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On Her Majesty's Secret Service: Protecting the Consumer in New York City*

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In 1969, as a staff attorney for the NAACP Legal Defense Fund, I wrote an article describing my attempts to promote the rights of consumers by bringing test cases in the New York State courts.¹ I described the frustrations of litigating within a system that was fraught with procedural hurdles and long delays, and concluded that the courts in which I practiced were indifferent to the pressing needs of consumers and to the reforming legal doctrines which might answer those needs.

Convinced that there had to be a more effective means of protecting consumers than by lengthy test litigation, I left the Legal Defense Fund to see what I could accomplish working as a government official within the New York City Department of Consumer Affairs. This article is based upon my fifteen month tenure with the Department's Law Enforcement Division and is an attempt (1) to indicate the ways in which governmental power can be used to protect consumers, (2) to give law students an idea of the day-to-day activities and professional life-style of one type of "public interest" lawyer, and (3) to suggest the ethical conflicts felt by a civil libertarian who works in a law enforcement office.

I. Getting It Together

Protecting the consumer against fraud has been the job of the Federal Trade Commission and various state consumer protection offices or Attorney General's offices. Unfortunately, the records of most of

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1. Schrag, *Bleak House 1968: A Report on Consumer Test Litigation*, 44 N.Y.U. L. REV. 115 (1969).

these offices have been abysmal. Inadequate funding, understaffing, weak legislation, lack of public support, overbureaucratization and the absence of any real sense of mission conspired to render government agencies ineffective or, in some cases, servants of industry, while consumer fraud flourished.²

Ralph Nader sparked dramatic change. His publication of *Unsafe at Any Speed* in 1965 and his subsequent activities created new demands for consumer protection. As a result of Nader's exposé of the Federal Trade Commission in 1968,³ the FTC began undertaking widespread reforms designed to increase its effectiveness as a consumer protector.⁴ This same reforming impulse spread to state and local government as well.

The New York City Council responded to consumer needs by creating a Department of Consumer Affairs with an Advisory Council and the power to subpoena witnesses.⁵ Late in 1968, Mayor John Lindsay appointed me Chairman of the Department's new Advisory Council.

While the City Council's action was a step in the right direction, it had not gone far enough. The new Department of Consumer Affairs was really only an amalgamation of the City's Department of Markets (Weights and Measures) and its Department of Licenses (which authorized fee-paying non-felons to operate cabarets, sidewalk cafes, miniature golf courses, and one hundred and two other such industries designated as "sensitive" during the course of fifty years of municipal licensing legislation). Although the Department's licensing jurisdiction did cover a few occupations in which licensing might actually be a useful tool of consumer protection—home improvement contractors, used car dealers, and employment agencies—the staffing and jurisdiction of the Department were not well geared to the modern functions of such an agency, *i.e.*, deterring and punishing consumer fraud.

To be effective the agency needed a new law, adequate funding, and a vigorous staff with a tough image. Making the new law its

2. See, *e.g.*, AMERICAN BAR ASSOCIATION, REPORT OF THE COMMISSION TO STUDY THE FEDERAL TRADE COMMISSION (1969); CENTER FOR ANALYSIS OF PUBLIC ISSUES, THE NEW JERSEY OFFICE OF CONSUMER PROTECTION—A PROMISE UNFULFILLED (1970); E. COX, R. FELLMETH & J. SCHULZ, THE NADER REPORT ON THE FEDERAL TRADE COMMISSION (Black Cat ed. 1970); Kripke, *Gesture and Reality in Consumer Credit Reform*, 44 N.Y.U. L. REV. 1, 44-46 (1969).

3. E. COX, R. FELLMETH & J. SCHULZ, *supra* note 2.

4. Address by B. Mezines to the Legal Committee of the Grocery Mfr's of America entitled "The FTC Today," in FTC Release, Jan. 14, 1971.

5. New York City, Local Law 68, Sept. 10, 1968, as amended, NEW YORK CITY, N.Y. ADMIN. CODE, ch. 64 (Supp. 1971).

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first priority, the Advisory Council borrowed the best provisions of other state and federal laws, added a few ideas of its own, and ended up with one of the toughest consumer protection bills ever drafted. Among its strongest provisions, the bill forbade all deception whatever in the sale of consumer goods or services, the extension of consumer credit, or the collection of consumer debts; gave the Commissioner of Consumer Affairs the powers to issue regulations defining "unconscionable" practices; and gave the Commissioner the power to enforce the law by seeking in the courts substantial civil fines,⁶ temporary and permanent injunctions, and/or mass restitution to be paid to all defrauded persons.⁷

As a result of Commissioner Bess Myerson's⁸ tenacious lobbying, a public campaign in support of the bill, an opposition caught off-guard, and a little bit of luck, the New York City Council passed the Advisory Council's Consumer Protection Bill⁹ substantially as it had been drafted. Mayor Lindsay signed the bill in a City Hall ceremony on December 30, 1969.

The following week, Commissioner Myerson asked me to join the Department of Consumer Affairs. My primary responsibility was to head a new Law Enforcement Division which would implement the statute. I agreed on the condition that the City provide adequate

6. The bill provided for a \$50 minimum civil penalty in order to avoid the "housing code trap," whereby judges frequently undercut housing code enforcement by fining offenders only \$5. We hoped the agency would cumulate violations and seek substantial fines which the courts could not nullify.

7. We deliberately required the agency to go to court to obtain penalties or remedies, rather than authorizing it to impose administrative penalties subject to judicial review. To enable it legally to issue cease and desist orders, we would have had to create not only a new investigative staff, but a separate, neutral staff of hearing officers as well. Furthermore, although an administrative procedure would seem to expedite cases compared to the slow pace of most litigation, stays pending appeal of administrative orders are almost routine, so that the two-step procedure—administrative hearing and judicial review—was likely, in important cases, to take longer than litigation. Finally, we had some doubt as to whether the City Council would pass a bill authorizing the agency itself to order remedies, particularly the important, drastic remedy of mass restitution.

8. Mayor Lindsay appointed Bess Myerson as Commissioner of Consumer Affairs shortly after we finished drafting our bill. It is generally supposed that his motives were primarily political; he was up for re-election in a matter of months, and many of the city's Jews had defected from his camp because of the school decentralization controversy. The appointment of a female Jewish television celebrity—a former Miss America—was a brilliant political move. By accident or design it was also the best merit appointment he could have made. Not only was Commissioner Myerson quick to learn the field (including the legal aspects of consumer protection) and receptive to virtually all staff proposals, but her fame and charisma enabled her to win crucial battles with heads of other City agencies, and to get almost any story about consumer fraud into the newspapers. She made passage of the Advisory Council's Consumer Protection Bill the primary goal of her first year in office.

9. NEW YORK CITY, N.Y., ADMIN. CODE, ch. 64, tit. A (Supp. 1971) (printed in Appendix, pp. 1600-03 *infra*).

funding, by which I meant an annual budget of at least half a million dollars.¹⁰ Commissioner Myerson went to bat for the money, but found the Mayor's office spectacularly reluctant to provide any money whatsoever to enforce the law. Finally, after an impassioned personal appeal from Commissioner Myerson to the Mayor, the Bureau of the Budget agreed to let the agency spend \$100,000 on the new program,¹¹ on the condition that it save an equal amount of money for the City by not filling vacancies as they occurred among weights and measures inspectors.¹²

Over the course of the next year, we were able to obtain federal grants to expand the Division and to open a number of neighborhood complaint offices. The City's seed money proved sufficient; by the time I left the Law Enforcement Division in July, 1971, it was operating with more than half a million dollars and had forty-two employees.

Funding secured, the last problem was to hire a good staff. We put together a very young, aggressive, and imaginative group of people.¹³

10. \$500,000 is a very small amount of money in a city with an \$8 billion budget; that much is probably lost every year in arithmetic errors. However, the City does have a chronic, massive budget problem, and must constantly battle over salary scales with unions representing the uniformed services. It cannot afford to grant even small raises in pay scales, because even small raises for the many thousands of workers New York City employs throws the budget off badly. Since it is very difficult to plead poverty during collective bargaining negotiations while granting funds to start new programs, there aren't any new programs, even small ones.

11. The city does not really allocate *money* to agencies; it allots them specific *lines*. Departments have very little discretion about how to use their budgets. The Bureau of the Budget tells an agency, for example, that it may have sixteen lawyers, four economists, sixty-five inspectors, two bookkeepers, three clerks, two stenographers and a messenger boy. The \$100,000 was enough to pay for me, two lawyers, two investigators, two secretaries, and the use of a stenotype service. Commissioner Myerson used the usual dodge to supplement this; she assigned to my Division a number of then vacant lines from other parts of the Department. For example, we put one investigator on a cashier's line; my Deputy, an experienced lawyer, had the civil service title of Senior Kosher Meat Inspector. Unfortunately, wages are paid at the scale of the line, not that of the job being performed.

12. During my term in City Government, I saw the Bureau of the Budget use this technique—acceding to a Commissioner's request in exchange for diminution in the work force—more and more frequently. In the Department of Consumer Affairs, this resulted, over an eighteen month period, in decimation of the inspectorial force, which decreased in size through retirements, resignations and transfers, from 200 men to fewer than eighty men.

13. This was not an easy task. Very few jobs in the City of New York are exempt from competitive civil service examination. The lawyers of the Corporation Council (the City's Law Department), for example, are hired through the competitive Civil Service System. I was quite sure that the lawyers who took such examinations, or even lawyers who did well on them, were not necessarily the ones I wanted. To avoid the Civil Service System I attempted to distinguish our lawyers' jobs from those of the City lawyers generally, hoping, of course, to persuade the Bureau of the Budget, the Department of Personnel, and the Civil Service Commission that the Department of Consumer Affairs should not have to select its lawyers from the same list from which all other lawyers who work for the City are chosen.

It took the better part of a weekend to write formal job descriptions for thirty jobs, each different from the job of attorney, each different also from each other. A few examples from our submission to the Budget Bureau:

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For lawyers, we went primarily to the Columbia Law School class of 1970, which was about to graduate. I'd taught a seminar at Columbia in consumer protection the previous fall, and was able to persuade several of my best students to join us upon graduation. Each lawyer was assigned an investigator, the majority of whom were returned Peace Corps volunteers or refugees from corporations. Each month, as we got wealthier, we added staff—paraprofessionals, law students, various kinds of assistants. Our median age, however, remained about twenty-six.

II. Doing It

Since we were starting a new type of agency, we did not want to begin by developing a rigid set of procedures; instead, almost every-

SENIOR CONSUMER FRAUD SPECIALIST—Assumes primary responsibility for administering those sections of the Consumer Protection Act relating to deceptive practices in areas other than unconscionability and consumer credit Authorizes and supervises investigation of complaints where litigation is not needed Supervises the Consumer Fraud Specialists, the Deceptive Discount Research Associate, the Trade Disparagement Examiner, the Bait and Switch Advertising Examiner, the Deceptive Food Labeling Investigator, the Advertising Language Analyst, and the other specialists with respect to that portion of their work involving deceptive practices. *Qualifications:* A baccalaureate degree, expertise in consumer deception and deceptive trade practices, as demonstrated to the Commissioner of Consumer Affairs, and two years legal training, [If we'd said three, it would have looked like we wanted an attorney].

SUBSECTION "D" INJUNCTION ADMINISTRATOR—Analyzes ongoing violations in depth and recommends seeking of the appropriate type of injunctive order Supervises the Section Five Assurance Negotiators and the Discontinuance Assurance Administrator with respect to injunctive aspects of Section Five assurances Where appropriate, orders field investigations or research into particular problems presented by a particular complaint. *Qualifications:* A baccalaureate degree, expertise in the field of injunctions as demonstrated to the Commissioner of Consumer Affairs, and two years legal education.

UNCONSCIONABILITY SPECIALIST (A line for an investigator, not a lawyer)—Detects and investigates current unconscionable schemes and drafts regulations specifically dealing with the unconscionable elements thereof Acts as liaison between the Department and industry in a cooperative effort to eliminate unconscionable sales practices Conducts on-going research into unconscionable sales practices in New York City, including analyzing firm and industry pricing structures in relation to selling practices, market conditions, and firm clientele. *Qualifications:* A baccalaureate degree, understanding of the concept of consumer unconscionability as demonstrated to the Commissioner of Consumer Affairs, familiarity with court decisions construing § 2-302 of the Uniform Commercial Code . . . and negotiating and drafting ability, as demonstrated to the Commissioner of Consumer Affairs.

We won only a partial victory. The lawyers would not be classified as "attorney," so they would not be chosen from the City lawyers' list. But only three job titles would be created for the Division—"Consumer Specialist" for the college-educated investigators; "Senior Consumer Specialist" for the lawyers; and for myself, the most exotic official Civil Service title in the City, the Consumer Advocate. Some day, competitive Civil Service tests would be written for these positions, but we would be consulted on what types of questions would be asked. Meanwhile, we were free to hire anyone we pleased. In this case, the snail's pace of the City's bureaucracy worked to our advantage: a year and a half later, no one had even begun to design a test, and the Commissioner still has complete discretion in hiring.

thing we did was experimental. Today, the agency is still in the process of deciding what works and what does not, what is economical and what is not, what can be justified and what cannot. We took our cases primarily from the inspectors who serve as the Department of Consumer Affairs' complaint bureau. The inspectors were receiving over 20,000 complaints a year.¹⁴ They resolved routine problems by telephone mediation, and referred the serious problems (those companies generating huge numbers of complaints) to us. We also got some cases from our monitoring of advertisements, or from information given to us by companies' disgruntled employees. At any given time, we had approximately seventy companies under investigation, and during the year we investigated a total of 180 companies, involving over 2300 individual consumer complaints. We obtained sixty-five out-of-court settlements (formal assurances of discontinuance, or agreements to change a company's advertising or collection practices), and were involved in eleven court cases. The assurances and injunctions we obtained entitled affected consumers to cancel contract obligations and to get refunds of over \$2 million, if they chose to exercise rights of which they were notified.

These statistics, however, do not tell the more important and vexing story of the Law Enforcement Division's disenchantment with a traditional model of law enforcement and subsequent conversion to a more aggressive one. I suppose that when we began to operate, we had in mind a model of law enforcement procedure that might be called the "judicial" model. In this model, the law enforcement agency interviews witnesses, gathers facts, presents the facts and the issues to a court, and asks the court to dispense justice. In such a system, the only contact between the agency and the defendant prior to litigation would probably be testimony by the prospective defendant's officers pursuant to an investigative subpoena.

In reaction to the countless frustrations encountered in "judicial" model cases, we gradually evolved a "direct action" model, by which the agency, instead of or in addition to going to court, made a determination that a company was engaging in very bad practices and then sought out non-litigious methods of pressuring the company into changing those practices. In other words, instead of participating as

14. The inspectors operate a twenty-four-hour-a-day, seven-day-a-week telephone and mail complaint center. Nights and weekends, the center uses a tape recorder/call-back system.

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advocates in a two-party court contest, we and the company participated as two of many actors in the marketplace generally.

While probably no case can be classified exclusively within either the "judicial" or "direct action" model, I have selected three cases which illustrate the typical legal, practical, and ethical problems characteristic of each particular model.

A. The Judicial Model: The Case of the Kidnapped Lawyers

When the Law Enforcement Division began to operate late in the spring of 1970, I asked the Department's inspectors to refer to us the companies which generated the most complaints, relative to their volume of business. The inspectors had received more complaints about Kramer's Appliance Repair Company¹⁵ than about any other service store in the City, and had been utterly unable to obtain any cooperation from the store's managers.

The complaint of Mr. and Mrs. Homer Strong was typical. When their television broke, Mr. and Mrs. Strong, who live in the Borough of Queens, looked in the Queens Yellow Pages for a repair shop. The Kramer's advertisement was one of the largest in the book, so they chose to call Kramer's, assuming that the size of the advertisement was related to the size and reputation of the company. Kramer's answered right away and immediately sent a repairman to the Strong home.

The man turned on the set and looked at the defective picture, but did not look at the back of the television. He said he would have to take the set to the shop for repair. Mr. Strong asked that Kramer's give him an estimate of the price before performing any repairs, and the repairman agreed.¹⁶ He left with the set.

Three days later, the store called Mrs. Strong and said that the cost of repairs would be \$74.20. She told the man not to do any repair work unless her husband called to authorize it. The following day Mr. Strong called Kramer's to say that the price was too high and the

15. All company names and individual names (except those of Department employees) used in this article have been changed. I don't like changing names in a history, but I feel that it is necessary here, in view of the immediacy of the events, to protect privacy, to avoid the claim that I am unfairly commenting in print to influence pending litigation, and, in one case, to honor a non-disclosure commitment I made while in office.

All dialogue contained in this article is reproduced to the best of my recollection. Direct quotations of hearings testimony are condensations of stenographic transcripts.

16. In most cases, the repairmen told our complainants that an estimate would cost \$4, which the customers readily agreed to pay.

work should not be done. The man at Kramer's said that the work had already been done, and the set was in perfect working condition. Mr. Strong felt he'd been taken, but figured there was nothing he could do, so he agreed to pay for the repairs. The man said that payment would have to be made in cash; the store did not accept personal checks, on which payment could be stopped.

When a Kramer's repairman came to return the set, Mrs. Strong discovered that it still did not work. Nevertheless, the repairman demanded payment in full and refused to leave the set in the house unless she gave him the \$74.20. She refused, and they argued for a while, finally agreeing that if Mrs. Strong paid him \$40 in cash, he would leave the set, the balance of the money to be paid when the repairs were completed. The delivery man indicated the set needed only a minor adjustment which he could do in ten minutes the next day.

The repairman called the next night and said he had to take the set back to the shop; the adjustment could not be made without dismantling the television. Reluctantly, the Strong's agreed to this procedure, and Kramer's said it would send a man.

They did not hear from Kramer's for a week. Then, one day, Mrs. Strong found a note in her mailbox, scribbled on a Kramer's receipt form: "Mr. Strong, it's all over. Forget you. Kramer's." When Mr. Strong called Kramer's to protest, Kramer's sent a man to pick up the set.

For a week, Mr. Strong called Kramer's to find out when the set would be re-delivered. He could never get an answer. Finally a woman called him to say that the set had been fixed, and \$15.00 would be added to his bill. Kramer's claimed that it had installed a new transformer. Protesting that Kramer's had previously told him his set had been put in perfect working condition, Mr. Strong said that he would not pay the additional charge. Kramer's refused to return the set, and Strong complained to the Department.

The inspectors had discovered that Kramer's had no Queens repair shop at all. Despite its prominent advertisement in the Queens Yellow Pages, its only premises consisted of a small storefront in the Sheepshead Bay section of Brooklyn, near Coney Island.

Stephen Newman and Bruce Ratner, both former students of mine, got the case. Newman assigned a law student to visit Kramer's and size the place up and, if necessary, to serve a subpoena. (In New York,

personal service is required for investigative subpoenas.¹⁷) The student made an appointment to meet Mr. Sam Kramer, the owner, at the store one morning, but when he got there the store was locked (the Yellow Pages advertisement indicated that it was open twenty-four hours a day). He telephoned the store, and Mrs. Kramer, evidently speaking from her home, answered. She said that Mr. Kramer would come right over. When Kramer arrived, the student tried to discuss a few complaints with him, but got nowhere, so as he was leaving, he served the subpoena on Kramer.

On the day of the hearing, Kramer appeared with Irving F. Raskin, his attorney. When the questioning started, Raskin became obstructive, ordering his client not to answer most of the questions.

For example:

Newman: How many employees do you have there?

Raskin: I don't want to clutter up the record with my objections; however, the purpose of this hearing and the purpose of your organization is to check into fraudulent trade practices I will ask my client not to answer these irrelevant questions

Newman: We wish to find out whether Mr. Kramer is a single employee and therefore may be having trouble with a large volume of T.V. sets.

. . . .
Raskin: Is it your position that if he has too large a volume of work that this constitutes an unfair trade practice? . . . I deem it objectionable.

Newman: Do you employ any people who repair any T.V. sets?

Raskin: That is objectionable and he will not answer.

Newman: What percentage of your business is derived from repairs of T.V. sets?

Raskin: Objection.

Newman: Would you state your objection?

Raskin: Objection is that these are vague, general questions which have no relevance to a fraud situation

Newman: What is the average time you keep a T.V. in the shop for repairs?

Raskin: Objection, and may I add, it is an impossible question for

17. Although the law permits service of a summons by mail and affixation to the respondent's door where personal service cannot be made, and provides that a subpoena shall be served in the same manner as a summons, it also requires that proof of such service be filed within twenty days with the clerk of the court named in the summons. No court is named in an investigative subpoena, and the clerks have no authority to accept the filing of proof of service of something other than a document pertaining to a suit. Therefore, we had some doubt as to whether non-personal service of an investigatory subpoena was legal, and the City's Corporation Counsel advised us informally that only personal service would be valid. Furthermore, non-personal service is not valid until ten days after filing with the clerk. N.Y. Civ. PRAC. §§ 308, 2303 (McKinney, 1963).

any T.V. repairman to answer. It is like asking what is the average time that a legal matter stays in the attorney's office. It just cannot be answered

Newman: Did you receive complaints in 1970?

Raskin: Objection. I certainly under no condition will allow my client to be in the position to give you information as to that, so that you can now get together a case against him. I will not put him in that position The number of complaints that Mr. Kramer had received, if any, has no relevance to this hearing.

The hearing record was a shambles. Despite this, we determined to sue Kramer's. We held a strategy meeting and decided that to bolster our case, we would rely not only on the testimony of complainants, but we'd have a customer whose set had just been repaired by Kramer's take the set immediately to an honest repair company and obtain an independent assessment.

Just as our strategy meeting was concluding, an inspector came into my office and announced that a police photographer had just been gypped terribly by Kramer's repair shop. We instructed the policeman to take his set immediately to a repair store authorized by the company that had manufactured it. After examining the set, the repairman wrote to the Department that although Kramer's had charged the policeman \$45.58 for the replacement or repair of two condensers, a circuit breaker, the tuner, and for realignment, "the set had only a new circuit breaker installed recently. Other than that there is no sign of anything else replaced or touched recently. The set has a covering of dust over the entire chassis and picture tube high voltage lead. It is hardly possible to work on the under part of the chassis without leaving traces of handling somewhere on these parts. Therefore it seems to us that the set has not been taken out of the cabinet."

Meanwhile, we'd learned that Kramer was farming sets out for repair to other shops. The proprietor of one such store told us that Kramer occasionally cannibalized sets and sent them to him for repair "with the guts hanging out." This man was discontinuing his association with Kramer because he had sets taking up space in his shop which Kramer hadn't picked up for three months. He also informed us that Kramer had been convicted of forgery in 1966, for which he'd received a three-month suspended sentence. He'd heard, too, that Kramer was again in trouble with the federal authorities. We contacted the postal inspectors, who told us they suspected Kramer of stealing checks from the mails, but could not prove it.

This proprietor also told us that Harry's TV did work for Kramer, and that Max Gordon, a former benchman for Harry's, was

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currently a benchman for Kramer. We determined to subpoena Gordon. Since that necessitated a long trip to the far reaches of Brooklyn, we decided to subpoena Kramer again as well, hoping to hold a more orderly hearing than before.

Newman and Ratner were dispatched to serve the subpoenas late in October. They decided to try Gordon's house first. They rang the doorbell and asked the man who answered, "Are you Max Gordon?"

"Yes," he said, puzzled.

"We have this for you," said Ratner, extending the paper and the \$2 witness fee.

Gordon opened the screen to see what the paper was, and Ratner thrust it into the house.

"What's this?" Gordon asked, grabbing it.

"It's a subpoena."

"I'm not accepting this," Gordon shouted, letting the papers fall to the floor.

Newman and Ratner let the screen door close and walked briskly away from the house.

Pleased with themselves, and chuckling about how easy it had been, the young lawyers began walking to the store to serve Kramer. By the time they got there it was quite late at night. Through Kramer's soaped-over window they could see a small light. No other store on the isolated street was still open. They walked in.

The store had a small front room, which they entered. The room was dark, and as they walked they had difficulty avoiding bumping into televisions and chassis, which filled the area. From the front room, a very narrow corridor led to a back office in which a bare bulb illuminated three men: a teen-age boy, an enormous Negro benchman, and a red-headed, middle-aged man. Ratner and Newman started to walk to the office, but the men stood up and blocked them in the corridor.

"Is Mr. Kramer here?" asked Ratner.

"He's not in," said the Negro. Something in his manner suggested that he was not surprised to see the lawyers.

"Where is he?"

"Europe."

"Do you expect him back soon?"

"We don't know when he'll be back."

Suddenly, a noise at the front door caused Ratner and Newman to turn around. In walked Gordon, swinging a bunch of keys in his hand. Sensing that Gordon intended to lock the door from the inside, New-

man moved forward quickly, trying to get between Gordon and the door. Gordon pushed his elbow into Newman's stomach, keeping him from the door. He locked the door and put the keys in his pocket.

At this point Newman and Ratner abandoned their plan to serve Kramer and started to think about how they were going to get out. The four men surrounded them. The lawyers figured that they would be lucky to get away with a small beating.

Gordon said, "These are the guys I just told you about."

"Please let us out," Newman pleaded.

"You're not going any place until I find out what this is about," said Gordon menacingly.

"We gave you the subpoena," said Newman. "Everything is explained in there. It's all written there." He was trying desperately to avoid sounding flip. "Now please let us out."

"Who sent you?" asked Gordon.

"Philip Schrag," replied my good friend Newman.

"What's his phone number?"

"I don't know. You can call him at the office in the morning. Would you let us out now please?"

"You're not getting out of here until I get his phone number and call him."

During this conversation, Ratner had started to collect himself. He remembered that he was a lawyer as well as a prisoner. "You are keeping us here under arrest," he said. "We'll take legal action against you if you don't let us out."

"Kidnapping, eh?" Gordon laughed.

"Don't laugh," warned Ratner. "It just might be kidnapping."

"What's Schrag's phone number?"

"We don't know," said Newman.

"This is false imprisonment," said Ratner. "You'll be liable both civilly and criminally."

Gordon began to look worried. He looked around to his companions for support.

The Negro spoke. "If they gave that paper to me," he said, "I'd just put a bullet in 'em."

That made Gordon even more nervous. "Get the hell out of here," he said. He opened the door for Newman and Ratner.

A few minutes later, Gordon called me at my home. I hadn't yet heard anything from Newman and Ratner. "I'm calling you to protest, Mr. Schrag," he said. "Two fellows came to my house today and re-

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fused to identify themselves. Without saying a word, they threw a subpoena at me and ran away. Is that any way to behave?"

I took his number and told him I'd call him back.

After a while, I reached Ratner and learned what actually had happened. I called Gordon at his home, and his wife said he was at Kramer's. Then I called Kramer's and asked for Gordon.

"He's not in," said a voice.

"Put him on," I said.

"There's no one here by that name," protested the voice.

"I know he's there. Put him on." I tried to sound tough.

Gordon came to the phone. "Mr. Gordon," I said, "when you called me a little while ago, you neglected to tell me something."

"What's that?"

"That you imprisoned two officials of the Department of Consumer Affairs."

There was a pause. "Well, I wasn't the one who locked the door."

"I think you were," I said. "And I don't care if you weren't. You are going to sit down immediately and write letters of apology to Mr. Newman and Mr. Ratner, and you are going to come to a hearing on the return date of your subpoena."

"What if I don't show up?" he asked.

"Then we'll punish you," I said.

"What if I'm sick?"

"We'll still punish you."

The next day, Ratner and Newman received exquisitely hedged letters from Gordon, handwritten on a page from a yellow pad:

Dear Mr. Newman:

I cannot tell you how embarrassed and ashamed I am at the incident which occurred on November 19, 1970. I was terribly upset at the time and lost control. I wish to offer my sincere apologies at this time.

Yours truly,
Max Gordon

On the day of the hearing, Gordon appeared, represented by Raskin. Once again Raskin was obstructive, and no useful information was obtained. However, Newman could sense that Gordon didn't really know anything, so rather than apply for a court order compelling Gordon to answer the questions, Newman decided that somehow he would have to serve Kramer again and make a record for an order compelling Kramer to answer.

We began to compile papers for a lawsuit. We decided we needed more expert testimony; we wanted to take no chances that we'd lose a case against Kramer. RCA generously made available to the Department a television set and the services of an expert technician who caused the set to break by burning out a single resistor. We placed this set in an investigator's home and then called Kramer's to repair the set. Kramer's man came to the home, looked at the set, and took it to the shop to be fixed. Five days later he returned it, asking the investigator to pay \$41.35 cash for repairs. The investigator demanded an itemized receipt; it showed replacement or repair of three resistors, three condensers and the tuner, as well as realignment. Our RCA technician determined that only the burnt-out resistor had been touched.

We also asked the municipal television station, WNYC-TV, for help. That time we went all out. Its expert gave a set a complete examination and found it to be in perfect condition. He then inserted a single defective tube. A competent repairman could have fixed it in the owner's home. He painted the insides of the set with invisible ink, and we put the television in another investigator's home. Kramer's came and said the set had to be taken to the shop because there was a "short in the transformer." They returned it for payment of \$56.20, with an itemized statement that they had replaced a tube, cleaned a condenser, and aligned and cleaned the tuner. The WNYC-TV technician found that such work was neither necessary nor performed.¹⁸

Up to this point, we had not attempted to discuss individual complaints with Kramer. But we had one low-income complainant for whom the cost of repair represented a major burden, and who wanted us to try to do something for her immediately. Ratner called Kramer to discuss this case. Kramer angrily refused to return the woman's television, or even let her test whether the set was working before she paid for it.

We advised the complaining woman, and several others, to sue Kramer's in Small Claims Court. The summons in that court is served by registered mail, sent by the court clerk. In Kramer's case, however, the envelopes from the clerk to Kramer, which had the name of the court printed as a return address, were returned to the clerk unclaimed; Kramer had simply refused them. The clerk then advised the consumers to serve the summonses on Kramer themselves. We collected

18. Kramer often told his customers that they were receiving a real bargain. For example, one lady wrote that Mr. Kramer told her that his prices were lower than those of his competitors because "I overcharge niggers in Harlem 30% to 50%. They're unreliable so they don't deserve better."

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together a small brigade of Kramer complainants, and one of them volunteered to go out and serve all of the Small Claims summonses. He had no trouble serving Kramer at the store.

When Kramer did not appear in Small Claims Court, the customers won judgments by default. But the default judgments were a hollow victory; Kramer refused to pay the money customers were entitled to. The customers then called City marshals, whose job it is to collect judgments for a fee. Various marshals were contacted, but in each case when a marshal's secretary heard that the amount involved was under \$100—which meant that the fee would be very small—she said that the marshal was out of town and she didn't know when he'd be back. The customers finally tried to employ the Sheriff, who is authorized to levy on bank accounts to collect judgments. The Sheriff, however, could not locate any bank account for Kramer.

At this time, the 1971 Queens Yellow Pages were published. The first ad we looked up was Kramer's. We were astonished. This year Kramer's advertisement listed addresses for four Queens locations. We were pretty sure his only store was in Sheepshead Bay, so we checked the Queens addresses. One was an empty storefront, one a town house, one a vacant lot, and one an intersection with no television repair shop.

Commissioner Myerson wrote to the president of the telephone company, reciting not only the fraud in the Yellow Pages, but Kramer's activities generally. He designated company vice-president Walter Bohn to meet with us. In an exploratory switch to the direct action strategy, we asked Mr. Bohn to prevent deception through the Yellow Pages by changing Kramer's telephone number, without putting a recording on the old number informing callers of the new number. In other words, the telephone company could neutralize its own false advertisement by rendering the listed number inoperable, without depriving Kramer's of telephone service altogether.

Bohn was unwilling to do this. Although the telephone company did not condone falsehood, he told us, it could not legally discriminate against a user. We pointed out that punishing a fraudulent advertiser was hardly discrimination, but he said that the company could only insist that Kramer's future advertising be true.

We proposed several alternative suggestions: putting a tape recording on Kramer's number that would tell customers that the advertisement was false before ringing at Kramer's store; printing a notice in Kramer's advertisement in the Brooklyn Yellow Pages, about to be published, that Kramer's Queens Yellow Pages advertising was false;

and printing a full-page on the inside cover of all future Yellow Pages warning consumers that the advertising in the book might be fraudulent and should not necessarily be believed. Bohn rejected each suggestion.

We then told him that if the telephone company refused to do anything to correct false advertising it had published, and refused to warn the public that Yellow Pages advertising was unreliable, Commissioner Myerson might have to call a press conference to warn the public about the Yellow Pages. Suddenly Mr. Bohn indicated that he would pass the Kramer's case along to higher company officials who would decide whether to take punitive action against Kramer's.

Bohn called soon afterward to tell me that the telephone company agreed that action should be taken; it would disconnect Kramer's number and substitute a new one, as we'd originally asked. But later the same day, Bohn informed me that when he'd told this to Kramer, Kramer said he'd sue the telephone company. As a matter of courtesy, the telephone company was giving Kramer a week to draft his legal papers. Once again, we were back to the judicial model of dispute settlement.

Although the Department of Consumer Affairs was not a party to the suit, Bohn kept us informed and invited us to observe. When Kramer asked for a preliminary injunction against the telephone company the judge requested that the attorneys for the parties confer in his chambers with his law clerk.

At this meeting, Kramer was represented not by Raskin but by Ira Borden, a Manhattan Democratic District Leader.¹⁹ The other participants were the judge's law clerk, the telephone company lawyer, and Stephen Newman.

The telephone company quickly copped out. Instead of supporting its threatened action to change the telephone numbers, the telephone company lawyer agreed with Borden that it didn't really want to act against Kramer's but that the Department of Consumer Affairs was forcing it to. The law clerk, a quiet gentleman of about forty-five, was instinctively hostile to the Department, which was now cast in the role of an instigator. All of the clerk's questions were hostile, and all were directed at Newman, who found himself quite isolated. After

19. Politically connected lawyers often represented the companies we were fighting. In the space of a few months, for example, we squared off against not only this District Leader, but a former Regional Commissioner of the Department of Housing and Urban Development, a former Counsel to Mayor Lindsay, a defeated candidate for Governor of New York, and a defeated candidate for United States Senator.

hearing Newman's replies, the clerk told him that the proper way to proceed would be to commence the Department's own suit against Kramer's and ask for an immediate injunction. Newman replied that we were preparing to do that, but we had no illusions that we could get the other side to agree to a quick submission to the court.

The law clerk left the room for a while. When he returned, he related that he had discussed the case with the chief clerk, who had said that the Department was acting in a totalitarian manner. In light of the chief clerk's views, the court's decision was rather predictable:

Motion for a temporary injunction is granted. It is undenied and clear that plaintiff's business is substantially dependent upon business received over the telephone The basis for the threatened action is defendant's receipt of advice that the various addresses listed by plaintiff as its warehouses in its advertisements in the classified directories are not in fact plaintiff's warehouses. [Assuming this charge is true,] the action threatened is disproportionate to the wrong asserted. Other remedies are available including correction of the advertisement, not the substantially complete elimination of the prime source of plaintiff's business.²⁰

We decided to pursue the judicial model further by bringing our own suit against Kramer's.²¹ On April 16, 1971, we obtained a court order permitting us to expedite the proceedings by commencing the suit immediately and having our motion for a preliminary injunction heard three days later, on Friday, April 19. There was just one hitch: the order had to be served personally on Kramer that very day. Naturally, I assigned the job of serving process on Kramer to two experts—Newman and Ratner.

They drove to Brooklyn, taking with them their secretary, Gano Stephens, in case getting into Kramer's presence required a female to participate in a ruse. The trio reached the store late in the afternoon; it was locked, and no one appeared to be inside. They decided to try Kramer's home, in a nearby apartment complex.

Ratner and Stephens rang the doorbell of Kramer's apartment. A woman, evidently Kramer's wife, answered. Gano Stephens introduced

20. Unfortunately, the need to keep the real names of the defendants secret prevents me from giving a case citation for this and other court decisions quoted in this article.

21. By this time, the Department had the power to bring its own law suits. Previously, the Department had to rely upon the City Corporation Counsel to bring necessary legal action. The old system had occasioned even greater delay and formality than already existed in the classic aspects of the "judicial" model. In one case, for example, after our Department had drawn the appropriate summons, complaint, application for preliminary injunction, and supporting affidavits, it took the City Corporation Counsel seventy-six days before it got around to serving the defendant.

herself. "I'm Jean Maller," she said. "My husband and I"—she indicated Bruce Ratner—"live downstairs. We've heard that the landlord is thinking of making the building a cooperative, and we wanted to find out what our neighbors in the building think of it."

Mrs. Kramer, delighted to hear that the building might be co-op'd, let them in.

"Is your husband in?" asked Ratner.

"No, he's not."

"Can you tell us when he'll be back?" asked Stephens. "We want to get the reactions of both adults in the family."

The telephone rang, and Mrs. Kramer answered it. "Kramers Appliance Repair!" she said. There was a pause. Mrs. Kramer continued, "Just shut up," she told the caller. "You got your television back in good condition. Now stop complaining."

Another call came through just as she hung up. "Cash or no set," she told the customer.

Ratner and Stephens stretched out the visit as long as they could, hoping that Kramer would come home. Fortunately, Mrs. Kramer kept interrupting to take telephone calls for Kramer's. Finally, when it became difficult to invent any further questions regarding Mrs. Kramer's feelings about buying a cooperative apartment, Ratner and Stephens left and rejoined Newman, who'd been waiting outside. Night had fallen; the papers had to be served within a few hours. Feeling quite depressed over their failure to serve Kramer, the group drove to a nearby McDonald's for a hamburger.

After dinner, they drove back to Kramer's. Now a light was on inside; it might be Kramer. But they suspected that if they knocked, no one would open the door, and even if the door were opened, they would never get to Kramer. Furthermore, they had seen enough of the inside of that store under similar conditions.

They went to a telephone booth in a bar across the street and dialed 911, the police emergency number. They had no idea whether the police would help them, or whether legally the police could do so, but they had nothing to lose. After they explained their mission, the precinct sergeant said that he would send a squad car to meet them outside of Kramer's.

Just as the first car arrived another squad car drove by and they flagged it down. Both cars pulled up in front of Kramer's, their red lights flashing in the darkness. One policeman walked to the door with Newman. The lawyers' depression had been replaced by a feeling that all would go well. Newman knocked.

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"Who is it?" growled a voice. It sounded like Kramer.

"The police," said the cop.

Kramer opened the frosted-over door a crack. He could see only the policeman, not Newman who was standing to one side. "Mr. Kramer?" asked the cop.

"Yes. . . ."

"These gentlemen have some legal papers to serve upon you."

Newman stepped into Kramer's line of vision, and extended the papers. A disgusted expression captured Kramer's features. He started to slam the door. Newman moved even more quickly, hurling the legal papers at Kramer, so that they were swept in by the closing portal.

Kramer opened the door again and kicked the court order towards the street. The papers hit the policeman in the shin.

"Now look here, Mr. Kramer," said the cop. "You've been served with legal papers. You are required to take them. Now . . . pick . . . them . . . up!"

Kramer bent down, picked up the papers, and disappeared into the store. Newman and Ratner fell over themselves thanking the policemen.

Two days later, NBC-TV carried a news story on the commencement of this suit. An anonymous neighbor of Kramer's store called NBC to say that immediately after the broadcast he saw three men carting boxes of books and records away from the shop.

The motion was supposed to be heard in three days. I expected Kramer's lawyer to ask me for a postponement, and I knew that if I said no, the court would give him at least one postponement anyway; it is virtually impossible to get a New York judge to deny adjournments. So I determined that if he asked for a postponement I would grant it, provided he promised not to request another. Sure enough, Borden called and we agreed to put the case off for one week. Borden agreed that he would not ask for an additional postponement unless there were a genuine emergency.

A week passed. The night before we were to go to court, Borden requested a second one-week postponement. He said he had been sick. I did what is never done among New York practitioners: I refused the requested postponement.

He went to court and asked the judge to give him another week. I explained the urgency of the case, and the fact that Borden had had an extra week already, but the judge said, "The man says he's been sick. A man is entitled to one adjournment so I'll give him a week,

but I'll mark on the record that there can be no more adjournments."²²

Two days before the case was to be heard, Borden called me. "Sorry, Schrag," he said. "I'm withdrawing from the case. I can't get Kramer to pay me the fee he owes me."

The next day, I received a call from . . . Irving Raskin. "I've just been retained by Kramer's," he said. "I need at least a week to familiarize myself with the case."

"The answer is no," I said. "You've been on this case from the beginning. You represented Kramer at a hearing months ago."

He applied to the court. "A lawyer can't serve his client unless he has time to familiarize himself with the case," the judge lectured me. Another one week delay was granted.

We thought our motion for a temporary injunction was an open-and-shut case. We'd filed numerous affidavits from complaining consumers, as well as experts' affidavits in the three instances in which we'd arranged for technicians to analyze the work Kramer's did. When the delays finally came to an end we were most anxious to see how Kramer would reply.

His response was amazing. He noted that the Department was currently supporting a bill to license TV repair shops, but no legislative action had yet been taken. Therefore, he argued, "What the plaintiff is attempting to do by judicial authority it has failed to do by legislative enactment as of this date. It is highly discriminatory to set up a set of rules for the defendant as the only licensed TV repair man and the remainder of the industry to continue [sic] to operate without any regulations at all."

Kramer said that the telephone company had insisted that he put some Queens address in his Yellow Pages advertising, and that when he said he had no such address, the telephone company salesman advised him to do what other companies did—make up a few.

He denied he cheated people. He said he had a large business, and some people were bound to be disgruntled. "I can name a number of people who are quite satisfied and have congratulated and thanked the defendant for its service, and such people are included in the Republican National Committee, Federal Reserve Bank of New York, IBM Company, New York Telephone Company, Democratic Party, Paul O'Dwyer, Mayor Lindsay."

22. The judge may have meant that a man is morally entitled to delay; no such right appears in the statute books.

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Kramer dismissed the expert technicians by saying that they were "plants," not "actual consumers." "The court should merely bear in mind this is one of those 'entrapment situations.' "

A few weeks later, the court rendered its decision:

Briefly stated, defendants are charged with an unlawful scheme designed to force their customers to pay high bills for television repairs which defendants falsely claim to have performed. A temporary injunction is an extraordinary remedy, which is sparingly granted upon a showing of a clear right to relief and the threat of irreparable injury. Moreover, the sweeping injunction . . . which plaintiff seeks, in effect, determines the litigation and gives substantially the same relief that could be obtained by a final judgment after trial. Such preliminary injunctions should be granted only when necessity requires it.

Although defendants admit that they have falsely advertised in the . . . telephone directory, this fact is insufficient in itself to prompt a temporary injunction since many efficient and honest repair businesses in various fields of endeavor have one central repair shop that services the entire City. Moreover, it is uncontested that defendants' [business] encompasses repairs to thousands of television sets each year. This court is quite hesitant at this time to pass final judgment upon an entire enterprise on the basis of the purported treatment of a small percentage of its customers [and defendants deny that they cheated the customers who filed affidavits]. Accordingly, the motion for a temporary injunction is denied without prejudice to renewal thereof in the event that the defendants shall fail to consent to an immediate trial of the action upon ten days notice by the plaintiff of her readiness to go to trial.

This decision reinforced our growing reservations about the judicial model of law enforcement. We were particularly upset by what seemed to be a cavalier attitude toward the effects of false advertising—the court appeared to be saying that the advertising of fictitious locations did no harm because a store in Brooklyn nevertheless might be able to service other boroughs.

Fortunately, the court did say that we could have an expedited trial. Unless Kramer agreed to have a trial in ten days, he would face a new motion for a temporary injunction. The next day we served Kramer's lawyer with a demand for a trial in ten days. He refused to consent, so our only option was to ask again for a preliminary injunction. To our surprise, the court referred the new motion back to the judge who had ruled against us the first time. We expected a better response, now that Kramer had refused the court's suggestion of a quick trial. Fur-

thermore, we knew that the court was faced with an all-or-nothing decision this time, since the last day for trials before the three-month summer court recess had now passed.

The court ruled:

Defendants refused to consent to immediate trial and, hence, the instant motion was brought. Upon renewal, a perusal of the moving affidavit fails to reveal any new evidentiary matter that might now induce the court to grant the drastic relief that has been previously denied Although the public interest demands that the serious allegations of wrongdoing herein be resolved at the earliest possible date, the interests of justice also require that the defendant be given at least a minimum period of time to prepare a proper defense [The new motion is denied and] the present action is given a trial preference and the parties are further ordered to be ready for trial on the first trial day in October of 1971.

When I left the Department, the staff was looking forward to the trial,²³ while continuing to tell new complainants that the Department was sorry, but there was nothing it could do about Kramer's. The complainants could not understand why a City agency supported by their tax dollars could not help them.

And a year after the transaction, Kramer's still had Mr. Strong's television.

* * *

We had always regarded the Kramer's case as one of the strongest in the office. The evidence was clear; not only did we have a concededly false Yellow Pages advertisement and a substantial number of complaints from consumers, but we had gone to great expense, relative to our small budget, to obtain expert analyses of Kramer's work in relation to the store's promises, and in three out of three cases checked by technicians, Kramer's had lied about the work performed. Furthermore, because Kramer's was still holding our complainants' televisions after months of Departmental complaint investigation, the equities seemed strong for judicial intervention. Our confidence in the power of our evidence was matched only by our incredulity at the unwillingness of the court to act on it.

Most of the lawyers in the Department had just graduated from law school. Cases like Kramer's were their first exposure to the behavior

23. In mid-summer, Raskin notified the Department that he wished to take Commissioner Myerson's deposition. The Department felt constrained to resist; permitting what the Department regarded as an unwarranted harassment of the Commissioner would set a bad precedent. When Raskin persisted, the Department decided to resist the demand in court. However, since litigation over the propriety of the proposed deposition had to precede Kramer's trial, the judge's order setting a trial date was automatically nullified and the trial postponed indefinitely.

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of courts. They were surprised that the first Kramer's decision was made, for all practical purposes, not by a judge but by a law clerk who had been instinctively hostile to our position. But that decision, at least, might be justifiable, since we were asking a public utility to take on a new, debatable responsibility to prevent fraud by one of its subscribers.

The lawyers were puzzled by the second decision. To them, the fact that it was possible to operate an honest city-wide repair service with only a single location did not lead logically to the court's proposition that the admission of false advertising by a dishonest company should not prompt injunctive relief. And if the court was not persuaded by the Department's experience with expert testers and by the testimony of the technicians, how were we supposed to prove that a company regularly violated the law? Theoretically, it might be possible to commission a statistically valid opinion survey of a representative sample of a company's customers, but their names and addresses were almost always withheld from us, and even if we had the names, the cost of the survey, at the going rate of approximately \$50 an interview, would have been enormous. Furthermore, if we had taken a survey and could demonstrate that a company cheated five per cent of its customers, would that galvanize a court into action? Five per cent could represent a substantial number of people, but the court seemed concerned not with numbers but with proportion. How often did a company have to steal before a court would tell it to behave?

The third decision was the one that radicalized the young lawyers. They had been cursed at, held captive, delayed and defeated in court, but finally they had procured an order entitling them to a trial in ten days. They informed the company of their readiness to present the evidence in court, and the company mocked them. Yet when they returned to court, the same judge who had set down the "ten day" rule characterized their desire to have a trial immediately following the ten days as failure to give the defendant "at least a minimum period of time to prepare a proper defense." The second trial date set by the court proved equally illusory.

Between the second and the third Kramer's decision, Deputy Commissioner Henry Stern and I visited the judge on other business; we wanted to explore the possibility of sponsoring a seminar for judges, to educate them about our problems in presenting cases to the courts and obtaining judicial sympathy. This judge had known our Deputy Commissioner for years, and the meeting was very cordial. He asked us for an example of what we considered lack of sympathy from the

judiciary; since his involvement with the Kramer's case appeared to be over (we did not know that the renewed application for an injunction would be assigned to him), we described what happened in that instance.

The judge listened and then replied, "Everyone comes into this court wanting an immediate injunction, but I've been here a long time and I've discovered that there's practically no case that can't wait until the day after tomorrow. Injunctions are harsh remedies. They should only be granted sparingly."

I pointed out that because of the clogged court calendars, parties had to wait many months to get trials. Preliminary injunctions were often the whole ball game because a company could cheat thousands of people while the Department was waiting for a trial, and then could go out of business.

He gave us a lecture that lasted ten or fifteen minutes. He knew that even if he ordered an immediate trial, he said, the calendars were so backlogged that we couldn't get one for six months. But that was *our* fault, not his. *We* worked for the City of New York, and it was the City that would not give the court sufficient funds to hire enough secretaries or clerks. He observed, correctly, that the country claims to believe in law and order, but its appropriations to courts and its acquiescence in tremendous court backlogs prove otherwise. Things would get worse before they got better, he warned, and that was the fault of the politicians, not the judges.

We were stunned. In large measure, the judge was right. Our problems stemmed not so much from judicial reluctance to grant relief on the basis of sterile papers rather than trials, but that the machinery of justice, including trials, had broken down, and nobody cared. Gazing out his window the judge concluded, "There are felons out there going free because the political leadership won't provide money for police, prosecutors, defense counsel, courts, jails, rehabilitation or even for the prevention of crime or the control of narcotics. You think you have problems? If we ever do get more money to fund this court, I hope we put it into crime control. Sure consumer fraud should be eliminated. But we're short of resources and it's not the priority area."

We often brooded about the judge's sentiments. We all lived in the City of New York, so it was obvious that there were more pressing problems than consumer fraud, including not only the high crime rate but the deteriorating schools, the housing shortage, and more than anything else, the tendency toward compartmentalization of the inner city into pockets for an increasingly wealthy white middle class among an

increasingly alienated, poor, black population. Should young lawyers devote their resources to fighting consumer fraud, when so many worse things were happening? Doubt about the priority to be given the elimination of consumer fraud mingled with the depressing awareness that law enforcement of any type was inevitably a negative activity. The people we were fighting were making, fixing, or at least distributing things. They acted, and appeared to produce something tangible. We reacted in a manner designed to prevent or stop something, never to create.

Staff demoralization, however, was always cured by client contact. The frustration of dealing with companies like Kramer's upset our lawyers, but those frustrations nearly drove some consumers insane. We talked to customers who had called Kramer's thirty or forty times, pleading for the return of a television that was one of their few links with the world. They had been insulted and abused, and that experience, no less than crime in the streets or drugs in the schools, had increased their fury at urban society. We went on fighting consumer fraud not, as the common wisdom would have it, to make the country safe for "legitimate business" and the sale of ever more unnecessary products, but to punish men who robbed not one victim at a time at the end of a dark alley, but thousands of persons at the end of a mail order plan, franchising scheme, door-to-door selling swindle or mass media advertisement.

But cases such as Kramer's led to increasing cynicism about how effective we could be by working through bureaucratic and judicial channels. Our frustration and occasional rage led us to explore new strategies and to discard some of the self-imposed restraints on tactics. Gradually, our methods of investigation became less gentlemanly, and our bite more ferocious.

B. *The Direct Action Model*

1. *The Case of the Cut-Up Body*

People sometimes ask me to describe the most outrageous case I ever saw of exploitation of consumers. A leading candidate is the case of Foolproof Protection, Inc., which sold burglar alarms door-to-door.

Virtually all the complaints about Foolproof came from low-income people residing in the slums of New York: Harlem, the South Bronx, the Lower East Side, Jamaica, Central Brooklyn. We heard the story again and again. A salesman had come to the customer's home; in many cases, he arrived within hours after the police had been notified that the

person's house had been robbed.²⁴ The company sold a remarkable package designed to appeal to the residents of high-crime areas of the City. A Foolproof alarm would be installed immediately which would ring in the police station and in the house or apartment itself if the home were robbed. The customer had a one-month free trial period, and could also cancel at any time and have the alarm removed. The customer was taking little or no risk, because the salesman knew that the Foolproof company did not sue people who could not afford to keep up their payments, nor did it garnishee their wages.

The price was only about \$14 a month for three years (about \$500 total), during which time the customer would not have to worry about service because the company retained ownership of the alarm. At the end of the three years the customer could buy the alarm for \$50. For a total of about \$750 the company would give the customer an attachment that would call the fire department in case of fire.

Bruce Ratner went to work on the case and found that almost everything the company's salesmen said was a lie. The alarms did not ring in the police or fire stations. The customers could not cancel at any time or even within a month; the fine-print documents they signed obligated them to pay for three years even if they decided they no longer wanted the alarms. And of all companies in New York City, Foolproof was the fifth most frequent user of the courts; only three banks and the telephone company sued more often, making Foolproof the most frequent plaintiff of all sellers of goods in New York.

Furthermore, the Fire Department's Division of Fire Prevention was shocked when Ratner asked them to inspect the \$750 model installed in a consumer's home. After this visit, the Fire Department wrote to Commissioner Myerson:

While this system could conceivably cause an alarm to sound in case of fire, its reliability and integrity are definitely compromised by the use of unmarked, possibly inferior, and poorly installed components and wiring method All of the alarm components, switches, wire relay, siren, heat detectors, etc. are unlabelled or of unknown origin. The entire system has been assembled and installed in a very low grade, poor workmanship manner.

This installation could by no means be acceptable by any known electrical code or standard and its reliability as a fire and burglar alarm is questionable.

Using standard price catalogue knowledge and labor time cost

24. We later learned that Foolproof salesmen carried police radios in their cars and cruised to the site of a burglary.

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figures it is my opinion that the approximate cost of the material for this alarm system, including labor and installation, would be under \$75.

It should be noted that my figure of \$75 is a material/labor cost judgment only, to which would have to be added a reasonable sum for overhead and profit.²⁵

The \$75 worth of parts to which the Fire Department referred included only a bell or siren, two dry cell batteries, a relay, a metal box which was placed on the customer's wall, one toggle switch for testing, an off/on switch, a few wires, pressure-sensitive switches fitted into the customer's windows and, in the case of the \$750 model, heat detectors. If a window were opened, the switches would cause the alarm to sound; however, because the alarm was of the inferior "open-circuit" type, it would not sound upon the mere cutting of its wires. A burglar who smashed the glass in a window and then reached in to cut the wire before opening the window would not trigger the alarm.

By the time we learned the pattern of Foolproof's sales technique, we'd had enough experience with the courts to know that we were unlikely to obtain swift and effective justice by their invocation alone.²⁶ But before deciding upon some other strategy, we determined to learn everything there was to know about Foolproof. We got one early break that significantly accelerated the detective work.

When Ratner began his investigation, he discovered that the company was one of the Department's licensees,²⁷ and, as such, had a greater duty to disclose information than did other companies. We did not have to resort to the usual subpoena-and-hearing route to learn about Foolproof.

Ratner called the company and told them that he would like to visit its premises with a Department accountant and inspect the books. The official he spoke to readily agreed. But when Ratner and the accountant arrived, the receptionist denied they had an appointment, said no officers were on the premises, and refused them entrance.

After the Department sent Foolproof a formal letter of demand to inspect the books, Sam Stone, Foolproof's president, requested a meeting to which he brought his two attorneys. One was Richard Toole,

25. Letter from Joseph F. Connor, Assistant Chief, Division of Fire Prevention, New York City Fire Department, to Commissioner Bess Myerson, Jan. 4, 1971.

26. See Part II(A) *supra* and Schrag, *supra* note 1.

27. In 1968, the City Council had passed a law, effective October 1, 1968, requiring home improvement contractors in New York City to be licensed by the Department of Consumer Affairs. See NEW YORK CITY, N.Y., ADMIN. CODE, ch. 32, art. 42 (1970). Unfortunately, Foolproof had been granted a license without a thorough investigation.

the company's full-time secretary and general counsel, who initiated its dozens of lawsuits against consumers every week. The other was Lister Young, a politically connected attorney whose son had been appointed to a significant post in City government by Mayor Lindsay. The message of his presence was not lost on us, but our reaction was simply to get more angry and to prepare, as part of our developing strategy, for the possibility of political intervention.

At the meeting, Foolproof agreed that Ratner and an accountant would visit the company's offices and examine the records. We did not divulge the purposes of the inspection.

The investigation revealed that we were dealing with a much larger enterprise than appeared on the surface. Although the company's midtown headquarters were unpretentious, it had seven or eight field offices all over the City, from which fleets of door-to-door salesmen operated. Each office served a particular area of the City; in some areas, where it was useful in making sales, Foolproof employed an all-black sales force. The company's salesmen had sold 16,000 alarms during its three years of operation, forty-two per cent of them to persons who earned less than \$6000 per year. It had batteries of employees who enforced collections from consumers slow to pay. The company's accounts receivable amounted to over \$4 million.

Its connections to the outside world were also impressive. Foolproof was the only active subsidiary of Detective Systems, Inc., a holding company which was publicly traded over the counter and listed every day in the *New York Times*. The officers of Foolproof were identical with those of Detective. The price of Detective stock had been rising steadily and was currently selling at around \$7 per share. The company also had obtained over \$1 million of loans from several well-known New York banks. The loans were secured only by Foolproof's accounts receivable.

In addition, Detective, the parent, had a stunning asset. It had signed an agreement with a major New York Department store, which I shall call Branson's,²⁸ to operate a "leased department" in the store's various branches. A Branson's customer who wanted a burglar alarm would be visited by a Foolproof's salesman; the customer would buy a Foolproof alarm using his Branson's charge card, and would never

28. The size and reputation of the company are a significant part of the tale, but so is the secrecy surrounding its name. The reader must take my word for it that Branson's reputation is comparable with that of J.C. Penney's—a name I can safely use by way of illustration since Penney's, with no New York City outlet, cannot be Branson's.

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know that he was not dealing with a Branson's employee. For the use of its good name, Branson's would get a significant cut of the gross.

Ratner spent three days scrutinizing Foolproof's records—and three nights too. During the day, Stone would sit by him and look constantly over his shoulder, or talk to him nervously about what an honest company he ran and how anxious he was to obey all the laws. Sam Stone sold from morning to night, and probably sold in his dreams as well. Each day, Ratner listened patiently as Stone told him, for example, that the burglar alarm industry in New York was a haven for fraud, and that other companies were in flagrant violation of the law.

But at night, Stone would get tired and would head for his stately home on the north shore of Long Island, leaving Ratner to lock up the office. Then Ratner would start the day's work in earnest, examining the business records until midnight, then hurrying home for a little sleep before beating Stone into the office in the morning.

In this manner, Ratner sized up his adversary and gathered extremely valuable information. For example, Stone told Ratner that the price of the alarms was high because the customer was paying for more than the parts of the alarm and its installation; he was paying for three years of service. But by painstaking analysis of service records late one night, Ratner determined that the most frequent service Foolproof provided was replacing dead dry cells, and that only a quarter of the customers ever requested even that much service.

Ratner also wanted to obtain, if possible, the names and addresses of a substantial number of Foolproof's customers. Although we had a few dozen complainants, many with sad stories of deception combined with serious financial hardship, it would be difficult to present most of them to a court. For a majority, testifying would be a serious psychological and financial burden, and their memories of the precise events that had occurred years before were sufficiently imprecise that Foolproof would have demolished them on cross-examination. Obviously, a complete list of Foolproof customers, from which witnesses could be selected, would be very helpful.

Foolproof kept these names and addresses, as well as other pertinent information, on three-by-five cards and on punched computer cards. Ratner had heard Stone tell Foolproof's comptroller to give the Department full cooperation. So at 8:30 one morning, before Stone arrived, Ratner asked the comptroller to show him the three-by-five cards.

"Do you mind if I Xerox these?" he asked. "The Department will pay the costs of duplication."

"No, go right ahead," the comptroller told him.

For twenty minutes, Ratner labored over the machine, wondering how many names and addresses he could copy before someone changed the rules. The comptroller kept turning around and looking at him, and every time he did so, Ratner figured the jig was up; the question was, would the comptroller insist not only on halting further copying, but on surrender of the already copied names? At last the comptroller stood up and walked over.

"Mr. Ratner," he said, "it just kills me to see a lawyer spending his time doing clerical work. Here, let me get one of the girls to do this copying for you, so you can do something more important." He had a secretary copy the entire stack for Ratner.

Ratner's investigation of Foolproof's records also confirmed an important suspicion. The 1970 New York State Legislature had passed a law providing that a person who signed a contract brought to him by a door-to-door salesman could cancel the obligation within three days by notifying the company of his intention to do so.²⁹ The law also provided that the salesman must notify the consumer of his right to cancel by handing the customer a stiff, perforated card containing, in English and Spanish, a prescribed, simple text. The notice said that if the consumer wanted to cancel, all he had to do was tear off the bottom half of the card, sign it, and mail it; the bottom half, by law, was pre-addressed to the seller. Violations of this law were punishable neither criminally nor civilly, but a consumer not properly notified of his right to cancel continued to bear such a right until three days after the company provided him with the statutorily required stiff card. As far as Ratner could determine from the records, Foolproof had never printed or distributed the cards to its new customers, although it had made at least 1200 sales since the law became effective on September 1, 1970.

Finally, Ratner's very presence at Foolproof's offices produced one surprising by-product. Two of the company's salesmen, disgruntled because Foolproof had not been paying them at the rate promised, contacted him and supplied him with extensive information about how they had been trained to sell the company's products. For example, their sales managers had instructed them to say that Foolproof had a

29. N.Y. PERS. PROP. LAW art. 10(a) (McKinney Supp. 1970).

policy of not suing customers who were in default. The salesmen were shocked to learn that the policy was exactly the opposite.

When Ratner returned to the Department with an accurate profile of the company, we reviewed our strategic options:

(1) We could sue Foolproof under the Consumer Protection Law. This course of action would involve a minimum of several months delay while we drew up all the necessary papers. Then, in view of the decisions we were getting in other cases, it seemed likely that a court would deny any request for a preliminary injunction against the company's sales tactics (especially since the company would point out that it was nationally traded, and a decision before trial affecting practices would have a serious impact on the stock). Finally, after more than a year of preliminary grappling, we might get a trial, but our witnesses' memories were already fading, and our case would not be an easy one to win.

(2) We could institute a Departmental proceeding to revoke or suspend the company's license as a home improvement contractor. This course had the advantage that it could be commenced immediately, but we had the usual problem with the potential witnesses. We asked one Departmental official, an old hand at such hearings, how many consumer witnesses we would need to put on the stand to sustain a decision against the company, and he suggested that several dozen might be needed. Furthermore, this course did not really avoid delay. Departmental licensing determinations were subject to review in a series of three courts, and it was customary for the courts to grant stays of suspensions or revocations for the year or more that review required. During this time, Foolproof could continue to operate with impunity. And even if the Department did revoke its license, and its determination were ultimately upheld, Foolproof could continue to collect its \$4 million from deceived ghetto consumers; it could even continue to sell without a license, subject to the petty annoyance of defending periodic misdemeanor charges for operating without a license, and paying occasional fines if found guilty.

(3) We could contact the big institutions on whose credit and friendship Foolproof thrived. The company could not last two months if the banks refused to renew their thirty-day loans, and would be in serious trouble if Branson's terminated the leased department. Unfortunately, this course of direct action had the disadvantage of being unlikely to work. Those institutions had to be considered foe, not friend, at least for the present. While non-renewal of the loans would cause the company's collapse, the collapse would in turn insure that the banks

would be unable to get their money out of the company. The banks' interests were intertwined with those of Foolproof, and we had no reason to believe that even if the banks knew everything about Foolproof's business practices they would do anything differently. As for Branson's, Foolproof provided the store with a substantial profit for very little work.

However, we reasoned, the strategy of putting pressure on Foolproof through its reputable cronies was not wrong, but only premature. For example, if Foolproof's fraud were sufficiently exposed publicly, the banks and Branson's might begin to fear that the glare of publicity would reflect on them. Furthermore, although Foolproof was strong and secure at the moment, if it began to falter its companion protectors might be transformed into vultures, each eager to consume what was left of the carcass before the others could react.

(4) We could take unprecedented unilateral action to strike the company a hard and possibly mortal blow, based upon a violation that was not its most serious, but one whose enforcement could be accomplished by direct action. The 1200 customers who had purchased alarms since September 1, 1970, still had the right to cancel, because Foolproof had never given them the perforated cards required by law. If we notified the customers of this right, a substantial number of them might exercise it, and each cancellation would deprive Foolproof of up to \$550 in accounts receivable and would instantly reduce the company's current income. Furthermore, the law specified that a company whose contract is cancelled must refund payments made by the consumer. Despite its \$4 million in accounts receivable, Foolproof was cash-short, and refunds would be damaging.

This strategy, too, had its shortcomings. First, if it killed the beast, the fraud would be terminated; but if Foolproof were able to withstand it, we would have on our hands only a wounded animal, more desperate than ever and probably more ready to engage in harsh collection techniques to survive. Second, there was a chance, although a very minor one, that we were wrong about the law. The statute applied to door-to-door sales and said nothing about leases, but Foolproof cast its contract in the form of an installment lease with an option to purchase. Foolproof might argue that it need not make refunds because the statute did not apply. No cases had yet arisen under the new law. Third, we had no really hard evidence that Foolproof had consistently violated the law; we had only the absence of evidence that it had complied. Fourth, if Foolproof claimed that the cancellation law did not apply to it, or even if it conceded the law's application, it might sue the

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City for damages for inducing breach of contract. While we were likely to win such a suit, we could just imagine how the City's ultra-cautious law department, the Corporation Counsel, would react. (We even feared that the Corporation Counsel would insist that a damage action by Foolproof be settled, and that the Department refrain from further punitive action against the company). Finally, we knew that Foolproof had political connections, and there was an outside chance that we would lose our jobs for engaging in direct rather than judicial action. We were persuaded, however, that this company was so evil that it would be an honor to be canned for punishing it.

We decided on this last strategy.

Our assault was carefully prepared for many weeks. We took pains to keep our plans secret, lest Foolproof pre-empt our strike by making its own, less flashy notification to its consumers, by suing to enjoin our intended action (thus alerting the Corporation Counsel), or by invoking political muscle. Only six persons in the Department, including Commissioner Myerson, knew about our plan.

Taking the names and addresses of the 1200 post-September customers from the copied three by five cards, we prepared a mass mailing, which we kept under lock and key. Each envelope to a customer contained:

(1) a covering letter signed by Commissioner Myerson, in English and Spanish, informing the customer of his right to cancel his burglar alarm contract, and stating that under the law, if Foolproof did not pick up the alarm within forty days, the customer could keep it along with his money;

(2) two stamped post cards, one addressed to Foolproof, and one addressed to the Department (as a check), each containing an identical text: "To Foolproof Protection, Inc.: One of your salesmen sold me a burglar alarm and installation and maintenance services at my home after September 1, 1970. At no time did you inform me of my right to cancel under New York Personal Property Law, Sections 425-430. I now cancel. Within ten days send me the agreement I signed and all the money paid you. My name and address is: _____." This was followed by a mailing label on which we had typed the consumer's name and address. Thus, to cancel, the consumer had only to drop the cards in the mail, as stated in the Commissioner's letter. He did not even have to sign his name;

(3) a copy of the card, to be retained by the consumer;

(4) a formal opinion of the General Counsel of the Department

and of the Consumer Advocate, that the law applied to Foolproof's agreements;

(5) in case Foolproof reacted by suing people who cancelled and stopped paying, a list of all of the OEO Legal Aid offices in the City; and the kicker,

(6) to enable consumers to make a rational choice about cancellation, a copy of the opinion we'd received from the Fire Department, that the alarms were worth only \$75, plus profit and overhead.

We also made several contingency plans, in anticipation of the company's possible reactions. For example, we thought it likely that the company would sue some or all of the people who cancelled, and we did not want the burden of testing the propriety of our action to fall on their shoulders. So we prepared to sue Foolproof the day it demanded payment from any customer who cancelled. We would claim that telling a person he owed money when actually he had cancelled his contract was a misrepresentation of consumer rights under the Consumer Protection Law. Thus we could immediately put the applicability of the cancellation law into issue with no problem of a dispute about the facts which would necessitate calling witnesses. Finally, we prepared to obtain legal assistance immediately for anyone who cancelled and was sued, so that the first person into court claiming rights based upon our action would have good representation.

We also prepared to test the last missing piece of information, but to do so at the last possible minute, lest our intentions be discovered by Foolproof while there was time to pre-empt. After everything had been prepared and the envelopes stamped, Ratner called Toole, and engaged him in discourse concerning several minor aspects of the company's forms. Even at this point we were prepared to abandon the plan if there seemed any reason to do so. After about ten minutes of meandering conversation, Ratner asked offhandedly, "By the way, has Foolproof been giving out the three-day cancellation cards under last year's State law?"

Equally offhandedly, Toole replied, "Oh, no, that's one of the laws we haven't gotten around to complying with yet."

We mailed the letters early on a Friday morning, late in March. That afternoon, as a matter of courtesy, Ratner went to see Stone to tell him what we had done. Although Stone said that he would receive him, the office was virtually empty when Ratner arrived; it seems likely that a leak to the company occurred that morning, as soon as the mailing was made known generally within the Department. Toole received

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Ratner and heard the news stonily. "We're very bitter about this, you know," he said.

A few days later, I received a not entirely unanticipated telephone call from one of the Mayor's aides. He was apoplectic. "What gives you the right to notify a company's customers that they can cancel their contracts?" he screamed. "What law says you can do that? Where is it in the statute books? I want a brief on my desk by nine o'clock tomorrow showing me that you have that right. The Mayor works a twenty-hour day to keep businesses from moving out of New York and you scare them away! Did you research the Department's authority to do this? Who made the final decision to do this, anyway?"

"Commissioner Myerson," I happily told him.

That stopped him, but just for a moment. "Did you consult the Corporation Counsel?"

He ranted and raved for twenty minutes. At every chance he gave me to speak, I described to him (as whoever had spoken to him from the company had not) what the company did to its customers. Eventually he came to see that this might not be one of the companies that the Mayor worked day and night to keep in New York. Finally he calmed down, retracted his demand for a brief, and insisted only that he be notified before the Department again sent out such a mailing to a company's customers.³⁰

The results of the mailing were extremely gratifying. Over a three week period, 376 customers cancelled, wiping out \$190,000 of Fool-proof's accounts receivable. Approximately 140 envelopes were returned to the Department because the addressee had moved without leaving a forwarding address. Of the remainder, thirty-five per cent of the mailing's recipients cancelled. We kept a separate count of customers with Spanish surnames, and the same proportion (thirty-five per cent) of these customers cancelled.

One aspect of our mailing which we thought clever turned out to be extremely important: we deliberately did not phrase our notice in the form prescribed by the statute—the form which starts the three-

30. Since this was only one of several times that the Mayor's aides had intervened on behalf of a company we were investigating, I was becoming disturbed by what seemed to be lack of support in City Hall. However, I have been told, probably correctly, that the Mayor's aides were substantially more jumpy and protective of business than was he, and that even they didn't really want to stop us from taking action that Commissioner Myerson deemed justified, but they had to satisfy campaign contributors that they had done something—they had made a call. In fact, they never called twice about the same case, and Bess Myerson never once altered a decision or a policy in response to City Hall intervention.

day cancellation period running. Therefore, consumers who received our mailing could cancel at any time, even after they were sued, months or years later, unless Foolproof meanwhile sent them a new notice in the proper statutory form. In the interim, the rights of consumers slow to respond would be preserved, and Foolproof's books would have to reflect the fact that all 1200 of its contracts since September 1, 1971 were in jeopardy. The majority of cancellation cards were returned *after* the third day following the mailing. In addition to demonstrating the importance of our tactics, this customer response suggests that "cooling-off-period" laws, such as that in New York, which provide only three days to think over a transaction may give buyers insufficient time to make a decision.

Concurrent with our mailing, we decided to institute a license revocation proceeding against Foolproof, on the theory that even if final action in such a proceeding were months or years away, the Department ought to begin such a case; it ought not allow its licensing to tacitly approve the conduct of this public enemy. In the proceeding, the Law Enforcement Division would prosecute and the Commissioner would appoint a neutral, unbiased hearing officer to hear the case and recommend a disposition. We served Foolproof with a complaint containing a wide variety of allegations. We alleged twenty-seven different instances of fraud or failure to perform by Foolproof, which we were prepared to prove by testimony of consumer witnesses. In addition, we listed eighteen other types of violation of the licensing law, such as the company's failure to keep the Department informed of the names of its salesmen or the location of its offices. One "count" in this complaint referred to a brochure we had obtained in which Foolproof stated that it "saves 55 lives per month."

The witnesses lived in every part of the City, but each one had to be interviewed before the hearing. Ratner sought the cooperation of the Legal Aid Society, and set up evening interviewing schedules in Legal Aid offices in every borough. As they talked to the complainants, Ratner and his investigators became more and more angry, and determined to insure not only that Foolproof cease its fraudulent practices, but that Sam Stone be stopped from repeating this pattern, using other corporations, year after year.

Shortly before the hearing was scheduled to take place, Foolproof made its move. It informed the Department, through the reputable law firm of Downe, Sanders and Hammerman, that it wanted to negotiate. The law firm explained to us, somewhat apologetically, that it did corporate and securities work for Detective Systems, Foolproof's

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holding company parent, and had been called specially into this case because of the serious consequences that license action might have for the parent as well as the subsidiary.

The demand for negotiation produced something of an internal crisis within the Department. As everywhere, militancy was exhibited in inverse proportion to seniority. The investigators, who had been interviewing the victims day and night, were altogether opposed to any compromise, and wanted simply to revoke the license. Ratner was mildly opposed to discussions with Foolproof. I was mildly in favor. The Commissioner settled it: a government agency had an obligation to hear out a party, even if it rejected compromise.

So we heard out Foolproof's arguments for compromise, which were astounding. First, Foolproof contended it was improper to punish the company for the acts of a few door-to-door salesmen. The company had instructed the salesmen to obey the law; Stone and the other corporate officers hadn't known about the "55 lives" brochure, for example, which had been written by one of the regional sales managers without authorization. We should perhaps reprimand the individual salesmen, but the corporation was not responsible. Second, if we did put Foolproof out of business, a vacuum would be created that would be filled by smaller, less reputable companies which would be impossible to control and would engage in even more vicious tactics. Finally, Foolproof's lawyers told us, in tones reminiscent of the Mayor's aide, to put this company out of business would adversely affect thousands of stockholders and would cause the unemployment of hundreds of employees, many of them black. Even if the company were as bad as we said, were we prepared to cause such harm to innocent stockholders and employees?

"Do you mean," asked Henry Stern, our Deputy Commissioner, "that we can revoke the license of a little company that is cheating people, but that we should be more hesitant to revoke the license of a big company that is cheating even more people, because many employees would lose their jobs?"

"That's exactly what I mean," replied the man from Downe, Sanders and Hammerman.

We decided that we had to negotiate, at least for a while. If hundreds of people were threatened with unemployment, and we refused even to talk, it might be difficult to convince City Hall of the propriety of our strategy. If, on the other hand, we talked, and Foolproof rejected our terms, no matter how harsh, City Hall was most unlikely to intervene. There is a significant difference between telling an agency

to keep open the lines of communication and second-guessing the agency's bargaining positions. We made up our minds that the settlement, if one were negotiated, would be the toughest in the history of consumer protection in the United States.

The negotiations lasted nearly a month, consuming days or half-days per session. Stone himself and one of the Downe, Sanders lawyers were present for all sessions. From time to time they brought Hugh Wood, vice-president of Foolproof and Detective, Richard Toole, and a variety of other Downe, Sanders attorneys. The negotiations had an eerie character because neither side directly discussed its core interests or its weaknesses. Our weak points were (1) our belief that if the negotiations collapsed and we had to proceed with the licensing hearing, real changes, after all appeals, might be two years away, and (2) our fear that Foolproof would sue the City for \$190,000 damages as a result of our mailing. Their weak points were (1) their fear that publicity, particularly publicity mentioning Detective, would depress Detective's common stock, and (2) their fear that if the proceedings heated up sufficiently, Branson's and the banks might turn against them.

We insisted, as a precondition to the negotiations, that while we were talking, Foolproof employees were not to contact the 376 customers who had cancelled. We imagined that a new fleet of fast-talking salesmen might try to salvage the company's receivables by persuading the customers, perhaps for a small rebate, to rescind their cancellations.

This ground rule established, we presented our demands for a final agreement. One of our first concerns was to protect the people who had cancelled, for whom we bore special responsibility because they had acted upon our information. We wanted to see to it that Foolproof refunded their money, as it was obligated to do under the statute. Foolproof, on the other hand, said it wanted to "renegotiate" their contracts, in a fair and honest manner, and that it wanted to offer the people who cancelled as much as a fifty per cent discount to sign up again. The fact that it was in Foolproof's interest to contract even at half price confirmed our belief as to the low value of the burglar alarm. After several hours of discussion, we reached agreement on this point: Foolproof could attempt a resale, by strictly truthful sales techniques, but only one man could go to make the pitch, and he had to physically hand a refund check to the customer who had cancelled before he could even begin the resale pitch.

Our next concern was with refunds or cancellations for the people

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to whom Foolproof had sold alarms in the past—the people who owed Foolproof \$4 million. We wanted Foolproof to mail them a questionnaire to determine whether they had been deceived, and to refund money to any customers who had been misled. Stone insisted that his customers would lie, and would say they had been misled just to get cash refunds. For days we circled this point, unable to reach any agreement. Finally, I told Stone that since we insisted on the point, we had better go ahead with the licensing proceeding, and with our other plan for getting refunds for the customers.

“What other plan?” the lawyer asked.

“We’re preparing a suit for mass restitution under the City’s Consumer Protection Law,” I said. He looked puzzled, having been unaware of the law. I handed him a copy of the statute and explained the nature of a mass restitution action.³¹ He quickly realized that not only were all of Foolproof’s assets threatened for the first time, but that the pendency of such a suit would have to be disclosed in Detective’s annual reports and future prospectuses to stockholders.

Stone asked if there might be some way to determine without a mailing those few people who may have been misled. I explained an alternate plan. Foolproof would pay \$25,000 to hire an impartial arbitrator for a year and equip him with an office. We would mutually agree on a procedure for selection of such a person, who, once hired, could not be fired. He would use any means at his disposal, within a year, to contact and personally interview Foolproof customers, and his word would be final as to whether or not they had been misled.

Stone took this plan seriously enough so that we began drafting a budget—\$6000 for office space, \$700 for Xerox, etc. However, by the start of the next session, he had decided that he could not accept the open-ended risk of losing all his contracts. His customers, he was certain, would lie convincingly to the arbitrator.

Stone asked if we had any other plans. Ratner and I exchanged glances. When we had drawn up our list of demands, we had drafted a provision so radical that we had not even presented it to Stone. This seemed to be the time to take it off the shelf and dust it off. “Mr. Stone,” I said, “you claim to want to run an honest business, but your record is very bad. Your salesmen seem incapable of making an honest presentation to a low-income consumer, and we view with alarm the fact that the ghetto is your major market. Consumers who are less

31. See NEW YORK CITY, N.Y., ADMIN. CODE, ch. 64, tit. A, § 2203d-4.0(c) (Supp. 1971) (Appendix, p. 1602 *infra*.)

educated are more easily taken in, and it is just these consumers who can least afford to be cheated. We will abandon our demand for a survey of your past customers if you agree to get out of the ghetto."

To our surprise, Stone readily agreed.

"No more sales to any customers having weekly salaries below \$155," Ratner said. "And to police compliance, you will have to have your customers fill out credit applications open to our inspection, stating their salaries, and you cannot accept a contract unless the customer's employer verifies that he earns more than \$155."

Stone insisted on two modifications, which we agreed to: first, the critical salary figure was to start at \$100, rising to \$155 on a sliding scale over a period of nine months; and second, the limitations would not apply to Branson's customers who had held Branson's charge accounts for ninety days before buying an alarm.

Our next demand was that Foolproof employ a series of devices to ensure that no customer with a legitimate grievance would be sued. No customer could be sued for non-payment until Foolproof had sent him a series of dunning letters encouraging him to notify the company of any complaints, enclosing in each letter a self-addressed, stamped reply post card on which complaints could be registered. The final letter in this series had to include the following text: "Foolproof hopes you are satisfied with your burglar alarm, which alerts you to intruders and, as you know, does not ring at the police station. We told you before installation that installation was not free, that there was no trial period, and that your agreement could not be cancelled for three years. If you have any complaints regarding sales, service or the above facts, please mail us the enclosed card so that we can make whatever adjustment is appropriate." The prestamped card enclosed with this final dunning letter was to be addressed to Foolproof at a Post Office box maintained by the Department; the Department would open the mail and log the responses before sending them to the company.

Then, Foolproof would be required to put each complaining consumer in the position he would have been in if the salesman had been telling the truth. For example, if the customer had been told that the alarm would ring in the police station, Foolproof would have to provide him with that type of alarm (sold commercially for approximately \$1000). If the customer had been told that he could cancel at any time, he would have to be permitted to cancel.

Furthermore, if Foolproof sent a customer all of these notices and received no response, it could sue him, but it would have to attach to its summons a list of names and addresses of all the Legal Aid and

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OEO Legal Services offices in the City. After several negotiating sessions, Stone accepted these restrictions.

Next, to ensure fair dealing in the future, we insisted that salesmen take positive action to correct their former misrepresentations. They would henceforth have a duty to disclose, orally and in writing, that the alarms they were selling were *not* connected to the police station,³² that Foolproof sues people who do not pay, and so forth. Furthermore, before installing an alarm, Foolproof would have to send each new customer a letter asking whether the salesman had made each of the required affirmative disclosures, giving the customer a stamped card for reply. No contract would be valid if the customer reported that any disclosure had been omitted. Stone readily accepted this demand also.

We had a number of less innovative demands as well: that Foolproof immediately settle the individual complaints that had been filed with the Department, that Foolproof stipulate that any claims it might have against the City for the mailing to customers were settled (we raised this incidentally, although it concerned us throughout the negotiations), that Foolproof accept a reprimand and fine on its licensing record, and that the company pay the Department costs of \$2500. We also insisted that within twenty days after the out-of-court settlement agreement was signed, Foolproof and Stone sign another document consenting to a court judgment embodying, word-for-word, the terms of the earlier agreement, so that Stone would be liable for a jail sentence for contempt if he violated his promise.

Meanwhile, we neared agreement. Stone and his battery of lawyers agreed to virtually every one of our demands. But there remained the issue of publicity. Our Deputy Commissioner, Henry Stern, conducted the discussions on publicity, meeting with Stone, his Vice-President Hugh Wood, and Stone's lawyers. Stone requested the right to edit any press release that the Department planned to issue, as a precondition to his signing the complete agreement. Stern flatly refused to permit "negotiation" of a press release, adding that he expected no press release would be issued until the subsequent judgment was entered, approximately twenty days later. We expected that they would not like the publicity, and didn't want them using it as an excuse to terminate any relationship before they signed the consent to the entry

32. Stone had a pitch for every situation. To inform the customer that the alarm would not be connected to a police station, Stone suggested that his salesmen say, "Mrs. Jones, this alarm will ring in your home, frightening off the burglar without causing unnecessary disruption by signaling the police."

of judgment. They then made two demands to which the Department agreed: that the release mention only Foolproof, not the publicly traded parent, Detective; and that it not mention Branson's. A meeting was scheduled for the afternoon of Friday, April 23, to sign the settlement.

However, the day before the document was to be signed, we began to get telephone calls from Foolproof customers who had cancelled. Salesmen had come to their homes and frightened them into agreeing to remain as customers. One customer complained that the Foolproof salesman had kept his hand in his trenchcoat pocket, causing her to fear that he had a gun. Foolproof was breaching our interim understanding that there would be a moratorium on visits. Furthermore, the sales tactics were a violation of the provisions of the agreement governing conduct during any resale negotiations. Enraged, Ratner rushed to the home of a customer which Foolproof had not yet revisited and planted a tape recorder. That evening, Thursday, April 22, a Foolproof salesman called.

The next day, when Stone and his lawyers arrived to sign the agreement, I protested about the visits. Stone admitted that visits had been made, and claimed not to recall the interim understanding, which had not been written down. But Stone insisted that the visits had been conducted in accordance with the provisions of the agreement about to be signed. Stone read the agreement and initialed each page; then he and the lawyer from Downe, Sanders signed. I gave them copies and filed the original away before commencing Act Two.

I next produced a small tape recorder and placed it on my desk. An apprehensive look crossed Stone's face. "Now, Mr. Stone, I am going to do you a favor. All along, you have complained that you were innocent. Then, a few minutes ago, you assured me that your salesmen when visiting customers who cancelled had not violated the terms we had agreed upon for the procedure for such visits. I am now going to demonstrate to you that even on the eve of signing this agreement, you were not in control of your company, and you did not know what your employees were doing." I turned on the recorder and played for Stone and his lawyer the recording Ratner had made in Brooklyn the previous night.³³

Salesman: Good evening. As you know, I'm here to explain about that letter you received from the Department of Consumer Affairs.

33. The dialogue is an edited and partially paraphrased condensation of a conversation which actually lasted forty-five minutes.

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You know, Bess Myerson wants to make a big name for herself, so she can run for public office. And Foolproof is a big company, so its books are open for inspection any time by the government. So Bess Myerson sent some young punk up to our office to look over our books, and while he was there this fellow noticed that a few of our contracts were missing a clause required by a new law. We had made up new contracts, but we accidentally used a few of the old ones, and yours was one of them. So this punk, wanting to get a pat on the back from some big supervisor,³⁴ told Miss Myerson to send out those letters.

Now you can cancel if you want to, but I'd just like to know why you want to cancel, and find out if we did anything wrong.

Customer: Well, the salesman who came here told me the alarm would make a loud noise, so that it could be heard all over the neighborhood. But one day, my husband came in from work and accidentally set off the alarm and he didn't know how to turn it off. It rang for hours in the apartment, but nobody could hear it in the street. When I came home from work later, I didn't even know it was on until I actually entered our apartment. I don't think the alarm works well because no one but the burglar can hear it.

Salesman: But that's not the company's fault. That's because you have an old building. If you lived in a newer building, it could be heard on the street.

Anyway, half the purpose is alerting you if you are asleep during a burglary. Alerting neighbors to a break-in while you are away from home is important, but the most important purpose of a burglar alarm is to wake you up if there is a burglar in the house, and frighten him off. After all, [the salesman's words become slow and measured] a stereo, a hi-fi, a suit of clothes can always be replaced, [voice falls to a near-whisper] but God forbid, a cut-up body will always bear a scar, or require an amputation.

The salesman let that sink in, and then continued his pitch. The company, he told the woman, would be willing to make a reasonable deal. First, he offered her a discount of \$90 if she would recommit herself to retaining the alarm. When she refused this offer, he raised the discount to \$120, then \$240, then \$360, and finally to \$400. She consistently refused him, and finally he left the house. At no time did the salesman hand her a refund check or make the disclosure required by our understanding with Stone.

Stone and his lawyer sat mute for ten seconds after I turned off the recorder. Then Stone picked up my telephone, dialed his office, and told his sales manager, "Stop all re-selling immediately. I want to see

34. He got it; Ratner is now the City's Consumer Advocate.

all the salesmen in the central office first thing Monday morning." I began to think that the company might be capable of reform.

I was soon disillusioned. During the next few days, people who had cancelled continued to call, reporting new visits by Foolproof salesmen which did not comply with the terms of the agreement. Three times within two weeks, we summoned Stone to the Department to explain what appeared to be violations of the settlement. Each time he said that he'd misunderstood the meaning of the settlement, and each time, rather than sue Stone, we permitted him to sign a new stipulation, clarifying the settlement and strengthening the enforcement provisions. Twenty days passed, and on May 12, 1971, Stone and his attorney came to sign the consent to the entry of judgment. "Could you do us a favor," he asked, "and hold up publicity on this for at least ten days?" I assured him that the judgment would not be entered, nor the press release issued, at least until Monday, May 24.

At about this time, other agencies, including the Federal Trade Commission, the United States Attorney, and one of the District Attorneys, began their own investigations of Foolproof. In addition, the Attorney General of New Jersey, who had been working on the case for several months, sued Foolproof for fraudulent practices in the sale of its alarms there. On the first day of the suit, a court signed a temporary restraining order enjoining Foolproof from collecting any money on any outstanding contracts in New Jersey, or on any *judgments* it had obtained in the New Jersey courts. We were amazed by the order, because the New Jersey courts seemed so much more prepared to deal swiftly with consumer problems than their New York counterparts. Stone was even more amazed, because the order immediately cut off five per cent of his revenue. Coming only a few weeks after our mailing, it was a serious financial blow to the company.

Also, Stone had disclosed to Branson's that he'd had some trouble with the Department, but told the store that it was now settled. Branson's lawyer came to see me, to ask what had happened. I gave him a copy of the settlement, without making any recommendation that Branson's take any action against Detective. I did ask that he give me a copy of the contract between Branson's and Detective, and he refused. This attitude confirmed my earlier suspicion that it would not have been productive at the outset to ask Branson's not to deal with a company which cheated its customers.

On May 25, I took the papers that Stone had signed to the clerk's office of the State Supreme Court for signature by the judge. An

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elderly clerk greeted me from behind the desk and took the papers. He read through the decree, very slowly.

"This is improper," he said. "I'm going to recommend to the judge that he not sign it."

"Why not?" I asked, worried because court clerks in New York wield significant power; many judges rely on their judgment.

"This decree goes into too much detail, regulating every aspect of this company's business."

"But that's necessary for enforcement," I argued. "We've got to make it specific to make it work."

He shook his head. "Besides, it's too long, six pages single spaced. Judgments shouldn't be so long. The judge shouldn't have to read so many pages. And neither should I. It's an imposition. It's not my job."

"Is that all that is wrong with it?" I asked.

"No, that's not all. You have a long section in here regulating their collection procedures. That's improper. When someone owes his creditor money, the creditor should be able to collect any way he wants to short of violence. This company sells to a lot of Negroes, doesn't it?"

"Yes."

"Well you know as well as I do that Negroes don't pay their debts on time."

"Many of these people have been defrauded," I told him. "They need special protection so that they can defend themselves."

"Then let them come into court and defend themselves," he said.

"Look," I said, getting more worried, "this is nothing new. Attorney General Lefkowitz has been getting consent decrees regulating selling and collection practices for years."

"Lefkowitz is making it impossible for a man to run a business in this state," the clerk replied. "And Lindsay is making it impossible to run a business in the City. Lindsay is without a doubt the worst Mayor New York ever had," he told me. "He even makes Wagner look good."

"Well, will you present these papers to the judge?" I asked.

"No, I told you I thought they were improper," he said. "But I will present them to the chief clerk, with the recommendation that he recommend to the judge that they not be signed. Come back in two hours."

When I returned, he told me that the chief clerk had decided, against his better judgment, to submit the papers to the judge without any recommendation. An hour later, the judgment was signed.

That afternoon, the Department issued a strong press release which began, "A burglar alarm company that sold its alarms for seven times their cost by falsely stating that some were connected to police stations has consented to a court judgment halting its unfair sales practices." The release mentioned the mailing we had undertaken, but, in accordance with the Department's assurances, did not state the name of the company's parent corporation. The *New York Times* described the judgment on the first page of its second section the next day; other newspapers gave the story minor coverage, or none at all.³⁵ Publicity did not affect the price of Detective stock, which hovered around \$7 per share.

Almost immediately, Foolproof began violating the judgment. Complaints began to come in from new customers of the company as well as from those who had cancelled their contracts. During this period, we sent Stone a steady stream of individual complaints to resolve. Although we pressed him regularly, he did not resolve them promptly. His failure to pay prompt attention to the individual consumers who said they had been gypped, together with the developing evidence of continuing violations, caused us to summon him to yet another meeting. We threatened enforcement action unless Stone agreed to pay a new fine and to sign a new stipulation promising prompt refunds to individuals who complained of deception. Stone said that he would have to think it over; a few days later, he refused.

We then heard from a new law firm—Stone's fourth group of attorneys during our brief relationship—that all our future contact with the company should be through them. My first contact with this firm was a request that it supply me with copies of the Foolproof credit applications which we were entitled to inspect under the provisions of the agreement and judgment. The attorney I spoke to promised to call me back with a response in three days. He never called back. Having lived through this kind of delaying tactic in several other cases, I was not prepared to beg repeatedly for documents that the Department had a right to inspect.

These developments completely altered our relationship. Up to this point the company and the Department had been circling each other, feeling out areas of mutual agreement. The Department had used each new piece of evidence to tighten the screw, but ever so slightly,

35. The *Amsterdam News*, New York's major black newspaper, did not pick up the story until two months later, when it suddenly printed the press release in full.

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and Stone was becoming a familiar figure in the Department's offices. Now we were dealing at more than arm's length, and it was total war.

A direct action rather than a judicial approach had worked thus far, so we continued to apply that strategy. We had begun receiving complaints from burglar alarm customers of Branson's, so we decided to do our own investigating of the Branson-Foolproof set-up. Several investigators posed as customers and asked Branson's to send a burglar alarm salesman to their homes. They recorded the presentations, and we found that even when selling under the Branson's name, Foolproof salesmen were unable to restrain themselves from exaggeration. I informed the general counsel of Branson's that we had evidence that Branson's had been violating the City's Consumer Protection Law, and requested that Branson's voluntarily supply the Department with various documents concerning its sales of alarms, including its contract with Foolproof. It was implicit that if voluntary cooperation was not forthcoming, I would issue a subpoena.

Branson's sent one of its attorneys to see me. "We hate like the devil to be investigated," he told me. "We didn't know anything about Detective's tactics until we heard about them from the Department. We'd had a few complaints, but they just seemed to indicate that there were some overly zealous salesmen. We were impressed by the fact that we were dealing with a publicly traded company. We felt that offered us protection."

I told him that we had not reached any firm conclusions about Branson's culpability, and that we were still investigating, which is why we wanted the documents. He asked whether we would still insist on investigating Branson's if they terminated their contract with Foolproof.

"If you're not selling any burglar alarms," I said, "I don't see how we could fruitfully devote our resources to investigating your sale of burglar alarms."

Branson's terminated its agreement with Detective the next week.

Even before that termination, Detective's stock had started to slip. The slide began weeks after the publicity hit, but once it started, it continued steadily. After Branson's terminated, the stock hit a low of seventh eighths of a dollar.

And then a new development occurred which drastically changed the character of the case. A man called to complain that he had bought Detective stock at \$7, on the recommendation of Optimum Analysis Corp., a public relations firm. The firm had never mentioned that the

company was in trouble, and immediately after his purchase, the price of the stock had declined dramatically. He offered to send us a copy of Optimum's report on the stock, and we urged him to do so.

The report was astonishing. Although it was dated "April, 1971" and purported to be based upon information received from Sam Stone, the company's president, it contained no mention of the \$190,000 loss caused by the consumer response to the Department's late March mailing, or of the agreement signed late in April, or of the New Jersey Attorney General's suit initiated late that month. Ratner went to see Victor Berlin, president of Optimum.

Berlin, it developed, had first heard of Detective in March, 1971, when he had received a letter from one of its attorneys, on the stationery of Downe, Sanders and Hammerman, requesting that Optimum issue a report on the company in the near future. Berlin had agreed, in large measure because the request had come from a prestigious law firm. All during March and April, he had met with Stone and the vice-president, Hugh Wood, and had received highly favorable information indicating that the company would do well. On the basis of the information, Berlin had written a glowing report, which Stone signed, and had mailed it to over a hundred stock brokers in the New York area. Stone and Wood had never mentioned that they were simultaneously in negotiations with Ratner and myself, nor had they said anything about the 376 consumers who had cancelled their contracts.

A few weeks later, Berlin read in the newspapers that the company had suffered unusual losses and had consented to a far-reaching judgment. As the price of the stock fell, Optimum's clients became angry, and accused Optimum of misleading them. Berlin's credibility had been destroyed, and his attorneys were preparing a damage action against Detective and Stone.

Impressed by the information they had received, Berlin and several other employees of Optimum had themselves bought large quantities of Detective stock at \$7 a share. When the bottom dropped out, they themselves had lost substantial sums.

"Incidentally," Berlin said, "watch that fellow Hugh Wood. He used to be at Endowment National Bank, when the Bank gave Detective \$1 million in loans. After that deal was completed, he left Endowment to become a vice-president and director of Detective and Fool-proof."

We watched him. We consulted the Securities and Exchange Commission's Official Summary of stock transactions by corporate "insiders"—officers and directors. Wood had attended two of the sessions at which

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Stone and his lawyer had negotiated the agreement with the Department of Consumer Affairs. That agreement was signed late in the afternoon on Friday, April 26, 1971. The following Monday, weeks before the agreement was publicized, Wood had sold 1200 shares of Detective. It was not inconceivable that the company's insiders had used Optimum to keep the price of the stock steady for a short period while crucial sales were made. Commissioner Myerson advised the S.E.C. to investigate.³⁶

The stock continued to fall. By consulting records at the S.E.C., we

36. Sam Stone knew a great deal about stock manipulations. With a noticeable degree of envy he once told me what he claimed was the story of Budget Finance, Inc. See Schrag, *supra* note 1. "At the time Budget began," Stone related, "there were a number of finance companies buying three-year consumer contracts from slum stores. I was president of one of them. But these contracts were with such poor people, and were subject to so many legal defenses, that no finance company would pay a store more than seventy-five or eighty percent of the face value for the right to collect the face value plus eighteen per cent per annum from the consumer. The fellows at Budget decided to pay ninety-seven per cent instead of seventy-five per cent, and they wiped out the competition."

"Although they knew the paper was uncollectable, they wrote the accounts receivable up on their books for the full face value, and treated those accounts as current income in the year in which the contracts were purchased. That made it look as though the company was very rich, and made it seem as though earnings were skyrocketing. Eventually, the company went public, and people paid a pretty penny for the stock. The owners and directors paid peanuts for their stock, of course."

"The more accounts receivable they had on the books, the more stock they were able to sell. And the more stock they sold, the more the banks and other financial institutions tripped over themselves to lend the company money. The banks were underbidding each other to get Budget to borrow their money. Of course, the banks knew these assets existed only on paper, and that many of them would be uncollectable. But they weren't interested in the contracts as security for the loans. The loans took priority over the stockholders' equity. That was their security. Budget had raised \$20 million through the sale of stock, so the banks weren't really worried about losing their money."

"I once offered to lend Budget some money," Stone continued. "The president of the company took me into his office and showed me his financial records. 'These books show that this year I made \$1 million,' he told me."

"But I wasn't so dumb, you know. 'As I read the books,' I said, 'it looks like you lost \$1 million this year.'"

"That just shows that you're not living in the jet age, Stone," he told me. "On the basis of this statement I was able to sell \$14 million worth of stock. So I lost \$1 million. I still got \$13 million left."

"The price of Budget Finance kept rising," Stone continued, "and the company's officers and directors kept buying shares at below-market prices. Eventually the company was listed on the American Stock Exchange, and the price went higher. Meanwhile, the company used a variety of accounting techniques to postpone its reported losses. Finally, in 1969, the bubble broke. The company suddenly announced its discovery that not as much money could be collected on its contracts as had previously been thought. It declared a loss of about \$20 million on contracts supposedly worth \$40 million. Over the course of a few months, the stock plummeted from \$34 to \$4. But the insiders sold all the way down. Today some of them are millionaires. The company got out of the finance business, but it had served its purpose."

"The consumers lost out, because Budget then sold their contracts, at a huge discount, to another finance company, which was geared to use even stronger collection techniques than Budget. But the major loss was suffered by the company's innocent stockholders, whose investments were suddenly wiped out. The banks got out all their money, and didn't lose a dime. The only commercial losers were the legitimate finance companies, such as mine, which couldn't meet the competition of the ninety-seven per cent offer, and the low-income retailers, which had no one else to sell their contracts to by the time Budget folded."

learned that while Stone claimed not to own any publicly traded shares of Detective, and disclaimed beneficial ownership of his wife's shares, he did own over \$500,000 worth (at \$7) of restricted shares, which could not be sold on the market until the middle of 1972. The value of these shares was wiped out. Berlin called us with a new discovery: the previous owners of some of the shares he had bought while promoting the stock were partners in the law firm of Downe, Sanders and Hammerman; they too had been selling.

Meanwhile, Foolproof was still selling alarms, and was still collecting on old contracts, and Richard Toole was still suing consumers at a furious rate, except in New Jersey, where the order obtained by the Attorney General put us to shame. We had to act.

We drew up a new license revocation summons—this time, one which would not require the presence or testimony of many consumer witnesses. We made two kinds of allegations: first, that the officers of the company were not of good moral character (a statutory standard for home improvement contractors in New York City) because they had violated the standards of conduct established by the federal securities laws, and second, that the company had violated its agreement with the Department. We served the company with papers, calling for it to appear on Monday morning, July 26, 1971.

I suspected that Foolproof's new lawyers would make some move to block the hearing, and I did not want to inconvenience the Department's witnesses by having them appear unnecessarily, so in the week before the hearing I called Spencer Cates, who was now handling the case for Foolproof. "Are you going to try to get a court order against the hearing?" I asked.

"Yes, I am," said Cates.

"Will you tell me in which county of New York State you will apply for the order, so that I can be there to oppose you?"³⁷

"No, I will not," he said.

I expected him to make his move on Friday afternoon, so that morning I called the motions clerk in each nearby county and requested that I be telephoned and called to the court if Spencer Cates showed up trying to enjoin the Department of Consumer Affairs.

"What's the name of the company?" said the clerk in Queens.

"Foolproof Protection Inc.," I said.

³⁷ A motion without notice can be made in any county. N.Y. CIV. PRAC. § 2212(b) (McKinney, 1963).

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"Oh, sure we'll call you," he said. "Everyone knows they're a bunch of crooks. I've been reading about them in the newspapers."

Another clerk told me, "We won't call you, but we'll take this telephone call into account in deciding whether to issue the stay."

A third clerk, in Brooklyn, said he might call.

The fourth clerk, in Manhattan, told me: "Manhattan never stays a public agency."

By Friday night, I had heard nothing from either Cates or the clerks. I concluded that we would have a hearing on Monday morning, and advised the witnesses to appear.

At ten in the morning that Monday, the witnesses had arrived, the hearing officer was seated at his desk, the prosecution was ready. But neither Cates nor anyone from Foolproof had appeared. Nor had we been served with any court papers. By 10:20, I knew something was wrong. I called Cates, who wasn't in; his secretary said that he had gone directly from his home to work on the Foolproof case. That could have meant that he was on his way to the hearing . . . or it could have meant trouble.

At 10:45, the hearing officer and the witnesses were getting restless. We could have started without Foolproof, since the company had defaulted—that would have been pleasantly ironic, since it had obtained thousands of judgments by default against consumers—but we thought it better first to establish definitely whether they were absent on principle or had merely been delayed in traffic. We opened the hearing for the record, and then, before we put on any witnesses, I called Cates' secretary again.

"Mr. Cates isn't here yet," I said. "Do you have any idea where he might be?"

"All I know is he had some papers he went out to get signed."

"Can you tell me what county he headed for?"

"I think he said something about Queens."

That was all I needed to know, I called the motions clerk in Queens. The man who answered was not the clerk who had read about Foolproof in the papers.

"Could you please call me if a Mr. Cates, representing Foolproof Protection, Inc., shows up in your court seeking to stay a hearing by the Department of Consumer Affairs?"

"Why, he's here at the desk in front of me right now!" said the clerk.

"Could I come right out to oppose his application?" I asked.

"How soon could you get here?"

"Twenty minutes."

"O.K., we'll wait twenty minutes," he said.

Ratner and I raced out to Queens. Cates was standing at the clerk's counter. I asked him for a copy of his application papers.

"Do I have to give him a copy?" he asked the clerk. "This is the part of the motions office for motions without notice. Schrag got notice accidentally, but he wasn't entitled to notice."

"Better give him a copy," the clerk said. "The judge might want to hear his side of it, too."

We leafed quickly through more than 100 pages of affidavits and exhibits that Cates was presenting to the court. This was the move we'd been waiting for—Foolproof and Detective were staking everything on this motion, and throwing in all the ammunition they had. This was not merely an application for a stay of the hearing, but an application to hold a hearing on nullifying the consent judgment, so that we would both start off again at day one. The only ground for such an unusual demand is that the consent to the judgment was obtained by fraud and duress, and that is just what Foolproof claimed.

In his affidavit, Stone gave his version of all that transpired, and described the negotiations as he had perceived them. He told the court, for example, "I signed the Assurance of Discontinuance most reluctantly, with the licensing proceeding pending and the Sword of Damocles hanging over Foolproof's head, well-knowing that if the proceeding were not settled, the chance of keeping Branson's was nil. I now realize that in signing the Assurance of Discontinuance I was not unlike Neville Chamberlain meeting with Adolf Hitler at Munich—I gave an inch and they took a mile."

The judge, hearing motions "without notice" that week was an elderly, retired judge filling in. He hadn't had time to read the papers. "What's this case all about?" the judge asked Cates.

Cates explained that he was trying to re-open a judgment obtained by fraud and duress by the Department, and to stay a Departmental hearing until his motion to re-open had been decided. (If he won the motion and reopened the judgment, half the grounds for the license hearing would disappear).

"What harm will come if the Department's hearing were adjourned for a couple of days while I refer this to the judge who hears cases 'with notice'?" the judge asked me.

I was very unhappy about the prospect of even a short stay because of what I believe to be Newton's law of judicial inertia: a hearing,

suit, or injunction in motion tends to remain in motion, but a proceeding that is stayed tends to remain stayed. I explained that the company was alleged to be gypping low-income customers all the time, that half a dozen government agencies were after it, and that the proper procedure would be to let the hearing continue, subject to Foolproof's right to apply for a stay if the Commissioner ruled against the company and the company appealed the ruling. The judge was not persuaded that there was any urgency. He virtually ordered me to consent to a two-day postponement of the hearing. I did.

We drew up very brief reply papers and went to court, before another judge, that Wednesday morning. This judge was vigorous, tough-minded, serious, and legally oriented. The argument lasted fifteen or twenty minutes and centered around the stay, since the judge made it clear that he would not rule on the motion to vacate the judgment until he'd read the papers. After he heard where things stood, he dissolved the stay. Cates was furious. He kept protesting, pressing his argument. Although he'd made his decision, the judge heard Cates out, then reaffirmed that the stay had been dissolved.

Cates stormed out of the courtroom. In the corridor, I told him that the hearing would resume Friday morning. "Come hell or high water, we won't be there," he said. We confirmed the date to him by telegram.

True to his word, Cates did not show up on Friday. We presented the first half of our witnesses, who testified about the company's stock manipulations. The hearing was then adjourned until the following week.

Late that afternoon, the judge ruled on Cates' motion to vacate the consent judgment:

That branch of the motion which seeks to vacate and set aside or modify the consent judgment is denied. To vacate the judgment herein the burden is upon the movants to show fraud, coercion or misrepresentation. Defendants have made no such credible showing. The defendants knowingly and intentionally entered into a legal and binding agreement. They were represented by counsel and had adequate opportunity to refuse to the entry of the consent judgment. As for the license hearing, the hearing is not in excess of the Department's authority or jurisdiction nor can this court assume that the hearing will be unreasonable, biased or unfair. Lastly, defendants will have an adequate remedy for judicial review in the event the hearing is adverse to their interests.

Now Stone was in very serious trouble. He had staked everything on this legal maneuver, and he had lost. Branson's had deserted him,

several government agencies were proceeding against him, and the banks from which he borrowed were considering not renewing their loans.³⁸ If they did not renew, Detective would probably fold; it did not have enough cash to repay.

Stone filed an immediate appeal. Within a few days, Cates and Ratner stood before an appellate court clerk, waiting to see the judge assigned for that week to motions in the appellate court. Since the court had begun its summer recess, the appeal could not be heard for months, but meanwhile, Cates was still pressing for a stay of the Departmental hearing. The clerk pointed out to him, however, that he had neglected to attach to his papers a copy of the judgment that he was appealing. Lacking that, Cates could not see an appellate court judge to apply for a stay until the next week.

The next week's judge was Thomas O'Hara, who nine months earlier had sent to the Department of Consumer Affairs a copy of an angry letter of complaint he'd mailed to a collection attorney. The attorney had obtained a judgment against the judge's maid, arising from her installment purchase of a vacuum cleaner. She had not received the summons, however. It had been a typical case of what in New York is called "sewer service"—the obtaining of default judgments against debtors on the basis of perjured affidavits of service of process. The attorney had dropped the case in response to the judge's protest. His name was Richard Toole.

Ratner and Cates arrived at the court at 2:00 P.M. one day that next week, and the clerks kept them waiting an hour while Judge O'Hara looked at the papers. Then he summoned them to his chambers. Before they could sit down, he announced, "I'm going to deny this application." Cates asked if he could at least argue the point. The judge said that he could, but said he would deny the motion anyway. "Every-

38. The type of loan that Detective had obtained was called a "Chinese take-out" loan. Several banks participated. Endowment National, which had first made the loan, lent only for thirty days. At the end of that time, other, smaller banks, "took" Endowment "out" by paying the money to Endowment and accepting the risk that Detective would not pay, along with the interest for that month. Then, after another month, Endowment would again take over the indebtedness.

I have tried to discover the purpose of this arrangement. Under federal law, banks are not permitted to have more than a fixed percentage of their assets loaned to risky enterprises. They are not supposed to know in advance the schedules of the bank examiners. But might they be so arranging their loans so as to have less money in risky ventures in the month when they will be examined?

Now it was Endowment's turn to take over the loan. It refused, leaving the smaller banks stuck with extending the term of the loan themselves, or calling the loan. But if they called the loan, Detective was likely to go bankrupt, and they would lose all chance of collecting. The banks would then have only the consumer contracts which secured the loan—and would face a difficult battle with the Department if they tried to collect that money.

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body in New York knows about your company," he told Cates. "It's common knowledge."

Cates argued that the Department had unfairly obtained the consent judgment. The judge seemed bored. He interrupted Cates to say, "I know this company. Mr. Richard Toole is involved in sewer service and all kinds of things."

"You see," argued Cates, "that's just why we need the protection of the court. Everyone has a bad impression of the company."

"I can't believe that it's unjustified," said Judge O'Hara. "I know too much about this company."

Cates continued to argue, but to no avail. When he finished, the judge said, "You fellows brought this on yourselves in the way you conducted your sales. The corporation signed the consent judgment and was represented by counsel. Motion denied."

The appellate court's decision was the end of the line. The Department completed its hearing, with Cates still refusing to participate, and revoked Foolproof's license. The banks began to maneuver for position, seeking tactical advantage before the collapse. One of the small bank's attorneys called Ratner to say that Endowment National had misled it into loaning money to Detective by misrepresenting the value of the investment;³⁹ it wanted to know whether, if it foreclosed and took over collecting the contracts, the Department would raise any objections. Another one urged Ratner to permit the banks to collect from consumers lest banks be deterred from lending to companies selling in low-income areas. "You wouldn't want to frighten banks away from the poor," the bank officer told Ratner. "Foolproof and the banks were working with the ghetto area people."

We began a series of weekly visits to the court, recording the names and addresses of the people Foolproof sued. As soon as Toole filed suit, we sent the defendants a letter advising them of a legal services office willing to represent them. A volunteer lawyer—himself a collection attorney—attached himself to that office and began serving Toole with hundreds of mimeographed answers and demands for pre-trial information, paralyzing Toole's use of the courts to collect Foolproof debts.

The week I left the Department, a committee of bankers instructed Stone to stop making sales, because selling expenses would reduce the

39. The small bank could theoretically sue Endowment for damages caused by any misrepresentation, but this course was practically foreclosed to it, the lawyer said, because small banks thrive on referrals of business by big banks, and a small bank that acted uppity by suing a big bank would be blackballed in the banking community.

salvage value of the company, and the banks' accountants took up residence in Foolproof's offices to insure that any money coming in from consumers went straight to the banks. Two weeks later, Foolproof filed a petition in bankruptcy and sought to make what the Bankruptcy Act⁴⁰ calls an "arrangement" with its corporate creditors, permitting it to pay its debts to them at an agreed number of cents on the dollar. But Ratner, following an obscure precedent,⁴¹ obtained an order from the federal bankruptcy court enabling him to represent thousands of forgotten "creditors"—the consumers who had been gypped over the years and who should stop paying and receive funds. He won an order permitting any consumer who filed a claim against the company in the bankruptcy court to halt further installment payments.

As the company's collapse became total, Ratner was able to convince the Bronx District Attorney's office to intensify its theretofore lackadaisical investigation. In the early autumn of 1971, a Bronx grand jury indicted Stone on thirty-eight counts, including a charge of grand larceny.

The District Attorney announced the indictments in a crowded press conference, with nine television cameras whirring. Edward Thompson, the tough-minded administrative judge of the Civil Court,⁴² learned about Stone and his company for the first time through this publicity. On his own, he searched his Court's records and discovered that Foolproof had won thousands of default judgments against consumers over a two-year period. On his own motion, he instituted an unprecedented action against Foolproof to reopen all of those judgments, meanwhile staying all of the company's pending suits and its collections on past judgments.

This action, the stay, its consequent cash squeeze and the attendant publicity forced Stone to negotiate further. On the morning of the hearing on the judge's motion, dozens of low-income consumers, most of them black, filled the judge's anteroom. In his chambers, he hammered out a settlement between Stone, Stone's lawyers, Ratner, the United States Attorney, the New York State Attorney General and the bankruptcy referee; Ratner and Stone (or in the event of their failure to agree, the bankruptcy referee) would establish a "fair value" for the

40. 11 U.S.C. §§ 701-99 (1970).

41. See Schrag, *supra* note 1, at 147-48, 152-55.

42. The Civil Court is the court in which companies sue to collect on installment contracts. The Department could not bring suit under the Consumer Protection Law before Judge Thompson, or in his court, because that court lacks equitable jurisdiction. N.Y. Civil Court Act, § 202 (McKinney's 1963).

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alarm, taking into account the value of all affirmative defenses probably outstanding. Consumers would not have to pay more than this amount, and if they had already paid more, they would be entitled to refunds of the excess. Unfortunately, since the banks claimed to have priority in bankruptcy over unsecured creditors, these refunds might never be paid. But at the very least, millions of dollars would be saved for poor consumers. This was the finest hour for consumer protection in the City of New York, and only the third instance in which the Department had won mass monetary relief, the novel new remedy provided by the Consumer Protection Law. Yet these events had come about without judicial enforcement of that law, without its citation or invocation in any court.⁴³

2. *The Case of the Secret Agent*

The case that prompted us, during the spring of 1971, to evaluate our own feelings about our investigative tactics came to us from a salesgirl who resigned in disgust from Superior Research Enterprises, Inc. She called us to report that the relatively new company, for which she had worked only briefly, sold cheap books for a great deal of money. Selling door-to-door, the company misled people to believe, among other things, that it was connected with the famous children's television show, Sesame Street.

She had gone to work for the company, she told us, after responding to an advertisement for "interviewers" in the *Village Voice*, a popular New York newspaper. The advertisement had not revealed that the job was basically selling.

Then she had been instructed in "cold canvassing"—selling door-to-door without previous appointment—as practiced by the company. Using a new Sesame Street album as an entree, she was to determine whether the home had children. If so, she was to engage the mother of the house in conversation, ask a series of survey questions, and then discuss the company's program, in which the mother could enroll. Then she was to talk the mother into signing a contract for materials to be delivered at a later date, which our informant felt were virtually worthless.

Another young girl, who had also recently left the company, called with a similar story a few days later. Although we had not received any

43. The other two cases in which the Department had obtained massive financial relief were also instances in which it had pressured companies into disgorging the money, rather than bringing an action in court.

complaints from the company's consumers, we judged that this might be the beginning of a fraudulent plan that would later generate many complaints—possibly when the company began suing people who didn't pay. We decided to investigate the company early enough to prevent trouble, rather than waiting for hundreds of people to be swindled.

Our immediate problem was that neither girl could remember exactly what she had been told to tell the mothers, and we had no mothers reporting what had been said to them. We wanted an accurate statement of what was said, to corroborate the girls and to give us evidence for any subsequent proceeding.

We could have issued a subpoena and requested the company's president to tell us what his employees' sales pitch was, but we knew that he could postpone any hearing for months through a variety of delaying tactics, and that when he finally testified he might deny knowledge of what the salesgirls said or might tone down or color the presentation for our benefit.

To get an accurate record quickly, we decided to get one of our own employees a job working for the company. Sylvia Kronstadt was selected. This was her first case since she'd graduated at the top of her class at the University of Utah and come to work for our Department as an investigator. She answered the advertisement Superior Research placed in the *Village Voice*, and was asked to come for an interview with the company's President, Ron Lumak. She packed a tape recorder in her pocketbook.

Lumak turned out to be younger than she'd expected, short, and very nervous. He talked quickly, while she completed the job application. He was looking, he told her, for young women who were creative, and who had a social conscience—women who wanted a creative rather than a hum-drum job. "Selling the company's services," he said, "requires creativity because every mother is different. You have to use a different psychology on each one."

Although his company was only a year old, Lumak told Kronstadt it already had 90,000 subscribers in New York. He employed about sixty salesgirls who were given a one-day training session. After that, they were driven each day by a crew manager to a lower middle-class residential area of the City, where they sold a package of educational materials produced by a company in Chicago.

The interview lasted forty-five minutes. Kronstadt drew upon her true background, omitting only the week she'd worked with the Department, and impressed Lumak as strongly as she'd impressed us. Lumak offered her a job selling the company's services. "But," he said,

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“you really are smart. Wouldn’t you rather work as my special assistant here in the office, training salesgirls, interviewing candidates and working on the business records?”

Kronstadt drew a breath and thought for a moment. “I might,” she said, “but first I’d like to try working in the field, to get a better feel for the organization. Perhaps after a day or two of that I could consider working here in the office.” He suggested that she attend a training session the next day, and she accepted, with a new cassette in her recorder.

The trainer was a young woman, Delores West, who had worked for the company since its start. She outlined the official sales presentation to her trainees. “Hi,” it began, “my name is _____. I’m with Superior Research, and we’re speaking to all the mothers in the neighborhood about the new Sesame Street album. We’ve made it part of our child development program for young children. Do you mind if I ask you a few questions about your opinion on education?”

Then the salesgirl was to request entry into the home so that she could use a table to write down the answers. “Which do you feel are the most impressionable years in a person’s life—childhood, adolescence, or adulthood? Which institution had the greatest impact—home, school or church? What type of employment is your husband in?” No sales were to be made to the unemployed.

The salesgirls were instructed to pretend to record the answers to the questions, and then to ask: “Are you familiar with the work of the Children’s Educational Workshop?⁴⁴ Well, how about Project Head Start? As you know, poor people have Head Start to give them an educational advantage, and the rich have private schools, but the middle class mother felt left out and wanted to have a program that would provide her children with the same opportunities that other children were receiving.”

The salesgirl was then to list the “offerings” of the “Workshop”:

(1) a “10-year information service,” to which children could direct “any questions” and receive two-to-twenty page research reports. (The service is run by a Chicago company, which maintains thousands of files responding to questions children frequently ask. Copies of the prepackaged reports in the files are sent to subscribing families who have purchased the service through hundreds of companies like Superior Research located throughout the country.) West explained how

44. Children’s *Television Workshop* is the producer of *Sesame Street*.

to make mothers feel the need for the information service: "Get the parent off-balance and insecure" by showing them examples of the "new math"; make them feel that they cannot communicate with their children about their education. Where mothers objected that their children were too young to use the information service effectively, the salesgirls were to refer to a Harvard experiment in which a five month old child's IQ was increased fourteen points in three months;

(2) four pamphlets on child guidance, including articles on thumb sucking, bed wetting and stealing. The salesgirls were to show the mothers a poster illustrating these pamphlets. A banner heading on the poster read "YOUR MOTHERS CLUB," as if the mothers were being asked to join something rather than buy something;

(3) a fifteen to thirty-five per cent discount on purchases of products contained in a color catalog. "Flip through the catalog, and let the mother see the pictures," said West, "but never let her pick it up or examine it." The catalog bore no address, publisher's name or other indication of origin, and contained no price list;

(4) "an exclusive option" to buy an Annual Events Book every year, for \$6;

(5) a "Career Guidance Chart." The chart consisted of one page, with arrows pointing from interests to jobs, and indicated, for example, that a child interested in gardening might have a career ahead in the civil service;

(6) the right to purchase "educational materials" from the company for half price. No further details of this were given the salesgirls.

The girls were then to say, "Now, because of the new methods of teaching, we're trying to enroll more mothers in our program. We are currently giving premium inducements for joining the club." It was illegal, West explained, to say that anything was free. The girls were to use this phrasing so that the mother would "get that impression anyway."

The items designated as "premium inducements"—a twelve-volume set of children's books, a seven-volume science library, a dictionary, the Sesame Street record album, and two posters—were the only materials of any significant value. The mothers were supposed to see this while suspecting that the salesgirls didn't, which would make the mothers feel that they were taking advantage of the program.

"To close the sale," instructed West, "just assume that the mother wants to join, and breeze right into closure. Never ask her to 'sign' anything. Get her signature by telling her to 'write down your name for the office' or say, 'just O.K. this application here.' Don't

tell them that the form is a contract, and don't tell them the total price. If they ask, tell them that it only costs \$.89 per week, but don't tell them that they will have to pay for 297 weeks.

"If the mother appears hesitant after learning the price," West continued, "say, 'Aren't you strong enough as a mother to put away \$.89 a week for your child's education?'"

"After the mother has signed, tell her that the 'delivery boy' will be in the area the next day to bring the books, and ask her whether morning or evening is most convenient. Say that the program previously mailed the books, but since they were stolen half the time, we now use our own delivery boys. It's important that the mother be home when the delivery boy comes, because he's the real salesman. He signs the mother up on a contract to pay at the rate of about \$10 a month, and gives her a discount for her agreement to pay at this accelerated rate.

"Incidentally, here's a little hint to improve your selling success. Make up a few names and write them at the top of your enrollment sheet, so that it will look like everyone in the neighborhood is joining. And don't worry if your presentation isn't perfect for a few days. These people never ask questions anyway, and most of them are so dumb they don't know if what you're saying is right or not."

Lumak had been sitting at the side of the room. Now he broke in, "The secret is to get them so hypnotized by your presentation that they don't know what hit them. And remember, in dealing with the consumer, people like us have to come down a few notches."

The next day, Larry Williams, an officer of the company, took Kronstadt and Delores West out in the field to make sales. They drove to Queens, where they met a man named Mike and a salesgirl named Rose. Mike was a crew leader, a position he'd held in companies doing this type of selling all over the country. He selected a neighborhood for the day's canvassing. During the ride, Rose gave Kronstadt a few more hints.

"Play on the mother's sympathy," she advised. "You're this poor, hardworking young girl, trudging around in the rain or the heat, just trying to make an honest living. They love you—they sit you down and make you coffee, and you've got them in the palm of your hand. It's all very woman to woman, and easy to clinch sales.

"What's bad is when you get into an area where the people are pretty educated and they start asking you questions. When you hit a block like that, forget it—they're too smart."

"Delores, can I watch you make a presentation before I try it?" asked Kronstadt. "I don't feel comfortable doing it alone."

After unsuccessfully trying to persuade Kronstadt that soliciting was not difficult, West relented and agreed to give a demonstration. "I didn't want to demonstrate for you," she said, "because the way I do it is illegal. If there are only a few doing it this way, we don't get caught. But if I teach people to do it this way, we'll probably get caught." The tape recorder whirled away in Kronstadt's bag.

The car stopped in an Italian neighborhood. Kronstadt went with West; the others fanned out. It took them twenty-five minutes before they found a mother who spoke English. When they did, West asked her if they might ask a "few questions from Superior Research" about her opinions.

"Are you selling something?" asked the woman.

"Oh, no," said West. "We're just interviewing mothers about their views on education."

The woman admitted them to her house, which consisted of several small, cramped rooms. Her six children scampered in and out as West explained the services of the "club" and invited her to join. The woman said very little, and finally signed the contract.

Outside, West turned to Kronstadt. "Wasn't that awful?" she asked. "I almost feel bad about that one. She was so stupid she would have bought anything from anyone."

Kronstadt then left West, ostensibly to do her own canvassing. However, she instead returned to Manhattan and telephoned Lumak to accept his offer to be his special assistant. He told her to report for work the following Monday.

On her first day in the office, Lumak trained her. "The key word in this job is control," he told her. "*We* are in control, and we must remain in control. We don't ask people, we tell them. And we tell them what we want them to know, when we want them to know it. The psychology of this job is to never let anyone get that control from you.

"Control is all important. Everything I ever say professionally is prepared in advance and memorized, including gestures, even laughs. From now on, write down everything I do, and memorize it.

"When a job applicant calls, don't answer her questions. Just say that the job involves field work, interviewing mothers in their homes about a new educational program for their children, to see if the mothers qualify. If they ask any questions, say that Ron will kill you if you talk about it. Say that he likes to tell them about it himself."

"How do the applicants learn about sales jobs?" Kronstadt asked.

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"We run two ads a week, in the *Village Voice* and the *New York Times*," Lumak replied. "The Civil Rights Law says we can't discriminate, so we have to solicit both male and female interviewers. If a man calls, just tell him that the position is filled."

"How many salesgirls do you want to have?"

"There is no ceiling. The summer months are a peak period, with college girls home for the summer. In June and July we could interview up to a hundred girls a day for jobs. That's the main thing I want you to do for now, concentrate on recruiting sales girls. When you interview them, use the interview script exactly. I've worked it out in detail, and every word has a purpose. And weed out the ones who ask a lot of questions. If you get just one person like that into a training session, they can ruin the whole thing—they can plant a seed of doubt or suspicion in everyone's mind."

Kronstadt worked for Lumak for three days. For her, they were days of intense emotional ambivalence. She knew the company was cheating its customers, and believed in her real work, which was to document the cheating. But at the same time, she was most unhappy in her undercover role. Lumak was talking to her out of trust; he already had a genuinely warm feeling towards his new protege. As time passed, Lumak, West and Kronstadt exchanged the small talk—about painting the offices, what to have for lunch, their careers—on which office friendships build. Lumak told Kronstadt of his background, and she began to sympathize with him and lose her capacity for blame. He had come from an immigrant family, and his hopes for self-improvement had been dashed again and again. He had come to believe that the only way to get ahead was over the backs of others.

Towards evening the second day, Lumak was sitting a few feet from Kronstadt, but facing away from her. Her telephone rang. Calling from the next desk, Lumak asked her to dinner, and she declined. During the conversation, he never once turned to look at her.

She was left alone in the office for hours at a time. At first with hesitation, then more confidently, she perused the company's files. She learned the structure of the business and the types of forms used. She copied the names and addresses of the company's sources of supply of books and services. She found in the files an out of court settlement which Lumak had signed with the State Attorney General the previous year, on behalf of a similar but differently-named company. In it he had agreed not to falsely describe the sales jobs for which his company sought applicants. Kronstadt found the financial records, and calculated that the goods and services delivered, for which the consumer was

charged \$264.33, cost the company only \$38. The ten-year information service, for instance, cost the company \$1 per subscriber.

She obtained the names of some subscribers from the files, so that she could contact them to determine whether they had complaints. But their dates of purchase were a year earlier, when Lumak had a different company. She really needed the names of the current customers, which Lumak kept in the top drawer of his own desk.

As it was, Kronstadt was frightened about rummaging through the files. She would take a document to her desk to read, but when she would hear a muffled sound in the corridor outside, she would quickly run back to the file cabinet to return the document. She couldn't bring herself to go through Lumak's desk.

Once Kronstadt had gathered enough information about Superior Research Enterprises, she had Stephen Newman call Lumak to say that she would not be in—that day or in the future. Newman said he was a friend calling with the message that Sylvia Kronstadt was in North Carolina visiting her dying grandmother. She had enjoyed her job, but her grandmother's needs forced her to quit.

Later that day, however, the superintendent of the building next door to Superior's offices called Kronstadt's own superintendent to say that he had found Sylvia's wallet, which had been stolen, and which had her landlord's telephone number on a scrap of paper inside. On her way to retrieve the wallet, Kronstadt passed Superior's building. Unbeknownst to her, Lumak was watching her from his window.

That evening, Kronstadt was working on a case at her home with Dennis Grossman, another Department lawyer. Her studio apartment was in a six-floor elevator building on a quiet street in mid-town Manhattan. Since, at that time, she was still a relatively new arrival in New York, the telephone company had not yet come to install a phone. At 11:30, Grossman left the apartment and rode the elevator downstairs. As he opened the inside lobby door, he saw two young men studying the names listed on the building's intercom system. He instantly recognized them from Kronstadt's description as Ron Lumak and Larry Williams. They spotted him at the same time that he saw them, and Williams grabbed the door that Grossman had just opened. Grossman blocked the entrance with his body.

"Does Sylvia Kronstadt live here?" Lumak asked. "She's not listed on the buzzers."

"I don't know," said Grossman. "I never heard of her."

Both men shoved past Grossman at once, into the apartment lobby.

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"Hey, you can't do that," he called. "You can't go upstairs unless a tenant buzzes you up."

"Let's start on the sixth floor and work our way down," Williams said to Lumak.

The two men got into the elevator cab, and as it began its ascent, Grossman ran up five flights of stairs to Kronstadt's apartment. As he stood outside, his heart pounding both from his run and from fear, he could hear the men knocking on apartment doors on the floor above and asking for her. He could not hear the tenants' responses. He knocked rapidly but quietly on her door, and she opened it.

Grossman rushed into the room and closed and locked the door behind him. Before a bewildered Sylvia Kronstadt, he turned off the radio, doused the lights, and whispered, "Don't say a word!"

Instantly, there was a banging on her door. Grossman and Kronstadt stood silently, not moving, as the noise continued. When she heard the voice of her caller, she understood.

"Sylvia," yelled Lumak, "we know you're in there. Let us in."

They made no response. The banging continued.

For twenty minutes, Grossman and Kronstadt stood frozen, while Lumak and Williams alternately banged on the door and listened for a response. Without a telephone Kronstadt could not call the police. Finally, there was a long period of silence, and it seemed that the intruders had left. Kronstadt tiptoed to the door to peer through the peephole. As she neared it, a floorboard creaked.

The banging resumed immediately. "Now we're sure that you're inside," called Lumak.

Twenty minutes longer the banging continued. Finally it stopped. An upstairs neighbor had summoned the police because she could not sleep. Lumak explained that the person they wanted to visit seemed not to be at home, so the men and the police left without speaking to Kronstadt. She sent Grossman home and went to sleep.

At three o'clock in the morning she was awakened by the ringing of her intercom buzzer. She did not answer it, and it continued to ring intermittently for an hour. When it stopped at four, she went back to bed.

As she was leaving for work that morning, a neighbor stopped her in the vestibule. "Say, two fellows were looking for you this morning, about half an hour ago. Did they find you?"

That day, Henry Stern called Ron Lumak and informed him that Sylvia Kronstadt was an investigator for the Department of Consumer

Affairs, and that while Lumak might be excused for harassing her before he knew her mission, the Department expected that he would refrain, from that point on, from any further contact with her. Lumak was speechless. He had not memorized a script for this occasion. The undercover phase of our investigation was at an end.

The case was now at a critical juncture. We had to decide whether to follow a judicial or a direct action strategy. We would undoubtedly have selected a direct action strategy without prolonged deliberation had not our doubts about our own methods during the investigative stage provoked a more searching inquiry.

We had to face the fact that the use of unorthodox methods had led to a situation where we believed an employee's life may have been in danger. Was it worth it? Did the company's deception of its customers and its contempt for them justify the actions we had taken, and more particularly, did they justify further direct action of our part? While we had become cynical about stopping fraud by going to court, who were we to use other methods, at physical risk to the young men and women of the Division, if society did not care to provide the means for dealing with such matters in a judicial forum?

Before making the inevitable strategic and ethical judgment, we considered the specific tactics that we might employ. If we chose the judicial route, we would have to start by trying to subpoena records of recent sales. We could never get a preliminary injunction without consumer affidavits. Yet despite the most extensive undercover work we'd ever engaged in, which had revealed a serious pattern of consumer fraud, we still had no consumer complaints or even the names of consumers who had recently purchased materials. The company was not yet suing people, so names of parties could not be culled from court records. They would have to come from the company itself, which we knew would be beginning an intensive summer selling season in a few weeks. If Lumak chose to fight the subpoena in court, he would probably lose, but he could avoid giving us the documents until fall at the earliest. And by appealing, he could delay until winter or spring. Then it would take more months before we could obtain the necessary affidavits and present the case to a court for decision.

We listed the possible alternatives for direct action. The company obtained sales girls by advertising in the *Village Voice* and the *New York Times*. We could inform those media of what we had learned, and they might refuse to carry further advertising.

We could issue a press release relating what we had discovered about the company. That was unlikely to be effective. People do not remem-

ber the names of companies they are warned to look out for, and if they did, Lumak could change the company's name. Furthermore, newspapers in New York, we had found, did not devote substantial space to stories of consumer fraud unless a big-name company was involved (and sometimes not even then), or unless the Department took unusual measures to indicate to the press the importance of the story.⁴⁵ If we held a public hearing we could play our tape recordings, and the result might be sensational. But what were we to make of the charge, frequently hurled at the Department by businesses it attacks, and certain to be made by Superior, that we were "trying the case in the press rather than in the courts"? Did this slogan speak to an important ethical principle deeply rooted in the American legal system, and therefore to be respected? Or was it merely the standard reflex reaction of those whose actions cannot withstand public scrutiny to a tactic which has been used frequently by government, with at least tacit support from the public?

We also considered, at least in conversation, even more unorthodox approaches. Would it be improper, we wondered, for Department employees, such as paraprofessionals, to picket Lumak's offices, carrying signs explaining what the company did? If that was going too far, or even if it were merely an inefficient use of Department resources, it might be possible for the paraprofessionals to organize a genuine community action group to picket this and other companies regularly. Was

45. We had taken such measures once before, successfully. By promising that they would earn \$1200 per month selling shares in Kansas oil ventures to foreigners, a New York City company had induced dozens of unskilled laborers to withdraw their savings and turn over to the company a \$3000 "bond," ostensibly to insure that once abroad "at the company's expense" the prospective salesmen would work, instead of vacation. The bond, they were told, would be refunded when the salesmen had made a certain number of sales. The victims of this fraud were given one-way tickets to European cities, and told to go to particular hotels to attend training sessions and pick up sales kits and lists of prospects; they were also told that hotel reservations had been made for them. When they arrived, there were no training sessions, no sales kits, no prospects and no reservations, and they were stranded abroad, unable to maintain themselves and equally unable to return to file a complaint.

A few did manage to straggle back, however, and our quick investigation revealed that the company was still sending people abroad. The usual delay involved in using the courts was out of the question and, among other things, most of the witnesses were out of the country and could not be brought before the court to testify; we could not even locate them to get affidavits.

Direct action in that case consisted of hiring a room at the New York City Bar Association on a Saturday morning, and there convening an investigatory hearing, with the press invited. Henry Stern played the role of hearing officer; my staff and I presented the victims who had made it back. The company was notified and invited to come and cross-examine; it chose not to. Stern made no findings at the time, nor were they necessary. The witnesses were featured on the evening television news, and stories appeared in the major newspapers, including a picture story on page four of the *Sunday News*. A few days later, the company stopped doing business, and although this technique did not produce refunds, it stopped the fraud almost instantly.

that a legitimate government function? What about picketing Lumak's house in Brooklyn, so that his neighbors would know the type of business in which he engaged? Was that any less proper than publicizing his activities in the newspaper? Picketing businessmen's homes had been done by community groups protesting real estate block busters. Was it unethical for the government to participate?

We recalled also that Lumak had told Kronstadt that a single person who announced her qualms during a training session could cause dissension in an entire group. It occurred to us that we might send an employee, or a volunteer, to each one of Lumak's training sessions. The agent would ask questions such as, "Isn't it wrong to lie to people?" in an effort to encourage all the others to evaluate their own participation. Was this wrong? And we considered organizing a "truth squad" to follow his salesgirls around in the neighborhoods, telling each mother how much the company's products really cost, and that the company was a commercial venture unrelated to Sesame Street, any survey organization, or any real research project. Finally, we considered informing the company's suppliers of its activities, and suggesting to them that we might have to investigate whether their acquiescence in their customers' fraudulent use of their products involved them in any violation of law.

All of these tactics had to be measured against invocation of the judicial system, and we had nothing but our suspicions to support our feeling that Lumak would use all available delaying tactics to oppose us in court.

Committing ourselves to neither a judicial nor a direct action strategy, we put a toe in each pond. On June 21, 1971, we served a subpoena on Lumak and, as expected, he retained Cates, who began a predictably slow court battle over the subpoena's validity. We also informed the *Village Voice* and the *New York Times* that the "interviewer" positions for which the company was advertising were really sales jobs, and we told those newspapers what we had learned about the company's sales methods. The *Voice* stopped accepting the advertising; the *Times* transferred it to the "Sales Help Wanted" column. This, however, did not appreciably reduce the number of girls who sought jobs from Superior Research. Thus, when I left, the Department was faced with a pressing strategic and ethical question which the case would force it to resolve.⁴⁶

46. Faith in the judiciary springs eternal. The Department chose to suspend direct pressure while seeking judicial enforcement of its June subpoena. The company's motion to quash was submitted to the court early in July. Late in August, the court ruled in favor of the Department. But then the judge went on a month's vacation, so it was im-

III. A Pig is Born

Perhaps it is merely a coincidence that the results I have reported in the Foolproof direct action case were more satisfactory than in the Kramer's judicial action case.⁴⁷ But I think not. In general, the Law Enforcement Division has been most successful when it has sought to prevent fraud or obtain refunds on its own rather than in court.

Of course, it is somewhat early to hazard forecasts of long-term trends. Kramer's, and other cases in which we pressed a judicial strategy, have not been closed, and the Department may yet nail down solid victories against those companies in the courts. But it is significant, I think, that a number of those cases were among the first investigated by the Law Enforcement Division.

Of course, we did not initially perceive that we might pursue distinct, alternative approaches. This option dawned on us only gradually, as did the awareness of our greater effectiveness when we chose not to go to court. Those of us who were lawyers were immensely saddened by this perception, on a theoretical level, because a model of law enforcement which we respected did not work—it let swindlers continue to swindle—and on a practical level, because if *we* could feel the courts driving us out of the normal channels into a kind of street warfare, we imagined that the police must feel the pressure a hundredfold.

All of us in the Law Enforcement Division were civil libertarians. We applauded the Supreme Court decision requiring policemen to warn suspects that their admissions could be used against them, and scoffed at police officials who claimed that the case would “hamstring”

possible for Ratner to submit an order for him to sign which could be served on the company. When the judge returned early in October, Ratner mailed his proposed order to the court. For three weeks, he heard nothing. Then he called the clerk. The clerk could not find the order.

The next week, the clerk found the proposed order and mailed it back to Ratner, unsigned; Ratner's draft was defective in several formal respects. For example, the word “enter” above the line for the judge's signature was on the right of the page, instead of being centered.

Ratner submitted a new draft, which the judge signed at the end of October. Ratner served the order on the company, demanding a hearing on November 4.

On the hearing date, a new lawyer for the company appeared at the Department, demanding a week's postponement so that he could familiarize himself with the case. Reluctantly, Ratner gave him a week. During that time, the company appealed the decision against it, and the appellate court stayed the hearing pending appeal. The appeal was scheduled for early January; a decision might be expected by early 1972. If the Department's position were sustained, and the company chose not to appeal further, the Law Enforcement Division could begin its investigation.

47. Of course these were not the only direct or judicial action cases undertaken by the Department. Other cases have not been discussed in this particular article for reasons of space. Foolproof and Kramer's are, however, representative of the direct action and judicial action models. For a fuller discussion, see P. SCHRAG, COUNSEL FOR THE DECEIVED: CASE STUDIES IN CONSUMER FRAUD (1972) (in press).

law enforcement officials. We condemned eavesdropping and wire-tapping. We decried the loss of privacy in American life. We demonstrated when police forces took the law into their own hands and beat kids over the head, or when they stood by passively while construction workers did so. We protested the use of informers and secret agents to convict Jimmy Hoffa.

Yet here we were, after experiencing for only one year the frustrations of law enforcement, eager to emulate every police trick we despised, and indeed, ready to invent a few of our own. By the end of that year we had an impressive inventory of electronic gadgetry, including a subminiature tape recorder with one microphone that looked like a vest-pocket fountain pen and another that hooked onto a bra-strap.⁴⁸ We thought of the press as one of a number of arrows for our bow, rather than the safeguard of a free people against oppressive government. We first learned that the government had to lie when we discovered that many subpoenas could not be served unless we used a ruse to get into the presence of a company's officers. By the end of the year, we were routinely engaging in deception to fight deception, and even the use of wired secret agents to infiltrate companies was becoming commonplace.

A lunch table conversation revealed that all of us were horrified at J. Edgar Hoover's pre-trial release to the press of the alleged correspondence between Father Berrigan and Sister McAlister concerning the possible kidnapping of Henry Kissinger. Was that public statement so different from the public hearing we were contemplating for Superior Research?⁴⁹ We regarded blacklisting of film artists during the McCarthy era as one of the darkest hours of the Constitution—was it so different from our sometimes subtle, sometimes not-so-subtle hints to newspapers, magazines, banks, stores, and other institutions that one of their customers was cheating people, although no court had so determined? We feared the advent of a national data bank, a computer in Washington with dossiers on every American, culled from the records of every local, state and federal agency with which a person had contact from birth to death. Yet we encouraged and actively participated in the creation of a consumer complaint data bank, now being assembled in a computer in Washington by the Federal Trade Com-

48. One hazard of a very young law enforcement staff: on the day this microphone was to be used for the first time, our investigator forgot to wear a bra.

49. Indeed, was Hoover's statement any different from the public hearing we had conducted at the New York City Bar Association exposing a company which specialized in defrauding unskilled laborers? See note 41 *supra*.

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mission, in which are recorded the details of every complaint about a company made to every consumer protection agency in the country, including, of course, the company's name.

What was enforcing the law—which ought to be a matter of some pride—doing to us? After her service as a secret agent, Sylvia Kronstadt told me, “I haven’t resolved it myself. I’m not proud at all of having spied, and I’m not proud to admit to the people who pay me, the citizens, that I’ve done that. But I think Lumak is a crook.”

We were driven to direct action and to use unpleasant investigative techniques, by sympathy with the victims of consumer fraud and by what we regarded as a breakdown in the system of civil justice. But what the police experience is much worse, in both respects. We talked, day by day, with people who had been gypped out of a few dozen or a few hundred dollars. Their stories enraged us. The police, by contrast, see the victims of physical violence—people who have been robbed, shot, and raped; they often talk to victims of crime who are still shaking with fright. Contact with these persons must anger the young policeman, must create in him a determination to apprehend and punish the offender, one way or another. And when he turns to the courts, he discovers that the system of criminal justice has failed more completely than the system of civil justice. When a man is released on bail and fails to appear for trial, his bail is forfeited and a bench warrant is issued for his arrest. But in New York City, only two out of seven of these warrants are ever executed.⁵⁰ The failures of the correctional system produce much public talk and in some cases violent death, but little willingness to spend money for improvement; the recidivism rate climbs higher. Finally, the decisions of the courts probably have made it harder to convict some of the guilty, particularly the professionals. I am quite certain that fewer of the businessmen we interrogated would have cooperated if we had started their hearings with *Miranda* warnings.

Of course there are differences between the steps we took and the actions we condemn the police and the F.B.I. for taking. We were dealing with companies, not individuals. And most of the ethically debatable measures we took were neither specifically permitted nor specifically prohibited by law, while, for example, beating up an alleged rapist is clearly illegal. But these distinctions go only so far. Some corporations—such as Superior Research—are basically the creation

50. See Rothwax, *The Criminal Court: Problems and Proposals*, in REPORT TO THE NEW YORK CRIMINAL JUSTICE COORDINATING COUNCIL (1970).

and embodiment of one individual. Indeed, some companies are not corporations at all, but partnerships or individual proprietorships. To strike at these companies is really to strike at the earning power of the individuals behind them, and if the strike is successfully done by publicity, it does seem a little like blacklisting a professional. Surely avoiding specifically illegal actions does not free a public agency to do anything else it pleases; its actions must be related to its mission.

But what is an agency's mission? How broadly or narrowly do we define its powers when we, the public, create an institution? The question cannot be answered by consulting the people who wrote the statute. I wrote the Consumer Protection Law, from the first draft to the final version, and while I can offer a good deal of advice on what business conduct it permits and prohibits, I have no idea what *agency* conduct it permits or prohibits. Nor are the critics of the statute-writers much help. I told a seminar of law professors about the Department's activities in the Foolproof case, and the responses ranged from general approval—"that's exactly what government agencies should be doing"—to condemnation.

Obviously, the puzzle should be avoided rather than solved. We should streamline and liberalize the law enforcement process so that backlogs are eliminated, delay made impossible, bureaucracy suppressed, and judges sensitized to justice. Meanwhile, conscientious law enforcement agencies will continue to be stretched between their concepts of service and their devotion to the judicial system. It's a hell of a choice to have to make.

APPENDIX

LOCAL LAWS OF THE CITY OF NEW YORK FOR THE YEAR 1969

No. 83

A LOCAL LAW to amend the New York city charter and the administrative code of the city of New York, in relation to unfair trade practices.

Be it enacted by the Council as follows:

Section 1. Subdivision e of section 2203 of Chapter 64 of the New York City charter as enacted by local law 68 for the year 1968, is hereby amended to read as follows:

(e) The commission, in the performance of said functions, shall be authorized to hold public and private hearings, administer oaths, take testimony, serve subpoenas, receive

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evidence, and to receive, administer, pay over and distribute monies collected in and as a result of actions brought for violations of laws relating to deceptive or unconscionable trade practices or of related laws, and to promulgate, amend and modify procedures and practices governing such proceedings, and to promulgate, amend, and modify rules and regulations necessary to carry out the powers and duties of the department.

Section 2. The administrative code of the city of New York is hereby amended by adding thereto a new chapter, to be chapter sixty-four, to read as follows:

CHAPTER 64

DEPARTMENT OF CONSUMER AFFAIRS

TITLE A

Consumer Protection Law of 1969

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

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

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

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

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

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

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

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

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

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

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

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

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

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

§ 2203-5.0 Settlements.—a. In lieu of instituting or continuing an action pursuant to this title, the commissioner may accept written assurance of discontinuance of any act or

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practice in violation of this title from the person or persons who have engaged in such acts or practices. Such assurance may include a stipulation for voluntary payment by the violator of the costs of investigation by the commissioner and may also include a stipulation for the restitution by the violator to consumers, of money property or other things received from them in connection with a violation of this title, including money necessarily expended in the course of making and pursuing a complaint to the commissioner. All settlements shall be made a matter of public record.

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

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

§ 2203d-6.0 Persons excluded from this title.—Nothing in this title shall apply to any television or radio broadcasting station or to any publisher or printer of a newspaper, magazine, or other form of printed advertising, who broadcasts, publishes, or prints such advertisement, except insofar as said station or publisher or printer is guilty of deception in the sale of offering for sale of its own services. This title shall not apply to advertising agencies, provided they are acting on information provided by their clients.

§ 2203d-7.0 Permitted Practices.—The provisions of this statute shall be construed so as to supplement the rules, regulations, and decisions of the FTC and the courts interpreting 15 U.S.C. Sec. 45(a)(1), but the provisions of the statute shall in no instance be interpreted in a manner inconsistent with the rules, regulations and decisions of the FTC and the courts interpreting 15 U.S.C. 45(a)(1).

§ 2203d-8.0 Separability.—If any provision of this title or the application of such provisions to any person or circumstances shall be held unconstitutional or invalid, the constitutionality or validity of the remainder of this title and the applicability of such provision to other persons or circumstances shall not be affected thereby.

§ 3. This local law shall take effect one month after enactment, except that the commissioner may immediately hold hearings with regard to proposed regulations, and promulgate such regulations pursuant to § 2203d-3.0. Findings of repeated or persistent violations of this Act shall pertain only to acts or practices engaged in after the effective date hereof.