of a consumer,"<sup>165</sup> or which results in a gross disparity between the value received by a consumer and the price paid by him.<sup>166</sup> This definition of "unconscionability" may be broader than the same term in the Uniform Commercial Code,<sup>167</sup> which does not disturb the "allocation of risks" because of superior bargaining position.<sup>168</sup> The unfair trade prac-

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2203d-4.0(e) (Supp. 1974). The Nassau County law does not contain this provision, though it probably does not evidence a contrary legislative intent in light of the definition of "deceptive" practices.

162. See, e.g., NASSAU COUNTY, N.Y., ADMIN. CODE tit. D, § 21-10.2(b) (Supp. 1974) (listing eleven deceptive practices); NEW YORK, N.Y., ADMIN. CODE ANN. ch. 64, tit. A, § 2203d-4.0(e) (Supp. 1974) (listing nine specifically proscribed deceptive practices).

163. See, e.g., NASSAU COUNTY, N.Y., ADMIN. CODE tit. D, § 21-10.2(b) (Supp. 1974); NEW YORK, N.Y., ADMIN. CODE ANN. ch. 64, tit. A, § 2203d-2.0 (Supp. 1974).

164. Morgan 254. It has even been suggested that the broad definition of deceptive trade practices prohibits ordinary puffing and exaggeration. *Id.* at 253. Compare NEW YORK, N.Y., ADMIN. CODE ANN. ch. 64, tit. A, § 2203d-4.0(e) (Supp. 1974) with N.Y. U.C.C. § 2-313(2) (McKinney 1964) ("an affirmation merely of the value of the goods or a statement purporting to be merely the seller's opinion or commendation of the goods does not create a warranty").

165. NEW YORK, N.Y., ADMIN. CODE ANN. ch. 64, tit. A, § 2203d-2.0 (b) (Supp. 1974); accord, NASSAU COUNTY, N.Y. ADMIN. CODE tit. D, § 21-10.2(2)(c) (Supp. 1974).

166. The Nassau and Onondaga County laws provide that a resulting "gross disparity in the rights of a consumer as against the merchant" is also unconscionable. NASSAU COUNTY, N.Y., ADMIN. CODE tit. D, § 21-10.2(2)(c) (Supp. 1974); Onondaga County, N.Y., Ordinance 2, Res. 1, § 1(C), (1973).

167. See Morgan 255-56.

168. N.Y. U.C.C. § 2-302, Comment 1 (McKinney 1964). Comment 1 states that "[t]he principle is one of the prevention of oppression and unfair surprise and not disturbance of allocation of risks because of superior bargaining power."



tices laws may lessen the bargaining power of merchants by declaring unconscionable any practice which takes unfair advantage of the consumer's inferior position.<sup>169</sup>

The Nassau County law<sup>170</sup> permits the Commissioner to proceed against all unconscionable trade practices. The New York City ordinance, however, requires that before a practice may be deemed unconscionable, it must be so described with reasonable particularity in a local law or in a rule or regulation issued by the Commissioner of Consumer Affairs.<sup>171</sup> No unconscionable practices are delineated in the New York City ordinance, but guidelines for the issuance of rules and regulations are set forth.<sup>172</sup> Though the guide-

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169. See Morgan 255. On the other hand, risks in consumer transactions are generally determined by legislation. See, e.g., N.Y. U.C.C. §§ 2-312 to -18 (McKinney 1964). It may be that any advantages unfairly taken by a merchant cause the oppression of consumers, a condition that Uniform Commercial Code section 2-302 was intended to remedy. See *Jefferson Credit Corp. v. Marcano*, 60 Misc. 2d 138, 302 N.Y.S.2d 390 (Civ. Ct. 1969) (where automobile buyer with little knowledge of the English language unknowingly waived warranties of merchantability and fitness for a particular purpose on a defective automobile the contract was held unenforceable); *Jones v. Star Credit Corp.*, 59 Misc. 2d 189, 298 N.Y.S.2d 264 (Sup. Ct. 1969) (freezer with actual value of \$300, sold for \$900 (\$1439.69 including credit charges), unlawful as a matter of law).

170. NASSAU COUNTY, N.Y., ADMIN. CODE tit. D, § 21-20.2(4) (Supp. 1974); Onondaga County, N.Y., Ordinance 2, Res. 1, §§ 2, 4 (1973); Suffolk County, N.Y., Ordinance 22, § 4, Sept. 9, 1973.

171. NEW YORK, N.Y. ADMIN CODE ANN. ch. 64, tit. A, § 2203d-2.0(b) (Supp. 1974). A similar provision is contained in Huntington, N.Y., Ordinance 8, ch. 27, § 27-2(B), Oct. 19, 1971.

172. NEW YORK, N.Y., ADMIN. CODE ANN. ch. 64, tit. A, § 2203d-2.0(b) (Supp. 1974) states: "In promulgating such rules and regulations the commissioner shall consider among other factors: (1) knowledge by merchants engaging in the act or practice of the inability of consumers to receive properly anticipated benefits from the goods or services involved; (2) gross disparity between the price of goods or services and their value measured by the price at which similar goods or services are readily obtained by other consumers; (3) the fact that the acts or practices may enable merchants to take advantage of the inability of consumers reasonably to protect their interests by reason of physical or mental infirmities, illiteracy or inability to understand the language of the agreement, ignorance or lack of education, or similar factors; (4) the degree to which terms of the transaction

lines are broad, courts have sustained regulations issued under them.<sup>173</sup>

#### b. Rules and Regulations

All of the comprehensive consumer protection laws provide for the issuance of rules and regulations.<sup>174</sup> In most instances the Commissioner of Consumer Affairs promulgates these rules,<sup>175</sup> but the power may be lodged elsewhere.<sup>176</sup> The New York City ordinance expressly provides that rules and regulations "may supplement but shall not be inconsistent with . . . decisions of the Federal Trade Commission and the Federal courts in interpreting the provisions of Section

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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."

173. In *Commercial Lawyers Conference v. Grant*, 65 Misc.2d 897, 318 N.Y.S.2d 966 (Sup. Ct. 1971) the court rejected plaintiff's claims that a regulation declaring it an unconscionable practice for a creditor, its agents or employees, or collection agencies to communicate or threaten to communicate with the debtor's employer prior to obtaining a final judgment against a debtor was violative of plaintiff's right to due process and free speech. *National Ass'n of Installment Co. v. Grant*, 37 App. Div. 2d 955, 326 N.Y.S.2d 539 (1st Dep't 1971) upheld both the constitutionality of the New York City Consumer Protection Law of 1969, and a particular regulation issued thereunder.

174. NASSAU COUNTY, N.Y., ADMIN. CODE tit. D, §21-10.2(3) (Supp. 1974); NEW YORK, N.Y., ADMIN. CODE ANN. ch.64, tit. A, §2203(d)-3.0 (Supp. 1974); Onondaga County, N.Y., Ordinance 2, § 4(A) (1973); Suffolk County, N.Y., Ordinance 22, §3, Sept. 9, 1973; Town of Huntington, N.Y., Ordinance 8, §27-3, Oct. 19, 1971.

175. NASSAU COUNTY, N.Y., ADMIN. CODE tit. D, § 21-10.2(3) (Supp. 1974); NEW YORK, N.Y., ADMIN. CODE ANN. ch. 64, tit. A, § 2203d-3.0 (Supp. 1974); Suffolk County, N.Y., Ordinance 22, § 3, Sept. 9, 1973. Under the Nassau and Suffolk laws, the commissioner must hold a public hearing upon seven business days notice before issuing any rule or regulation. A hearing is not so required under the New York City law.

176. Huntington, N.Y., Ordinance 8, § 3, Oct. 19, 1971 authorizes the consumer protection board to submit to the town board proposed rules and regulations. Onondaga County, N.Y., Ordinance 2, § 1 (1973), leaves the power to issue rules and regulations exclusively in the county legislature.

5 (a)(1), or the Federal Trade Commission Act . . . or the decisions of the courts interpreting General Business Law § 350 and the Uniform Commercial Code § 2-302.”<sup>177</sup> This indicates the legislative intent to establish a uniform standard defining “deceptive and unconscionable trade practices.” The Nassau County law<sup>178</sup> does not contain such a provision, but it would seem wise for courts to read it into the statute, especially since state law has adopted the federal standard.<sup>179</sup> The advantage of rulemaking is that it provides a means of declaring a deceptive or unconscionable practice unlawful almost as soon as merchants devise it.<sup>180</sup>

c. Enforcement Provisions

The local laws provide both formal and informal procedures for dealing with violations. Informal procedures are fairly uniform. In lieu of initiating formal proceedings against a violator, the Commissioner of Consumer Affairs<sup>181</sup> can accept an “Assurance of Dis-

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177. NEW YORK, N.Y., ADMIN. CODE ANN. ch 64, tit. A, § 2203d-3.0 (Supp. 1974). A similar proviso is contained in Huntington, N.Y., Ordinance 8, § 27-3, Oct. 19, 1973. NEW YORK, N.Y., ADMIN. CODE ANN. ch. 64, tit. A, § 2203d-7.0 (Supp. 1974) states that the provisions of the New York City law shall supplement, but not be inconsistent with, the rules, regulations, and decisions of the Federal Trade Commission.

178. The Suffolk and Onondaga County Laws are also without such a proviso.

179. See text accompanying notes 90-91 *supra*.

180. Morgan 257. However, the rule or regulation must be authorized by the legislation, or it will be struck down by the courts. See *New York State Merchant's Ass'n v. Grant*, 63 Misc. 2d 550, 312 N.Y.S.2d 600 (Sup. Ct. 1970). In that case a regulation promulgated by New York City's Commissioner of Consumer Affairs requiring unit pricing in food stores was permanently enjoined on plaintiff's motion for summary judgment, the court finding that the regulation involved the assertion of legislative power not granted by statute. See *Picone v. Commissioner of Licenses*, 241 N.Y. 157, 162, 149 N.E. 336, 338 (1925). The unit pricing regulation enjoined in *New York State Merchants Ass'n v. Grant*, *supra*, was later enacted into law by the City Council. See NEW YORK, N.Y., ADMIN. CODE ANN. ch. 64, tit. B, § B64-1.0-5.0 (Supp. 1974).

181. See also *Onondaga County, N.Y., Ordinance 2 (1973)* (Director of Consumer Affairs); *Huntington, N.Y., Ordinance 8, Oct. 19, 1971* (Consumer Protection Board).

continuance,"<sup>182</sup> which need not include the admission of any wrongful act.<sup>183</sup> It may include a stipulation for restitution to consumers and payment by the violator of the costs of the investigation.<sup>184</sup> The New York City<sup>185</sup> and Town of Huntington laws<sup>186</sup> permit a stipulation for restitution in the Assurance; a consumer accepting such restitution is thereafter barred from recovering further damages. There is no corresponding provision for restitution in the Nassau, Suffolk, or Onondaga County laws.<sup>187</sup> Formal enforcement is accomplished by court proceedings against violators<sup>188</sup> of the consumer protection law.<sup>189</sup> All local laws contain civil penalty provi-

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182. See, e.g., NASSAU COUNTY, N.Y., ADMIN. CODE tit. D, § 21-10.2(5)(a) (Supp. 1974); NEW YORK, N.Y., ADMIN. CODE ANN. ch. 64, tit. A, § 2203d-5.0(a) (Supp. 1974).

183. See, e.g., NASSAU COUNTY, N.Y., ADMIN. CODE tit. D, § 21-10.2(5)(b) (Supp. 1974); NEW YORK, N.Y., ADMIN. CODE ANN. ch. 64, tit. A, § 2203-5.0(a) (Supp. 1974); Suffolk County, N.Y., Ordinance 22, § 5(b), Sept. 11, 1973. Onondaga County, N.Y., Ordinance 2, § 5 (1973) is silent as to whether entering into an assurance is an admission of a violation or not. Violation of an assurance is treated as a substantive violation and is subject to the formal penalties provided. NASSAU COUNTY, N.Y., ADMIN. CODE tit. D, § 21-10.2(5)(b) (Supp. 1974); NEW YORK, N.Y., ADMIN. CODE ANN. ch. 64, tit. A, § 2203-5.0(b) (Supp. 1974); Huntington, N.Y., Ordinance 8, § 27-6(B), Oct. 19, 1971; Suffolk County, N.Y., Ordinance 22, § 5(c), Sept. 9, 1973.

184. See, e.g., NASSAU COUNTY, N.Y., ADMIN. CODE tit. D, § 21-10.2(5)(a) (Supp. 1974); NEW YORK, N.Y., ADMIN. CODE ANN. ch. 64, tit. A, § 2203d-5.0(a) (Supp. 1974).

185. NEW YORK, N.Y., ADMIN. CODE ANN. ch. 64, tit. A, § 2203-5.0(a) (Supp. 1974).

186. Huntington, N.Y., Ordinance 8, § 27-6, Oct. 19, 1971.

187. No such provision exists in N.Y. EXEC. LAW § 63(15) (McKinney 1972). Where such provisions do not exist there appears to be no bar to a recovery of further damages.

188. NEW YORK, N.Y., ADMIN. CODE ANN. ch. 64 tit. A, § 2203d-6.0 (Supp. 1974) and NASSAU COUNTY, N.Y., ADMIN. CODE tit. D, § 21-10.2(6) (Supp. 1974) exclude television and radio broadcasting stations, publishers and printers of newspapers, magazines or other forms of printed advertising who broadcast, publish or print the deceptive advertising of a merchant.

189. NASSAU COUNTY, N.Y., ADMIN. CODE tit. D, § 21-20.2(4)(a) (Supp. 1974); NEW YORK, N.Y., ADMIN. CODE ANN. ch. 64, tit. A, § 2203d-4.0(a)

sions.<sup>190</sup> The New York City ordinance provides a higher civil penalty or criminal fine for knowing violations.<sup>191</sup> Localities may also seek temporary injunctive relief, restraining orders, and other equitable relief. The Nassau and Suffolk County laws require "repeated, persistent or multiple violations,"<sup>192</sup> while New York City, the Town of Huntington, and Onondaga County laws permit application for relief after a single violation.<sup>193</sup> The latter laws are more sound conceptually; there is no reason why a deceptive or unconscionable course of conduct must be permitted to continue until it can be called "persistent."

The New York City,<sup>194</sup> Town of Huntington,<sup>195</sup> and Onondaga County laws<sup>196</sup> allow each locality to maintain a restitution action

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(Supp. 1974). The locality's legal department brings the court action at the request of the local department of consumer affairs. *See Morgan* 260 n.74.

190. The amount of the civil penalty varies. The New York City law provides for a civil penalty of from fifty to three hundred and fifty dollars. NEW YORK, N.Y., ADMIN. CODE ANN. ch. 64, tit. A, § 2203d-4.0 (Supp. 1974). The Town of Huntington provides for a sliding scale of from fifty to five hundred dollars. Huntington, N.Y., Ordinance 8, § 27-4(B), Oct. 19, 1971. NASSAU COUNTY, N.Y., ADMIN. CODE tit. D, § 21-10.2(4)(a) (Supp. 1974) provides a civil penalty of not more than five hundred dollars for each violation, as does Suffolk County, N.Y., Ordinance 22, § 4(a), Sept. 9, 1973. Onondaga County, N.Y., Ordinance 2, §§ 5(A), (B) (1973) provides for a civil penalty of not more than one thousand dollars for a particular course of conduct violative of the local law or administrative rules and regulations, thus avoiding the technical question of what constitutes a single violation.

191. NEW YORK, N.Y., ADMIN. CODE ANN. ch. 64, tit. A, § 2203d-4.0(b) (Supp. 1974) provides for a civil penalty of five hundred dollars or a fine of five hundred dollars, or both, on proof of a knowing violation of the Consumer Protection Law. Huntington, N.Y., Ordinance 8, § 27-4(C), Oct. 19, 1971 contains the same provision.

192. NASSAU COUNTY, N.Y., ADMIN. CODE tit. D, § 21-10.2(4)(b) (Supp. 1974); Suffolk County, N.Y., Ordinance 22, § 4(b), Sept. 9, 1973.

193. NEW YORK, N.Y., ADMIN. CODE ANN. ch. 64, tit. A, § 2203d-4.0 (d) (Supp. 1974). Similar language is found in Onondaga County, N.Y., Res. 1, § 4(C) (1973) and Huntington, N.Y., Ordinance 8, § 27-4(E), Oct. 9, 1971.

194. NEW YORK, N.Y., ADMIN. CODE ANN. ch. 64, tit. A, § 2203d-4.0(c) (Supp. 1974).

195. Huntington, N.Y., Ordinance 8, § 27-4(D), Oct. 19, 1971.

196. Onondaga County, N.Y., Ordinance 2, Res. 1, § 4(A) (1973).

against a violator upon a finding by the consumer director of "repeated, multiple or persistent violation" of the law, rules or regulations.<sup>197</sup> All property recovered in the restitution action must be paid into an account.<sup>198</sup> Where consumer claims exceed the recovery paid into the account, awards to multiple consumers are prorated according to the value of each claim proved.<sup>199</sup> Most importantly, where the consumer chooses to share in the proceeds of a restitution action, he forfeits his right to institute a private action.<sup>200</sup>

## 2. The Unfair Trade Practices Laws in Operation

In practice, local consumer offices with enforcement powers resolve most complaints<sup>201</sup> without litigation.<sup>202</sup> Advising local busi-

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197. The Nassau and Suffolk County laws do not contain any provision permitting a suit to be brought for restitution. NEW YORK, N.Y., ADMIN. CODE ANN. ch. 64, tit. A, § 2203d-4.0(c) (Supp. 1974), and Huntington, N.Y., Ordinance 8, § 27-4 (D), Oct. 19, 1971, require that written notice be given the defendant of the proposed action, and that he have the opportunity to demonstrate in writing within five days that no repeated, multiple or persistent violations have taken place.

198. N.Y. C.P.L.R. § 2601 (McKinney Supp. 1974). The consumer protection office is entitled to recover the costs of investigation from the violator. NEW YORK, N.Y., ADMIN. CODE ANN. ch. 64, tit. A, § 2203-4.0(c) (Supp. 1974); Onondaga County, N.Y., Ordinance 2, Res. 1, § 4(b) (1973); Huntington, N.Y., Ordinance 8, § 27-4(D), Oct. 19, 1971. The New York City and Huntington laws provide that the costs of the investigation may be deducted from the amount recovered for consumers if it cannot be recovered from the defendant. NEW YORK, N.Y., ADMIN. CODE ANN. ch. 64, tit. A, § 2203d-4.0(c) (Supp. 1974); Huntington, N.Y., Ordinance 8, § 27-4(D), Oct. 19, 1971. The same result can be inferred from section 4(B) of the Onondaga Consumer Protection Code. See Onondaga County, N.Y., Ordinance 2, Res. 1, § 4(B) (1973).

199. NEW YORK, N.Y., ADMIN. CODE ANN. ch. 64, tit. A, § 2203d-4.0(c) (Supp. 1974); Huntington, N.Y., Ordinance 8, § 27-4(D), Oct. 19, 1971.

200. NEW YORK, N.Y., ADMIN. CODE ANN. ch. 64, tit. A, § 2203d-4.0(c) (Supp. 1974); Huntington, N.Y., Ordinance 8, § 27-4(D), Oct. 19, 1971. No such foreclosure is effected under Onondaga County, N.Y., Ordinance 2, Res. 1, § 4(A) (1973). The possibility of multiple recovery also exists under N.Y. EXEC. LAW § 63(12) (McKinney 1972) and N.Y. GEN. BUS. LAW § 349 (McKinney Supp. 1974).

201. In 1973 Nassau County received 14,186 complaints against vendors. 1973 NASSAU COUNTY OFFICE OF CONSUMER AFFAIRS ANN. REP. 6

ness concerns of the various provisions of the local unfair trade practices law often results in their immediate discontinuance.<sup>203</sup>

Where the vendor ignores written requests or his alleged actions are flagrant or a pattern of deceptive acts has developed, the vendor may be requested to appear at the local consumer office for a conference.<sup>204</sup> He is then orally informed of the complaints and the provisions and penalties of the unfair trade practices law.<sup>205</sup> Vendors may simply be asked to end the deceptive practice and to make restitution to consumers.<sup>206</sup> In more serious cases, assurances of discontinuance may be executed.<sup>207</sup> In most cases, complaints against vendors are resolved during these conferences.<sup>208</sup>

Another method of resolving cases involves administrative hearings.<sup>209</sup> At these hearings the Commissioner of Consumer Affairs takes evidence.<sup>210</sup> If he determines that the vendor has committed a deceptive practice, he generally accepts an Assurance of Discontinuance<sup>211</sup> in lieu of instituting formal legal proceedings.<sup>212</sup> The Assurance often contains provisions for restitution to consumers and the payment of costs and fines.<sup>213</sup>

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[hereinafter cited as 1973 NASSAU COUNTY REP.]. Onondaga County received 856 complaints during that same year. 1973 ONONDAGA COUNTY OFFICE OF CONSUMER AFFAIRS ANN. REP. attachment 1 [hereinafter cited as 1973 ONONDAGA COUNTY REP.].

202. See 1973 NASSAU COUNTY REP. 3-4; 1973 ONONDAGA COUNTY REP. 1. Restitution and other remedial action is generally accomplished through the exchange of letters and telephone calls. 1973 NASSAU COUNTY REP. 3.

203. 1973 ONONDAGA COUNTY REP. 1.

204. The Nassau County Office held 217 of these "vendor conferences" in 1973. 1973 NASSAU COUNTY REP. 4.

205. *Id.*

206. *Id.*

207. See NASSAU COUNTY, N.Y., ADMIN. CODE tit. D, § 21-10.2(5)(a) (Supp. 1974); NEW YORK, N.Y., ADMIN. CODE ANN. ch. 64, tit. A, § 2203-5.0(a) (Supp. 1974).

208. 1973 NASSAU COUNTY REP. 4.

209. See, e.g., NASSAU COUNTY, N.Y., ADMIN. CODE tit. D, § 21.10.0 (a) (Supp. 1974); NEW YORK, N.Y., CHARTER ch. 64, § 2203(e) (Supp. 1974).

210. See 1973 NASSAU COUNTY REP. 4.

211. *Id.*

212. *Id.* 3-4.

213. See, e.g., NASSAU COUNTY, N.Y., ADMIN. CODE tit. D, § 21-10.2(5) (Supp. 1974); NEW YORK, N.Y., ADMIN. CODE ANN. ch. 64, tit. A, § 2203d-

Local unfair trade practices laws enable local governments to obtain services for consumers and return money to them<sup>214</sup> with minimal expense.<sup>215</sup> Legal proceedings are few;<sup>216</sup> informal resolution of consumer disputes are more typical.<sup>217</sup> Such laws have also had a deterrent effect.<sup>218</sup>

All county governments should consider passing unfair trade practices laws. Where consumer offices have not yet been established, the more basic consumer legislation creating and empowering the consumer protection agency<sup>219</sup> can be passed simultaneously with the unfair trade practices law.<sup>220</sup> Such laws at the county level would improve consumer protection statewide without great expense.<sup>221</sup>

#### IV. Jurisdiction Over Deceptive Practices By Regulatory Agencies

##### A. State Level

A variety of state regulatory agencies have the responsibility to

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5.0 (Supp. 1974). In 1973 the Nassau County Office of Consumer Affairs collected \$19,555 in cost fines for violations of the Unfair Trade Practices Law. 1973 NASSAU COUNTY REP. 4.

214. See note 213 *supra*.

215. The 1973 budget for the Nassau County Office of Consumer Affairs was \$376,000. 1973 ONONDAGA COUNTY CONSUMER REP. 1. The 1973 budget for the Onondaga County Office was \$44,385. *Id.* The New York City Department of Consumer Affairs' authorized budget for fiscal year 1973-74 was \$5,591,771. NEW YORK, N.Y., EXPENSE BUDGET FOR THE FISCAL YEAR 1973-1974, at 68.

216. The only reported cases under local unfair trade practices laws have been brought by or against the City of New York. See, e.g., *Commercial Lawyers v. Grant*, 65 Misc. 2d 897, 318 N.Y.S.2d 966 (Sup. Ct. 1971); *Meyerson v. Phillips Televisions, Inc.*, 170 N.Y.L.J. 2, col. 6 (Sup. Ct. May 13, 1971).

217. See 1973 ONONDAGA COUNTY CONSUMER REP. 1.

218. These local consumer offices place emphasis on eliminating unfair business practices. See 1973 NASSAU COUNTY REP.; 1973 ONONDAGA REP. 1. Many others have doubtless been dissuaded from unfair practices because of the penalties imposed and the possibility of public exposure. *Id.*

219. See notes 120-37 *supra* and accompanying text.

220. See Onondaga County, N.Y., Ordinance 2 (1973); Suffolk County, N.Y., Ordinances 21-22, Sept. 9, 1973.

221. See note 215 *supra*.



enforce consumer protection laws.<sup>222</sup> The Department of Agriculture and Markets supervises the food and drug laws,<sup>223</sup> while the Banking Department has jurisdiction over credit institutions.<sup>224</sup> The Department of State, through its Division of Licenses, handles a broad range of occupational and professional licensing.<sup>225</sup> Standards of conduct within the regulated field are set by legislation<sup>226</sup> and regulations promulgated by the authorized administrative board or official.<sup>227</sup> Violation of these laws and regulations can result in the imposition of criminal<sup>228</sup> and civil penalties,<sup>229</sup> including suspension or revocation of one's license.<sup>230</sup> Thus, when an unfair practice is discovered in a regulated field, the leverage often exists to persuade the violator to rectify the wrong done to the consumer.<sup>231</sup>

Specific statutes prohibit unfair methods of competition and un-

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222. See Rice 596.

223. N.Y. AGRIC. & MKTS. LAW §§ 5, 16(22), (23), (25), (27) (McKinney 1972); *id.* §§ 16(24), 16(25a) (McKinney Supp. 1974).

224. N.Y. BANKING LAW § 340 (McKinney Supp. 1974).

225. See, *e.g.*, N.Y. EXEC. LAW §§ 70, 432 (McKinney 1968). For a list of licensing functions of the Division of Licensing Services within the Department of State, see 1973 N.Y. LEG. MANUAL 607-09.

226. See, *e.g.*, N.Y. BANKING LAW §§ 340-65 (McKinney 1971).

227. See, *e.g.*, *id.* § 14 (granting the banking board rule making authority over credit institutions). See also N.Y. AGRIC. & MKTS. LAW § 18 (McKinney 1972) (granting commissioner of agriculture and markets rule-making authority with regard to food and drug laws).

228. See, *e.g.*, N.Y. AGRIC. & MKTS. LAW §§ 40 (penalty of not more than two hundred dollars for a first offense and not more than four hundred dollars for each succeeding violation of a rule or regulation), 202-d (McKinney 1972).

229. N.Y. EDUC. LAW § 6809 (McKinney 1972), *as amended*, (Supp. 1974).

230. See, *e.g.*, N.Y. AGRIC. & MKTS. LAW §§ 147-b, 251-e (McKinney 1972); N.Y. BANKING LAW §§ 40, 348, 362 (McKinney 1971).

231. An example will illustrate how this process can work. A Zambian woman complained to the State Consumer Protection Board that she had had difficulty in obtaining an apartment in New York City, and that a real estate agency would neither refund a \$1,035 deposit she had made nor provide her with an apartment. The Board referred the case to the Department of State's real estate licensing section, and soon thereafter the woman obtained both the refund and a new apartment. 1973 N.Y. ST. CONSUMER PROTECTION Bd. ANN. REP. 13-14.

fair or deceptive acts and practices in the insurance industry.<sup>232</sup> The Superintendent of Insurance is authorized to issue cease and desist orders against such acts,<sup>233</sup> impose civil penalties,<sup>234</sup> and obtain temporary injunctions.<sup>235</sup> The Commissioner of Agriculture and Markets is authorized to prevent false advertising and mislabeling in the sale of food to the public.<sup>236</sup> The Commissioner of the State Board of Pharmacy is similarly authorized with regard to the sale of drugs, devices, and cosmetics.<sup>237</sup> These officials may also impose monetary penalties,<sup>238</sup> seize misbranded or deceptively advertised products,<sup>239</sup> and obtain injunctions against continuing violations.<sup>240</sup> In addition, the violation of many such false advertising and mislabeling statutes is a misdemeanor.<sup>241</sup>

## B. Local Level

At the local level, licensing is the primary, though not the exclusive, means of regulation.<sup>242</sup> These local laws regulate specific fields

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232. N.Y. INS. LAW § 272 (McKinney 1966). “[U]nfair methods of competition” include violation of N.Y. PENAL LAW § 190.20 (McKinney Supp. 1974) (false advertising), among other statutes. N.Y. PENAL LAW § 273 (McKinney Supp. 1974).

233. N.Y. INS. LAW § 276 (McKinney 1966).

234. *Id.* § 280. Civil penalties up to five thousand dollars may be imposed for violation of the cease and desist order. *Id.*

235. *Id.* § 278(2).

236. N.Y. AGRIC. & MKTS. LAW §§ 199-a, 201(1), 202-a (McKinney 1972).

237. N.Y. EDUC. LAW §§ 6804, 6809, 6813, 6818, 6821 (McKinney 1972); *id.* §§ 6808-a, 6810, 6815, 6817, 6826 (McKinney Supp. 1974).

238. N.Y. AGRIC. & MKTS. LAW § 39 (McKinney 1972); N.Y. EDUC. LAW § 6809 (McKinney 1972).

239. N.Y. AGRIC. & MKTS. LAW § 202-b (McKinney 1972); N.Y. EDUC. LAW § 6813 (McKinney 1972).

240. N.Y. AGRIC. & MKTS. LAW § 202-c (McKinney 1972); N.Y. EDUC. LAW § 6824 (McKinney 1972).

241. N.Y. AGRIC. & MKTS. LAW § 41 (McKinney 1972); N.Y. EDUC. LAW § 6811 (McKinney Supp. 1974). The primary means of enforcement, however, is administrative regulation. In 1973, The Consumer Frauds and Protection Bureau of the Attorney General's Office recovered \$17,170 in Agriculture and Market penalties, and received 401 matters from that department for further proceedings. 1973 CONSUMER FRAUDS ANN. REP. 26.

242. See Truth-in-Pricing Law, NEW YORK, N.Y., ADMIN CODE ANN. ch.

and activities; however, these laws do not cover "unfair trade practices" in those localities that have an unfair trade practices law.<sup>243</sup>

### 1. Regulation in New York City

The New York City Department of Consumer Affairs, created by the New York City Council in 1968,<sup>244</sup> is responsible for enforcing "all laws relating to the advertising and offering for sale and the sale of all commodities, goods, wares and services."<sup>245</sup> That legislation gave the Department the powers and personnel of two pre-existing city agencies—the Department of Markets<sup>246</sup> and the Department of Licenses.<sup>247</sup> The Markets Division of the Department of Consumer Affairs protects consumers from theft resulting from short weights and measures,<sup>248</sup> and supervises all public markets.<sup>249</sup> It also licenses

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64, tit. B, art. 1, §§ B64-1.0 to -5.0 (Supp. 1974).

243. See *New York Food Merchants' Ass'n v. Grant*, 63 Misc. 2d 550, 312 N.Y.S.2d 600 (Sup. Ct. 1970), granting plaintiff's motion for summary judgment in an action to enjoin enforcement of a "unit pricing law" promulgated by the New York City Commissioner of Consumer Affairs pursuant to rule making power granted in New York City's Consumer Protection Law of 1969. The court found that the Commissioner's power to promulgate rules and regulations implementing that law's prohibition of deceptive or unconscionable trade practices did not authorize the Commissioner to promulgate what amounted to a law requiring unit pricing in retail grocery stores. This decision led directly to the enactment of the Truth-in-Pricing Law, which authorizes the Commissioner of Consumer Affairs to issue implementing rules and regulations. See *NEW YORK, N.Y., ADMIN. CODE ANN.* ch. 64, tit. B, art. 1, §§ B64-1.0 to -5.0 (Supp. 1974).

244. *NEW YORK, N.Y., CHARTER* ch. 64 (1972).

245. *Id.* § 2203(d).

246. *Id.* §§ 2203(b) (Commissioner of Consumer Affairs shall enforce all laws in relation to weights and measures), (f) (Commissioner shall exercise the powers of a Commissioner of Public Markets under the Agriculture and Markets law with respect to open air markets); see *NEW YORK, N.Y., ADMIN. CODE ANN.* ch. 36 (1970), *as amended*, (Supp. 1974) (Department of Markets).

247. *NEW YORK, N.Y., CHARTER* ch. 64, § 2203(c); see *NEW YORK, N.Y., ADMIN. CODE ANN.* ch. 32 (1970), *as amended*, (Supp. 1974) (Department of Licenses).

248. Violation of *NEW YORK, N.Y., ADMIN. CODE ANN.* ch. 36, tit. A, §§ 833-5.0, 833-16.0 (1970) subjects the offender to a fine of not less than

a number of occupations<sup>250</sup> and regulates other specified activities.<sup>251</sup> The Commissioner of Consumer Affairs is authorized to adopt and amend such rules and regulations as are necessary to carry out his powers and duties under the Markets Law.<sup>252</sup> Violation of these rules and regulations subjects the offender to criminal penalties.<sup>253</sup>

A new article of the New York City Markets Law gives the Commissioner regulatory and enforcement powers with regard to the labeling of perishable foods.<sup>254</sup> Specifically, it empowers the Com-

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twenty-five and no more than five hundred dollars, or by imprisonment not exceeding ten days or both. *Id.* § 833-23.0; see *City of New York v. Alkana*, 148 N.Y.L.J. 17, col. 1 (Sup. Ct. Dec. 7, 1962) (penalty for violation of section 833-16.0 recoverable only before a magistrate).

249. NEW YORK, N.Y., ADMIN. CODE ANN. ch. 36, tit. A, §§ 833-3.0, 833-6.0 (1970). See generally T. SMITH, 1966 GUIDE TO THE MUNICIPAL GOVERNMENT OF THE CITY OF NEW YORK 137-38 (9th ed. 1966).

250. See, e.g., NEW YORK, N.Y., ADMIN. CODE ANN. ch. 36, tit. B, art. 4, §§ B36-22.0 to -77.0 (1970) (solid fuel dealers); *id.* art. 6, §§ B36-92.0 to -98.0 (1970), as amended, (Supp. 1974) (peddlers).

251. See, e.g., *id.* art. 7, §§ B36-99.0 to -102.0 (1970) (hamburgers and chopped meat); *id.* art. 10, §§ B36-113.0 to -114.0 (1970) (sale of prepackaged meats).

252. *Id.* § 833-3.1(a). In *Jackel v. Pacetta*, 35 Misc. 2d 358, 229 N.Y.S.2d 57 (Sup. Ct. 1962), the court held that a regulation requiring the grinding of meats in a place open to the public was authorized by a law empowering the commissioner to enforce laws concerning weights and measures.

253. NEW YORK, N.Y., ADMIN. CODE ANN. ch. 36, tit. A, § 833-3.1(c) (1970). Each violation carries a fine of not less than twenty-five nor more than two hundred fifty dollars, imprisonment not exceeding ten days, or both.

254. *Id.* tit. B, art. 12, §§ B36-120.1 to -120.5 (Supp. 1974). The City Council expressed its intent to provide "a mandatory system of clear and legible dating accompanied by a statement of recommended conditions of storage" with respect to perishable foods. *Id.* § B36-120.1. The Commissioner of Consumer Affairs is authorized to promulgate regulations designating those perishable foods which must be stamped or labeled as such, and which must indicate recommended conditions and methods of storage, as well as a clearly specified date after which the food cannot be sold for human consumption. *Id.* §§ B36-120.2, B36-120.3(a). The Commissioner also has authorization to issue any other regulation he deems necessary to carry out the purposes of the Act, *id.* § B36-120.3(b), to initiate his own investigations, take appropriate action with regard thereto, including

missioner to require an honest and disclosure-oriented course of conduct by manufacturers with regard to perishable foods.<sup>255</sup>

The License Division of the Department of Consumer Affairs plays an increasingly important role in the protection of consumers in New York City. The Commissioner has two sources of power over licensed occupations and activities—the License Enforcement Law of 1973,<sup>256</sup> and the various provisions of each licensing article.<sup>257</sup> The Enforcement Law broadly declares that licensing<sup>258</sup> is “a necessary

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stop-sale and stop-removal orders, *id.* § B36-120.4(a), and “determine the reasonableness of any statement or representation as to the date and conditions of storage” after reasonable notice and hearing. *Id.* § B36-120.4(b). Provision is made for the imposition of civil penalties of not less than twenty-five nor more than two hundred fifty dollars for each violation, and criminal fines with the same range as the civil penalties where there is a violation of any section of the article or regulation promulgated thereunder. *Id.* § B36-120.5. The old Bureau of Weights and Measures could only attempt to persuade manufacturers to make only honest claims on their labels. T. SMITH, 1960 GUIDE TO THE MUNICIPAL GOVERNMENT OF THE CITY OF NEW YORK 138 (3d ed. 1960).

255. The article “recognizes consumer concern with the freshness of foods including, but not limited to, meat, poultry, fish, dairy products, eggs, fruit, vegetables and baked goods.” NEW YORK, N.Y., ADMIN. CODE ANN. ch. 36, tit. B, § B36-120.1 (Supp. 1974). In 1960 the Division, then the Department of Licenses, issued licenses for seventy-nine different license classifications. T. SMITH, 1960 GUIDE, *supra* note 254, at 221. In 1966 there were ninety different classifications. T. SMITH, 1966 GUIDE, *supra* note 249, at 135. By 1974 that figure increased to over one hundred ten. This information was derived from an untitled document issued by the New York Department of Consumer Affairs. A copy is on file in the office of the *Fordham Urban Law Journal*. Over 73,000 licenses are issued by the division to individual licensees in trades ranging from home improvement contractors, NEW YORK, N.Y., ADMIN. CODE ANN. ch. 32, tit. B, art. 42, § B32-352.0 (1970), to cabarets, *id.* art. 38, § B32-297.0, and process servers. *Id.* art. 43, § B32-450.0 (Supp. 1974).

256. NEW YORK, N.Y., ADMIN. CODE ANN. ch. 32, tit. A, §§ 773-1.0 to -15.0 (Supp. 1974).

257. *See, e.g., id.* tit. B, art. 42, § B32-356.0 (1970) (requiring that persons in the home improvement business obtain a license, and subjecting all such persons to the article’s provisions and regulations promulgated thereunder).

258. “License” is defined as “an authorization by the department of consumer affairs to carry on various activities within its jurisdiction, which

and proper mode of regulation with respect to certain trades, businesses and industries,"<sup>259</sup> for the protection of the public from "deceptive, unfair and unconscionable practices, for the maintenance of standards of integrity, honesty and fair dealing among persons and organizations engaging in licensed activities, for the protection of the health and safety of the people of New York City and for other purposes requisite to promoting the general welfare . . . ."<sup>260</sup> The law bestows upon the Commissioner "cognizance and control of the granting, issuance, transferring, renewal, denial, revocation, suspension and cancellation of all licenses issued" under him.<sup>261</sup> In addition, the law authorizes him to "promulgate, amend and rescind regulations and rules" as he thinks necessary and appropriate "to carry out the powers and duties of the department,"<sup>262</sup> "to prevent and remedy fraud, misrepresentation, deceit and unconscionable dealing, and to promote fair trade practices by those engaging in licensed activities."<sup>263</sup> He may likewise require licensees to disclose adequately the terms and conditions of performance of the licensed activities, "the true names or corporate names of the licensees, and . . . applicable local, state and federal laws pertinent to consumers' interests" in the licensed activities.<sup>264</sup> He is also empowered to require licensees to keep such records as he deems necessary or useful to effectuate the purposes of the License Enforcement Law, to retain such records for a period of three years,<sup>265</sup> and to ensure that all licensees have made appropriate financial disclosure.<sup>266</sup> The License Enforcement Law also authorizes the Commis-

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may take the form of a license, permit, registration, certification or such other form as is designated under law, regulation or rule." *Id.* tit. A, § 773-2.0(c) (Supp. 1974).

259. *Id.* § 773-1.0.

260. *Id.* The City Council noted that the "commissioner . . . requires powers, remedies, and sanctions which are equitable, flexible and efficient." *Id.*

261. *Id.* 773-4.0(a).

262. *Id.* § 773-4.0(b)(1).

263. *Id.* § 773-4.0(b)(2).

264. *Id.* § 773-4.0(b)(3).

265. Unless otherwise specifically provided for by a provision in the article. *Id.* § 773-4.0(b)(4).

266. *Id.* § 773-4.0(b)(5).

sioner<sup>267</sup> "to protect the health, safety, convenience and welfare of the general public" with regard to licensed activity;<sup>268</sup> and "to ensure that those engaging in licensed activities do not discriminate against any person on the basis of age, sex, race, color, national origin, creed or religion in violation of city, state or federal laws."<sup>269</sup>

The City Council intends that the broad rulemaking powers of the Commissioner be liberally construed.<sup>270</sup> They empower him not only to establish standards of conduct for a licensed activity, but also to establish remedial procedures for victimized consumers.<sup>271</sup> The Commissioner is also authorized to:

conduct investigations, to issue subpoenas, to receive evidence, to hear complaints regarding activities for which a license is or may be required, to take depositions on due notice, to serve interrogatories, to hold public and private hearings upon due notice, to take testimony and to promulgate, amend and modify procedures and practices governing such proceedings.<sup>272</sup>

The Commissioner can conduct any investigation and hold any public or private hearing if it relates to his licensing power or the public's interest therein.<sup>273</sup>

Under chapter 32 of the License Enforcement Law,<sup>274</sup> the Commissioner is authorized to suspend, revoke, or cancel any license issued by him upon due notice and hearing. Violation of chapter 32 subjects the licensee to fines. The Commissioner<sup>275</sup> is authorized to suspend a license pending payment of an imposed fine or "pending compliance with any other lawful order of the department."<sup>276</sup> A failure to appear at a hearing after due notice is given is punishable by fine or suspension or both.<sup>277</sup> Failure to return a license to the department after receipt of an order of suspension constitutes grounds for fine or revocation of the license.<sup>278</sup> Most importantly for

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267. *Id.* § 773-4.0(b)(4).

268. *Id.* § 773-4.0(b)(6).

269. *Id.* § 773-4.0(b)(7).

270. *Id.* § 773-3.0.

271. *Id.* § 773-4.0(b)(2).

272. *Id.* § 773-4.0(d).

273. *Id.*

274. *Id.* §§ 773-1.0 to -15.0 (Department of Licenses).

275. This applies to the Commissioner or his designee. *Id.*

276. *Id.* § 773-4.0(c).

277. *Id.*

278. *Id.*

consumers, the Commissioner may arrange for redress of injuries<sup>279</sup> in the form of a stipulation agreed to by the violating licensee.<sup>280</sup> The Commissioner's leverage is significant and a licensee, fearful of revocation, suspension, cancellation or even fines, will usually come to terms when confronted.<sup>281</sup> The consumer is also benefited by a provision which requires a licensee which has committed repeated, multiple, or persistent violations of chapter 32 to display in its places of business and in advertisements a notice describing its record of violations.<sup>282</sup>

Generally, civil<sup>283</sup> and criminal penalties<sup>284</sup> are available for chapter 32 violations. A sliding scale of criminal penalties exists for persons operating a licensed activity without a license.<sup>285</sup> The pen-

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279. *Id.* The Commissioner may also provide for compliance with the provisions and purposes of the various chapter 32 licensing articles, and the rules and regulations promulgated thereunder. *Id.*

280. The stipulation provides for restitution for the victimized consumer or consumers. *Id.*

281. The Commissioner's authority pursuant to section 773-4.0(b) of the New York City Administrative Code is of great significance, because he can promulgate rules and regulations for the various articles requiring licensing of specified activities. In addition, these articles often provide that violation of any of their provisions or rules or regulations thereunder constitutes grounds for revocation, suspension, or fine. *See, e.g., id.* art. 2, §§ B32-243.0 (advertising by employment agencies), B32-260.0 (garbage and parking lots), B32-332.0 (sightseeing buses and drivers), B32-357.0(8) (home improvement business).

282. *Id.* tit. A, § 773-4.0(f). The form, content, and size of the notice is specified by the Commissioner. *Id.* The Commissioner may require such display for not less than ten days nor more than one hundred days on each occasion such display is required. *Id.*

283. *Id.* § 773-5.0(a) (one hundred dollars for each violation to be recovered in a civil action).

284. *Id.* (fine of not less than twenty-five nor more than five hundred dollars, or imprisonment not exceeding fifteen days, or both).

285. *Id.* § 773-5.0(b)(1). When an unlicensed violator has never before held a license for the licensed activity, he is subject to a fine of not less than twenty-five dollars, nor more than five hundred dollars, or imprisonment not exceeding fifteen days, or both, and to a civil penalty of the greater of twice the applicable license fee or one hundred dollars. *Id.* If an unlicensed violator has never before held a license for the activity



alty increases with the degree of the defendant's fault. Managers and proprietors of unlicensed businesses, as well as those who lease premises to unlicensed businesses, are subjected to a penalty during the period the unlicensed business operates.<sup>286</sup> Finally, the City's legal department is authorized to seek an injunction to restrain or enjoin any violation of chapter 32.<sup>287</sup>

The Commissioner's powers under the Licensing Enforcement Law are supplemented by separate provisions under individual licensing articles. Each article<sup>288</sup> requires the licensing of a specific activity. Typically, the Commissioner is granted the power to determine the terms and conditions of issuing a license,<sup>289</sup> the only standard being reasonableness.<sup>290</sup> Many articles require that a bond be

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but has been convicted once previously of engaging in such activity without a license, or if he had held such a license but it had lapsed prior to his perfecting an application for renewal, the minimum and maximum fines are one hundred dollars and one thousand dollars respectively, the maximum period of imprisonment is thirty days, and the civil penalty recoverable in a civil action is one thousand dollars. *Id.* § 773-5.0(b)(2). If the unlicensed violator has had his license revoked or suspended, or if he has twice previously been convicted of engaging in the licensed activity without a license, he is subjected to a fine of not less than two hundred nor more than two thousand dollars or by imprisonment not exceeding sixty days, or both; the civil penalty recoverable in such cases is two thousand dollars. *Id.* § 773-5.0(b)(3).

286. *Id.* § 773-5.0(c) (one hundred dollars per day each day during which the unlicensed business operates).

287. *Id.* § 773-5.0(d).

288. *Id.* tit. B, arts. 1-44.

289. *See, e.g., id.* art. 2, § B32-25.0 (commissioner to pass on the location of a motion picture theatre and the character of the applicant before granting a license to the theatre operator).

290. *See In re Goodman*, 112 N.Y.L.J. 507 (Sup. Ct. 1944); *In re Ansre-lan*, 102 N.Y.L.J. 1880 (Sup. Ct. 1939). *But see City of New York v. S & H Book Shop, Inc.*, 41 App. Div. 2d 637, 341 N.Y.S.2d 292 (1st Dep't 1973), which reversed a temporary injunction enjoining petitioners from operating a place of public amusement which exhibited motion pictures by means of coin-operated machines. Declaring such film showing to be within the ambit of first amendment freedoms, the court noted that the Commissioner's grant of power under NEW YORK, N.Y., ADMIN. CODE ANN. ch. 32, tit. B, art. 1, appeared to vest, on its face, "unbridled discretion in the Commissioner to define and determine the standards for granting a

furnished to the city as a condition to obtaining a license.<sup>291</sup> Other statutory conditions may include fingerprinting,<sup>292</sup> proof of good character,<sup>293</sup> and requirements relating to the propriety and safety of licensed premises.<sup>294</sup> Once the license is obtained, the licensee must obey all statutory requirements and rules and regulations promulgated by the Commissioner.<sup>295</sup> Some articles provide that a violation is punishable by fines, suspension, revocation, denial of reapplication of a license,<sup>296</sup> or imprisonment.<sup>297</sup>

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license." 41 App. Div. 2d at 637, 341 N.Y.S.2d at 293. Questioning but not reaching the issue of the statute's constitutionality, the court found only that a clear right to the drastic remedy of temporary injunction was not shown by respondent. *Id.*, 341 N.Y.S.2d at 293. *See also* NEW YORK, N.Y., ADMIN. CODE ANN. ch. 32, tit. B, art. 44, § B32-474.0 (Supp. 1974), which requires a hearing before a license may be denied to television, radio, audio equipment, and phonograph servicemen and repairmen.

291. The Commissioner is authorized to require a bond for any licensed activity, the amount to be fixed by him after a public hearing, except as specifically provided in the licensing articles. NEW YORK, N.Y., ADMIN. CODE ANN. tit. A, § 773-14.0 (Supp. 1974). The bond may be furnished either in a specific penal sum, *id.* tit. B, art. 16, § B32-103.0 (1970), or in a sum to be fixed by the commissioner. *Id.* art. 1, § B32-10.0.

292. *See id.* art. 39, § B32-311.0(c) (operators of coffee houses).

293. *See, e.g., id.* art. 42, § B32-355.0(6) (good character required for home improvement contractors); *id.* art. 44, § B32-468.0 (television, radio and audio equipment, phonograph servicemen and repairmen).

294. *See, e.g., id.* art. 39, § B32-311.0(2)(3) (coffee houses).

295. The Commissioner is authorized to promulgate rules and regulations for all licensing articles by the Licensing Enforcement Act of 1973, as well as by certain articles of chapter 32. *Compare, e.g., id.* tit. A, § 773-4.0(b)(1), *with id.* tit. B, art. 42, § B32-356. (authorizing the Commissioner to promulgate rules and regulations consistent with the provisions of article 42, dealing with home improvement contractors).

296. *See, e.g., id.*, tit. B, art. 42, § B32-357.0 (1970), which provides penalties of fines, suspension, revocation, and denial of a reapplication for violation of seven specific prohibitions and a catchall provision prohibiting violation of any provision of article 42 or rule or regulation promulgated thereunder.

297. *Id.* § B32-360.0 makes false or fraudulent representations in the home improvement business a misdemeanor punishable by imprisonment not exceeding one year or by a fine not exceeding one thousand dollars. Many provisions of articles have been repealed with the enactment of the

The Commissioner of Consumer Affairs has enormous leverage over a licensed businessman engaged in any fraudulent or unconscionable practices. Moreover, the number of occupations requiring a license is growing.<sup>298</sup> For example, in recent years the City Council has required the licensing of the home improvement business,<sup>299</sup> and process servers.<sup>300</sup>

## 2. Other Local Government Regulatory Agencies

A number of other local governments have followed New York City in centralizing their departments of consumer affairs. Some local laws have consolidated formerly separate administrative divisions. Others have created new offices of consumer protection.<sup>301</sup>

The role of licensing is also expanding. Home solicitation sales are regulated in many localities by "hawking and peddling" ordinances.<sup>302</sup> These laws require, with some stated exceptions,<sup>303</sup> the

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Licensing Enforcement Act. *See id.* tit. A, §§ 773-1.0 to -15.0 (Supp. 1974).

298. *See* note 256 *supra* and accompanying text.

299. NEW YORK, N.Y., ADMIN. CODE ANN. ch. 32, tit. B, art. 42, § B32-352.0(a)(1970).

300. *Id.* art. 43, § B32-450.0 (Supp. 1974). In his study, Professor David Caplovitz found that ninety-seven percent of judgments in consumer credit cases resulted from defaults, in many instances the direct result of "sewer service." D. CAPLOVITZ, *THE POOR PAY MORE* 161 (1963). The New York State legislature has not yet enacted legislation that would license or otherwise regulate process servers.

301. *See, e.g.*, Buffalo, N.Y., Ordinance 1, §104(a), June 27, 1969 (abolishing the division of markets and creating in the division of licenses a bureau of weights and measures).

302. *See, e.g.*, East Greenbush, N.Y., Ordinance 2, Nov. 8, 1971; Hamburg, N.Y., Ordinance 28, Dec. 9, 1968; Pound Ridge, N.Y., Ordinance 2, § 2, Feb. 13, 1969; Tomkins County, N.Y., Ordinance 5, § 2, Dec. 8, 1969.

303. *See, e.g.*, East Greenbush, N.Y., Ordinance 2, § 11, Nov. 8, 1971: "Nothing in this local law shall be held to apply to any sales conducted pursuant to statute or by order of any court; to any person selling personal property at wholesale to dealers in such articles; to merchants having an established place of business within the town, or to their employees, or to the peddling of meats, fish, fruit and similar produce by farmers and persons who produce such commodities; or to dealers in milk, baked goods, heating oil and daily newspapers; or to any licensed real estate brokers, or to any honorably discharged member of the United States Armed Forces

licensing of all "persons"<sup>304</sup> involved in the hawking, peddling or soliciting of goods or wares from door to door or in a public place or street.<sup>305</sup> They further provide that the license applicant furnish extensive information under oath to establish his good character.<sup>306</sup>

At least one locality has enacted licensing legislation regulating certain other trades and businesses,<sup>307</sup> such as home improvement contracting<sup>308</sup> and disposal of waste oils.<sup>309</sup> In some localities, licensing boards exist for tradesmen such as plumbers<sup>310</sup> and electricians.<sup>311</sup> These boards operate to determine the fitness of applicants and to revoke a license if it is determined that a licensee is unfit or incapable of proper performance.<sup>312</sup> The existence of a licensing requirement reduces the occurrence of consumer deceptions; few li-

of the United States who has procured a license under article four of the General Business Law of the State of New York; or to persons soliciting or collecting for any bona fide organization."

304. "Person" is defined to include "any individual, firm, partnership, corporation, unincorporated association, and all other entities of any kind, any principal or agent thereof." East Greenbush, N.Y., Ordinance 2, § 2(d), Nov. 8, 1971.

305. The term "hawker and peddler" is broadly defined to include all persons who sell, barter, or offer to sell or barter goods or wares in a public place, street or highway, from door to door or from business place to business place. *See id.* § 2(a). "Solicitor" is similarly defined, but he is one who takes or offers to take orders for goods, wares, or merchandise, or for services to be performed in the future, or for making, manufacturing or repairing any article or thing whatsoever for future delivery. *Id.* § 2(b).

306. *See, e.g.*, Pound Ridge, N.Y., Ordinance 2, §§ 4-5, Feb. 13, 1969.

307. NASSAU COUNTY, N.Y., ADMIN. CODE ch. 21, tit. D-1, art. 1, §§ 21-11.0 to -11.14 (Supp. 1974). The provisions of the law are similar to those of NEW YORK, N.Y., ADMIN. CODE ANN. ch. 32, tit. B, art. 42, §§ B32-35.0 to -367.0 (1970).

308. NASSAU COUNTY, N.Y., ADMIN. CODE ch. 21, tit. D-1, art. 1, §§ 21-11.0 to -11.14 (Supp. 1974).

309. *Id.*, tit. G, §§ 21-70.0 to -70.8.

310. *See, e.g.*, Greenburg, N.Y., Ordinance 4, Apr. 22, 1969.

311. *See, e.g.*, Suffolk County, N.Y., Ordinance 17, Nov. 8, 1971, amended by Ordinance 27, Dec. 26, 1972, and Ordinance 21, § 2, Sept. 11, 1973 (creating licensing boards for plumbers and electricians under the jurisdiction of the county Commissioner of Consumer Affairs). *Id.*

312. *See* Suffolk County, N.Y., Ordinance 17, § 7(I), Nov. 8, 1971; Greenburg, N.Y., Ordinance 4, § 41-7, Apr. 22, 1969.

censed practitioners want to risk penalties which include the possible revocation of their license.<sup>313</sup>

## V. Conclusion

The effectiveness of consumer protection within New York depends in large measure on the existence, powers, and activities of government agencies on the state and local levels. Comprehensive and practical legislation must empower these agencies not only to take action with regard to existing deceptive acts or practices, but also to dissuade potential violators from entering into such practices. To the greatest extent possible, administration of the various state laws should be centralized to ensure maximum efficiency and expertise in dealing with consumer deceptions. Where this is unfeasible, administration by the various agencies must be coordinated to avoid duplication of effort and guarantee uniform enforcement of the law. Communication and cooperation among consumer agencies on all levels must exist on a permanent basis.

Because of the great variety of consumer protection laws at the state level, administration is lodged in different departments.<sup>314</sup> The State Consumer Protection Board performs the task of coordinating the activities of these governmental agencies,<sup>315</sup> and its powers allow it to prevent duplication of effort among state departments.<sup>316</sup> The Board also facilitates consumer protection by publicizing the existing consumer protection structure.<sup>317</sup>

At the local level, centralization of consumer protection activities in a single agency is more practicable. The legal and equitable remedies for deceptive practices are broad. The role of the civil penalty, however, should be increased significantly. Where such a penalty is non-existent, as in the case of a violation of section 349 of the General Business Law, it should be provided. Where civil penalties are provided, as in section 350(c) of the General Business Law, the

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313. The Suffolk County law authorizes the board of the licensed business or trade to formulate and recommend a code of rules governing the licensed occupation to the county legislature for adoption. Suffolk County, N.Y., Ordinance 17, § 7(H), Nov. 8, 1971.

314. See text accompanying notes 29, 111-20 *supra*.

315. See text accompanying note 121 *supra*.

316. See note 127 *supra*.

317. See text accompanying note 129 *supra*.

amount of the penalty should be increased. A higher penalty should be imposed where there is proof of a knowing violation. Where an Assurance of Discontinuance admits a violation, a stipulation imposing a civil penalty in a sum agreed upon by the parties should be permitted. The imposition of such penalties would dissuade potential violators from entering into a deceptive practice, and extract from actual violators a substantial sum for the deceptive dealings.

Local consumer offices and licensing apparatus are essential to ensure consumer protection on a state-wide basis. Local consumer offices on the county level should be created and given investigatory and educational duties. Unfair trade practices laws, preferably along the lines of the New York City Consumer Law of 1969, should be adopted by all county governments. Adoption of such laws would grant broad powers to local commissioners of consumer affairs, and provide leverage in obtaining informal and formal resolutions of consumer disputes.

The administration of consumer protection laws at the county level should be centralized, and the local consumer affairs commissioner should be given jurisdiction over weights and measures, and licensing. He should be authorized to issue rules and regulations as to licensees. With centralized administration and broad powers, a knowledgeable local consumer office can do much to rid its locality of deceptive practices.

A final question is whether unfair trade practices laws should be adopted at the town level. It is submitted that they should not. The concurrent jurisdiction of county and town governments would be confusing. If broadly empowered consumer offices are created at the county level, there should be no need for similar town offices. Legislation at the town level should be directed toward the education of local consumers and the discovery of existing deceptive and unconscionable practices.

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