Notes and Comments

Consumer Legislation and the Poor

The Poor as Consumers

A family’s standard of living is a function of both the size of its income and the way in which that income is spent.\(^2\) It is an error in theory but easy in practice to conclude that low income alone causes poverty\(^2\)—tacitly assuming that the poor allocate their money in the same way, and pay the same prices at the same sorts of stores, as would a middle class consumer whose income was suddenly reduced. In reality the poor buy different goods and services at different stores for different prices, and this has a profound effect on their standard of living—compounding, preserving and deepening their poverty.

Both national and local anti-poverty efforts have been largely concerned with increasing income. Of the total OEO budget for fiscal 1966 of $1.5 billion, only $1.4 million has been allocated to consumer programs—less than one tenth of one per cent.\(^3\) This concentration on what the poor earn rather than on how they spend their money has been and remains a serious mistake:

(1) Often it is less expensive to help a family save a given amount of money than to help them achieve an equal increase in income.\(^4\) This is especially true of a family which is and will remain on welfare.

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2. E.g., M. Harrington, The Other America (1963).
3. Interview with Walter S. Valverde, Community Services Division, OEO, in Washington, D.C., July 21, 1966. An IBM “print out” of 1966 OEO programs listed grants for consumer projects totalling $1,399,996. Before a House Subcommittee three months later, OEO suddenly discovered it was spending $8.5 million, still less than 1% of its annual budget. This figure may have been arrived at by including the grants for “housing and home management.” Whichever the correct figure, Congressman Rosenthal’s comment at the hearing was equally appropriate: “Not very encouraging, is it?” N.Y. Times, Oct. 11, 1966, at 39, col. 8. In New York City, for example, two major proposals for consumer action programs were submitted to OEO. That made by Mobilization for Youth was rejected. As of September, 1966, the other proposal was in serious jeopardy, its originator having resigned in a dispute with the director of Youth in Action. A proposal by the United Settlement Houses for City Funding was scrapped several years earlier for political reasons.
4. See note 157 infra.
(2) Many of the people not reached by the major income increasing efforts such as the Job Corps and the campaign for equal opportunity in employment could be helped by a consumer program.5

(3) A serious number of those low income consumers who do have employment continue to lose it because their wages are garnished and their employers refuse to do the necessary bookkeeping.6

(4) The benefits of increased income may be dissipated through poor spending habits.7

(5) The riots in Harlem, Watts and Philadelphia resulted in part from the exploitation of the poor consumer; the arson and looting was directed almost exclusively at those businesses associated with sharp selling practices, excessive prices, exorbitant credit charges, or poor quality merchandise and service.8

Thus anti-poverty efforts must not only aim at raising the income of the target population, but also at increasing the amount and quality of the goods and services which that income provides.

New Legislation and Old Realities

Recent years have witnessed a marked growth in national and local concern with consumer problems.9 President Kennedy appointed a

5. See also E. Peterson, Equality in the Marketplace 2 (remarks prepared for delivery by Mrs. Esther Peterson, Special Assistant to the President for Consumer Affairs, before the national convention of the NAACP, Los Angeles, July 2, 1966; on file, in Yale Law Library) [hereinafter cited as Equality in the Marketplace] ("[P]rotecting a man's right to a fair exchange in the marketplace is only an extension of his indisputable right to a fair exchange for his labor.")


8. The debate over increased government aid to the consumer has been nothing if not
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Special Assistant for consumer affairs and a number of consumer advisory groups. Several states, most notably New York and Massachusetts, have appointed or designated special government officials to deal with consumer problems. Both federal and state officials have expressed interest in the problems of the poor consumer.

The most significant new legislation proposals have been informational. The truth-in-lending bills would require that the cost of passionate. The case for such legislation, particularly to aid the underprivileged, was aptly put by Senator Robert Kennedy.

The disadvantages of the poor extend to every contact they have with the world of commerce. The quality of their food is lower, and the prices they pay are often higher. The interest rates they pay are higher. They are more often the victims of high-pressure tactics of deceitful salesmen. And they are more frequently casualties of the various laws that protect the producing interests of our society.

Hearings on H.R. 7179, supra note 6, at 125. Using words dear to the heart of these interests, Senator Magnuson attacked certain sections of the Truth in Packaging Bill (then S. 985, 86th Cong., 2d Sess. (1960)).

These provisions of the bill reflect one of two views—both profoundly distasteful—that our citizens are gullible, incompetent, uncomprehending, and irresponsible, or else that the American businessman is deceitful, exploitative, or corrupt. It is an approach that regards our people, particularly the housewife-consumer, as childlike and helpless; so confused that she requires the benevolent but firm guidance of a wise government . . . . This approach is demeaning, and in relation to business, morbid.


11. In 1954 Governor Harriman appointed as his special counsel for consumer affairs Dr. Persia Campbell, who held a similar position under President Roosevelt. Interview with Dr. Campbell in New York City, July 15, 1966. Governor Rockefeller did not appoint a comparable official, but in 1958 a Consumer Frauds and Protection Bureau was established in the Department of Law.

New York appears to be the first city to establish a comprehensive consumer program. See Draft of an Executive Order Setting Up a New York City Council on Consumer Affairs, March 1967, on file in Yale Law Library.


15. Most of the other proposals have been protective measures concerned with health and safety along the lines of most pre-1960 consumer legislation. See generally Barber, Government and the Consumer, 64 Mich. L. Rev. 1203, 1210-15 (1966); Peterson, Representing the Consumer Interest in the Federal Government, 64 Mich. L. Rev. 1923 (1966).
credit, either in dollars,\textsuperscript{16} simple annual interest\textsuperscript{17} or both,\textsuperscript{18} be revealed to the consumer. Truth-in-packaging proposals would provide additional information on labels and packages of consumer goods.\textsuperscript{10} These proposals, which have yet to provoke great enthusiasm from either Congress\textsuperscript{20} or the state legislatures, are adapted to deal with a special problem in a highly specific model.

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

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

Only such consumers can avoid repeated “bad buys” and insure the competition among businessmen which keeps prices at a reasonable level while assuring continued high quality.\textsuperscript{21}

Informational legislation does not question the general accuracy of

\textsuperscript{16} President Johnson's latest consumer proposals are almost entirely protective. N.Y. Times, Feb. 12, 1967, at 1, 4.
\textsuperscript{17} Forty-six states require such information. B. Cussen, TRENDS IN CONSUMER CREDIT LEGISLATION 293-300, chart 17, col. IVg (1965) [hereinafter cited as TRENDS IN CONSUMER CREDIT LEGISLATION]. In the wake of the apparent failure of the Truth in Lending Bill, note 18 infra, the FTC is considering prohibiting as "unfair and deceptive" the failure of a merchant to inform the consumer of the credit cost in dollars. N.Y. Times, Oct. 28, 1966, at 7, col. 6. In view of the congressional inaction this may raise constitutional questions. Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1952).
\textsuperscript{18} Three states require only the interest rate. TRENDS IN CONSUMER CREDIT LEGISLATION chart 17, col. IVg.
\textsuperscript{20} E.g., Fair Packaging and Labeling Act, 80 Stat. 1296 (1966).
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this model, but assumes a very particular sort of deviation: the absence of a specific sort of knowledge needed to make "best buys." Once provided, that information will by itself return consumers to their rightful place as all-powerful sovereigns of the retail market and restore (if it was ever really absent) vigorous competition.

Whatever its validity for the middle class, this model is almost always inapplicable to the purchases of the poor. Low income consumers normally lack all the model characteristics:

(1) Belief in Comparative Shopping: Low income consumers are often not aware that they could get more for their money by visiting a number of stores, particularly those outside their immediate neighborhood. Those who are may still not be in-

22. Even opponents of informational legislation at times tacitly admit that there is such a lack of information. See 111 Cong. Rec. 15,840 (daily ed. July 12, 1965) (remarks of Senator Douglas). It does not appear to have occurred to either the proponents or opponents of this type of legislation that the lack of knowledge may reflect and result from a lack of motivation. See p. 767 infra.

23. If consumers had an effective yardstick with which to measure the cost of credit, we would restore price competition within the credit industry. High-cost firms would have to become more efficient to stay in business.


The Massachusetts Legislature has provided a built-in restraint, forcing merchants to tell customers what the credit so cheerfully extended really costs them. This is an average of seventeen per cent, I am informed, which should make all but the hopeless think twice before they indulge in unnecessary and imprudent purchases.


24. We believe that the American consumer is intelligent and knows what he or she wants. The freedom to choose not to buy is a powerful weapon, and the consumer will exercise that right in an intelligent fashion if he is not fairly treated.

The facts of business life are that competition is so intense and the consumer so much the "boss" that no manufacturer would risk bringing a new product to the market without offering a solid value to the consumer that will lead to repeat orders, without which no items can commercially exist.

Hearings on S. 985, supra note 21, at 67-68 (statement of D. Beryl Manischewitz on behalf of the National Association of Manufacturers). Opponents of these bills argue that the consumer has never ceased to control the market in this way. 112 Cong. Rec. 11,506-07 (daily ed. June 2, 1966), 12,172, 12,213 (daily ed. June 9, 1966). The business community's enthusiasm for the use of economic force by the consumer tends to disappear when that force is mobilized outside of congressional hearings. Cf. N.Y. Times, Nov. 16, 1966, at 96 (full page advertisement by Good Housekeeping magazine protesting the supermarket boycott as "unfair").

25. "[The truth-in-lending bill] ... will invigorate competition and thus encourage more efficiency with, in the end, an added benefit to consumers in the form of cheaper credit." AFL-CIO, In Your Interest 9 (undated); see remarks of Senator Douglas, quoted supra note 23.

26. See Hearings on H.R. 7179, supra note 6, at 114 (testimony of Cornelia D. Johnson, Director, Washington, D.C. Bureau, National Urban League). Since the prices within a low income area are not likely to vary greatly, and since they will substantially exceed the prices for comparable items in middle income shopping areas, a low income consumer who does not shop outside his area in effect does not shop around at all. See note 61 infra.
clined to shop around for good values; they search, if at all, for other things. (A) Low income consumers usually shop primarily for credit. This is particularly true for purchases of expensive durables, and for purchases by welfare recipients during the last few days before the arrival of a new check, when they have run out of cash and must rely on credit from the local “bodega” or grocery store if they are to eat. (B) Low income consumers are frequently concerned to satisfy non-material needs by their purchases: status-seeking and escapism heavily influence their buying patterns. And unlike more affluent consumers, the poor cannot satisfy such needs without neglecting essential goods and services. (C) Many of the poor are shy and unwilling

27. See Hearings on H.R. 7179, supra note 6, at 114, 170. In fact the problems of middle income consumers may not be appreciably different from those of the poor. See p. 767 infra.

28. The poor seek small down and subsequent payments and a long period of time to pay off the entire debt, but they show little interest in the dollar or annual interest rate cost of the credit. See The Autobiography of Malcolm X 192 (1964).

29. Virtually every furniture and appliance store on 125th Street in central Harlem has at least one sign advertising the availability of credit. Survey by the author. See also Buy Now, Pay Later 126. Often the amount of goods which a low income consumer will purchase at a given store depends largely on the amount of credit offered to him. The Poor Pay More 19.


31. Hearings on H.R. 7179, supra note 6, at 114; Hearings on S. 2755 Before a Subcomm. of the Senate Comm. on Banking and Currency, 85th Cong., 2d Sess. 116 (1960) (hereinafter cited as Hearings on S. 2755) (a woman in a public housing project bought a panel to cover plumbing under her sink after the peddler pointed out “that all of the other neighbors had bought it and she wouldn’t want her kitchen to be less attractive than theirs.”). See also Hearings on H.R. 7179, supra note 6, at 171 ($8 million worth of Cadillacs were sold in Harlem in 1965).


A related problem arises from the low income consumer's desire to acquire the trappings of the American Dream of middle class prosperity, trappings which television, movies and advertisements constantly remind him that the rest of the country already has. Hearings on S. 730, supra note 6, at 267-68; Hearings on S. 2755, supra, at 103; The Poor Pay More 12-14, 41 (this study was limited to New York City, but the President's Committee on Consumer Interests has concluded that its findings were representative of the situation in many major cities. The Most for Their Money 6). In the summer of 1966 welfare recipients picketed New York City Hall demanding, among other things, enough money to buy new rather than used furniture. At the same time radio station WABC, whose listening audience contains many low income consumers, was advertising land in New Jersey, suggesting that now the “good life” could be bought on credit ($5 down and $2 a week), and that “ordinary working folk” could have homes of their own and commute. Cleverly hidden in the advertisement was the fact that to obtain the bargain rates quoted one had to buy not one plot but eight.

It should be noted that different income groups have different ideas not only as to what items will enhance their status, but also as to what items are essential trappings of the American Dream. V. Packard, The Status Seekers (1959). New York City poor often own flamingo bordered mirrors and false cabinets which would be unlikely to find their way into middle class homes. The Poor Pay More 50-51 (21 per cent of the low income consumers surveyed owned both).
to deal with strangers, preferring instead to trade with local people whom they already know,\textsuperscript{32} and who are more likely to be personable\textsuperscript{33} and speak their language.\textsuperscript{34} Thus the tradition of comparative shopping, accepted in theory and at times in practice by the middle class, is largely unknown among low income consumers;\textsuperscript{35} frequently the poor purchase food or durables without even inquiring as to their price.\textsuperscript{36}

(2) \textit{Ability to Pick Out the Best Buy:} Low income consumers generally lack the technical knowledge needed to choose among consumer durables such as appliances or cars; they are usually less educated,\textsuperscript{37} less likely to read publications such as \textit{Consumer Reports},\textsuperscript{38} and generally less able to make rational choices among

\begin{itemize}
  \item \textsuperscript{32} See, e.g., Williams v. Walker-Thomas Furniture Co., 350 F.2d 445 (D.C. Cir. 1965) (the defendant, a welfare recipient, had been dealing with the plaintiff-merchant for almost five years).
  \item \textsuperscript{33} \textit{Equality in the Marketplace} 5; \textit{The Most For Their Money} 6; \textit{PROCEEDINGS: CONFERENCE ON CONSUMER ACTION AND THE WAR ON POVERTY} 46 (1965) (remarks of David Borden, Director, Block Development Project, Inc.) [hereinafter cited as \textit{PROCEEDINGS}; \textit{Hearings on S. 2755, supra} note 31, at 112 (woman who knew she could get a bank loan nevertheless went to a finance company she knew was more expensive because she didn’t want to be “bothered by all those questions”). Merchants in low income areas now make a substantial and usually successful effort to make their customers feel at ease. Salesmen insist on dealing with any potential customer on a first name basis. \textit{THE POOR PAY MORE 30}. See the ads in any N.Y. Daily News, \textit{e.g.}, Aug. 11, 1966, at 47 (salesmen mentioned by first name only). This is also true of peddlers, who may deal with a family for many years and come to be regarded as a close personal friend. \textit{THE POOR PAY MORE} 61.
  \item \textsuperscript{34} \textit{THE POOR PAY MORE} 19-20.
  \item \textsuperscript{35} Cf. “From my experience I would say that the concept of individual thrift and frugality is dying out with depressing rapidity.” \textit{Hearings on H.R. 7179, supra} note 6, at 170 (statement of David Borden, Director, Block Communities, Inc., East Harlem).
  \item \textsuperscript{36} The problem is so widespread that the Mobilization for Youth consumer project felt called upon to remind shoppers to check prices before buying. \textit{Mobilization for Youth, The Choiceless Shopper: A Comparative Shopping Review of the Lower East Side} 2 (1966). The problem is far from limited to the poor. \textit{See, e.g., Peterson, Pennywise Teenagers, 2 AMERICAN EDUCATION} 24 (1966).
  \item \textsuperscript{37} \textit{THE POOR PAY MORE} 14, 189. Even the education given non-dropouts is of uncertain value. Several years after graduation a young man wrote his former high school principal, I want to know why you and your teachers did not tell and teach about life and the hard, critically practical world. … I wish I had been taught … paying of a small mortgage, … the chemistry of food, carpentry, how to budget and live within the budget, the value of insurance, how to figure interest when borrowing money and paying it back in small installments … how to detect shoddy goods, … how to be thrifty, how to resist high-pressure salesmanship, how to buy economically and intelligently, and the danger of installment buying.
  \item \textsuperscript{38} \textit{CONSUMER EDUCATION COMMITTEE, CONSUMER EDUCATION IN LINCOLN HIGH SCHOOL} 5 (1965). Many of the urban poor who have moved into the city from outside areas have lower educational levels than their neighbors. \textit{Hearings on S. 2755, supra} note 31, at 105. Not surprisingly, the first major high school consumer education program in the country was in the well-to-do Westchester County suburb of New York City. \textit{Id.} Beginning with the 1966-67 academic year similar programs will be set up throughout the state. Because it has autonomy from the State Board of Education, the New York City schools will not have such a program. Interview with David Schoenfeld of Lincoln High School, in Washington, D.C., July 22, 1966.
\end{itemize}
products than their middle income counterparts. In addition these consumers are often unable to recognize even poor quality food and clothing—largely because that is the only quality that they have ever had.

(3) Freedom to Engage in Comparative Shopping: Those low income consumers aware that they should engage in comparative shopping and able to make an intelligent choice among a number of goods or services may nevertheless fail to do so. They feel, usually correctly, that they cannot get the credit they need outside of their own neighborhood, and, in some cases (such as buying food on credit) that they cannot get it from anyone other than the local retailer with whom they are already well acquainted. This pressure to shop within the local business community is compounded by shyness, the need to care for children, and the inconvenience of a time-consuming trip to a more affluent area. Thus local merchants have an essentially captive market, and experience no meaningful competition with businesses in middle and upper income areas. An ability and willingness to shop outside of the local neighborhood is of great importance because of the differences in area price levels.

(4) Knowledge of Legal Rights and Liabilities: Most laymen lack more than a superficial knowledge of their rights and liabilities in a post-sale legal conflict, and rely on professional help when conflicts arise. Many low income consumers lack even this super-

and use this opportunity are those least in need of it. Cf. Superintendant of Documents, Consumer Information (2d ed. 1965) (a 32 page list of federal publications available on request).

39. The Most for Their Money 5. There are of course exceptions due to occupational factors. Car mechanics and appliance repairmen are probably the people most qualified to buy used cars and appliances, excepting perhaps avid readers of Consumer Reports. Such technical skills are most common among the low, but not the lowest, income groups. Under most circumstances, on the other hand, a mechanical engineer would be no more adept than a lawyer at choosing a used car.


41. Often an address is regarded as sufficient ground for the denial of credit. Hearings on H.R. 7179, supra note 6, at 171 (statement of David Borden, Director, Block Communities, Inc.). See Mobilization for Youth, Consumer Affairs Program, Feb. 22, 1966 (circular on file in the Yale Law Library). Most of the poor prefer, or feel forced, to buy furniture or appliances on credit. The Poor Pay More 98. Hearings on H.R. 7179, supra note 6, at 190 (statement of Barnett Levy, Assistant Attorney General of New York in charge of the Consumer Frauds and Protection Bureau).

42. See, e.g., Williams v. Walker-Thomas Furniture Co., 350 F.2d 445 (D.C. Cir. 1965). Local food stores will usually extend credit only after a long period of acquaintance. Interview with Helen Hall, Director, Henry Street Settlement House, in New York City, July 30, 1966.

43. The Poor Pay More 19.

44. Id. table 6.3 at 85.
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...ficial knowledge,45 and of the substantial number who feel that they have at one time or another been cheated by a merchant, few have ever sought professional aid—only 9 per cent in a recent survey. When asked where they would go for help if they were being cheated by a merchant or salesman, almost two thirds of the low income consumers interviewed replied that they did not know. Only 10 per cent mentioned the most significant sources of help: private lawyers, legal aid, and small claims court.46 More than half of those who knew of any source of help mentioned only the Better Business Bureau, which does not engage in litigation and is generally unable to offer much aid.47 Thus the consumers with the greatest need for knowledge of their legal rights are the consumers with the greatest lack thereof.48

(5) Motivation: A low income consumer is profoundly different from a middle income consumer who awoke one day ill-housed, ill-clothed, ill-fed and ill-informed. Underlying his problems and essential to any discussion of remedies is a crucial lack of motivation.49 Many of the poor who do have a conscious desire to get more goods and services for their money have failed so often in attempting to do so that they no longer regard

45. They do not know, for example, that they may still be liable for a debt after the merchandise has been repossessed, or that they should protest when confronted by a default judgment where there has been no service of process. The Poor Pay More 157-69, 159. See 2 Colum. J. L. & Soc. Probl. 1, 1-2 (1966).

46. See generally The Poor Pay More 171-76.


48. In this respect some discussions of consumer problems are most inadequate. The “typical” consumer discussed in Consumer Frauds, 114 U. Pa. L. Rev. 395, 401-03 (1966), went to the Better Business Bureau, the district attorney, a private lawyer, and legal aid. A more realistic appraisal of the role of law in this area was recently given by Gladys Aponte, of Bedford-Stuyvesant Youth-in-Action. “We could have the most adequate protective legislation for the consumer, but no protective legislation will be effective unless the consumer is equipped to understand their [sic] rights and to know when their [sic] rights have been violated.” Hearings on H.R. 7179, supra note 6, at 173.

49. The Poor Pay More 171; Equality in the Marketplace 15. See also Ridgeway, Segregated Food at the Supermarket, New Republic, Dec. 5, 1964, at 7. Although violations of state and city market regulations are at least as common in low income neighborhoods as elsewhere, the number of complaints from those areas to regulatory agencies is negligible, particularly in comparison to the number from middle income areas. Interview with Hugh Marius, Executive Assistant to the Commissioner of New York City Department of Markets, in New York City, July 30, 1966; L. Benson, Case Study of a Riot: The Philadelphia Story 44 (1966). See N.Y. Times, May 6, 1966, at 3. The word “apathy” is purposely avoided here, as it is by most people working with the poor. The term suggests people who are faced by great opportunities, probably comparable to those successfully seized upon by the speaker or his father, and who are too lazy to take advantage of those opportunities.
the attempt as worthwhile.50 For anyone living in poverty an effort to change his condition involves a recognition that the condition can be changed, and the acceptance of at least partial responsibility inasmuch as he has made no previous effort, or inasmuch as those efforts have failed or met with only limited success.51 Undoubtedly many low income consumers pass through several stages as their exploitation continues; their attitude degenerates from frustration to bewilderment to resignation to an abandonment of responsibility.52

Thus the typical low income consumer is not a hardened penny pincher employing all his skill and ingenuity to stretch his meagre income as far as he can. He is an increasingly frustrated and embittered man, with $10,000 desires, $5,000 essential needs, and $2,000 income, alternately groping for a standard of living he cannot possibly afford and resignedly paying exorbitant prices for his daily essentials.

In sum, the new wave of informational legislation will be of little help to the poor because it presupposes values, motivation and knowledge which do not generally exist among them. The actual problem is not just a shortage of a narrowly defined sort of information—such as the price per pound of prepackaged food—but a total breakdown in the function the consumer is supposed to play in the market. "Bad buys" are the rule and price and quality competition the exception. As one merchant in New York put it: "People do not shop in this area. . . . It is just up to who catches him."53

50. In one reported case a Negro housewife ordered a $100 washing machine and got a bill for $200 after it was installed. When she refused to pay the machine was taken away, and she expressed relief that she only lost her $50 deposit and had not had to pay the balance. The Poor Pay More 147, 172. Often the poor refrain from protesting their exploitation for fear that protest would only make things harder on them. Hearings on S. 750, supra note 6, at 492 (statement of Annie R. Swan).

51. The problem appears at an early age. It has been suggested that compared to more affluent white children, underprivileged Negro students show far less conviction that their personal behavior will affect what happens to them. McKissick, Is Integration Necessary? New Republic, Dec. 3, 1966, at 34-35.

52. This lack of motivation may help to channel the poor consumer's bitterness about his condition into antagonism towards the business community.

53. The Poor Pay More 19. Despite this perhaps not-so-new reality, old myths linger, "The consumer buys what he wants. He cannot and should not be told what to buy. But he must be told what is available for purchase." Presidential Message on Consumer Legislation (1966). This statement reflects a somewhat different view from that taken by President Kennedy. The 1962 Presidential Message on Consumer Legislation included among the rights of the consumer "the right to choose—to be assured, wherever possible, access to a variety of products and services at competitive prices; and in those industries in which competition is not workable and Government regulation is substituted, an assurance of satisfactory quality and service at fair prices." The entire low income area business community may or may not be an industry where competition is workable, but it certainly seems to be an industry where competition has not worked.
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The Resulting Problems

Consumer Purchases Generally

Because of their dissimilarity to the ideal consumers of modern economics and legislation, the poor pay prices for food, rent, medicine and durables almost always exceeding those paid by the more affluent, and usually exceeding those needed to yield a fair return on the businessman's investment. This comes about in several ways:

(1) Neighborhood Price Levels: Food stores in low income areas consistently charge higher prices than food stores in middle and upper income areas for comparable items. The low income consumer pays between 5 per cent and 10 per cent more for the same groceries purchased in his own neighborhood than does a middle income consumer.\(^\text{54}\) The average small grocery store

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The Bureau of Labor Statistics recently completed a study of food prices and quality, Bureau of Labor Statistics, A Study of Prices Charged in Food Stores Located in Low and Higher Income Areas of Six Large Cities (1965) [hereinafter cited as Study of Prices]. Despite the title and ostensible purpose of the Study of Prices, the data is tabulated in such a way as to make it extremely difficult to ascertain whether there are price differences between different areas, especially between stores of the same size. Only one table (id. at 10) is arranged to permit the reader to see whether there are differences among similar size stores, and it does not allow comparisons between small independent stores. Notwithstanding a clear showing of a price differential between chains and large independent stores in different areas (id. at 10) and an admission of this in the text (id. at 9), the printed summary insists that there are no “significant” differences. The press read only this summary, and understood it to mean there were no such price differences at all. N.Y. Times, June 12, 1966, at 56. On no interpretation of “significant” can this assertion be justified. Chains are said in the summary “usually” to charge less than small independents, yet for normal quality food this is true in only two of the six cities surveyed, and for low quality food it is true for only one of the six. Where the chains do charge less than the independents it was only an average of 12\(\frac{1}{2}\) per cent, whereas in the five cities where chains charge more in low income areas the average difference was more than 2\(\frac{1}{2}\) per cent.

The summary asserts that the poor do pay more, but only because the small stores where they often shop are more expensive. Although the proposition is true, see, e.g., Mobilization for Youth, supra, it is not supported by the findings in the Study of Prices. This is due to the BLS’s research methods. A “small” store was defined as one with a gross income of less than $300,000— a figure perhaps ten times the average local grocery store gross in low income areas. Study of Prices 2. Moreover, the survey excluded all but “full line” groceries—stores which did not carry all or almost all of the eighteen foods surveyed were not even visited. Id. at 3. Most of the small stores in low income areas were thus not considered, since many of these sell only dry goods or only fruit and vegetables, or only meat. Id. at 10 (the Study of Prices concedes as much); Mobilization for Youth, The Choiceless Shopper 2 (1965). This exclusion is evidenced by the fact that the Study failed to find many instances of food without price tags (id. at 13-14), whereas this is the rule in small low income area stores. Ridgeway, Segregated Food at the Supermarket, New Republic, Dec. 5, 1964, at 7. Thus the usual sources of low income consumer food were either excluded altogether from the government survey or they were averaged in with atypical stores which had gross incomes in six figures. For this reason
or "bodega" charges a median 10 per cent more than large middle income area chain stores, and the low income chain stores charge about 5 per cent more than the middle income area chains. There are significant price differences among branches of the same chain, reflecting in part the commission basis upon which store managers are employed. Some other stores, such as co-operatives or private stores selling in particularly high volume have prices more than 15 per cent below those predominating in the low income areas. Low income neighborhood stores usually price durables 50 per cent to 100 per cent above the going rate in more affluent areas, employing markups of 300 or 400 per cent and giving commissions running as high the most important price comparison, between normal small low income area store and the middle income area supermarket, cannot be made.

Given the method of tabulation, the definition of "small store," and the unsupported assertions in the summary, it is not surprising that the report was only adopted by a 9-6 vote and that three of the dissenters plan to publish separate views. N.Y. Times, June 12, 1966, at 56. Unfortunately some usually well-informed officials seem to have accepted the errors found in the summary of the Study of Prices. See, e.g., Equality in the Marketplace 4; Letter to the Author from Walter E. Duka, Information Director, President's Committee on Consumer Interest, Aug. 12, 1966 (on file in the Yale Law Library).

55. See sources cited note 54 supra.
56. Hearings on H.R. 7179, supra note 6, at 172 (statement of David Borden); 27 Jewish Social Studies 45 (1959); Ridgeway, Segregated Food in the Supermarket, New Republic, Dec. 5, 1964, at 6-7; Interview with Rina Garst, at Mobilization for Youth in New York City, July 30, 1966. In the Study of Prices 10 it was revealed that chain store prices vary as much as 7 per cent between areas.

57. A store in one low income area sold jaded-looking hamburger at 59 cents a pound—less elderly hamburger was sold at 49 cents a pound in a middle-income branch of the same chain. Ridgeway, Segregated Food in the Supermarket, New Republic, Dec. 5, 1964, at 6-7. Interview with Rina Garst, in New York City, July 30, 1966. The Study of Prices noted such variations but accepted statements of chain managers that this was due to the late arrival of new price lists.

58. See Mobilization for Youth, The Choiceless Shopper 2-3 (1966). Mrs. Garst at Mobilization for Youth found that nearby co-ops charged about 17 per cent less than the average area prices.

59. A Shoprite store in the Bronx charges about 15 per cent less than the average East Harlem prices, and a few residents of East Harlem travel all the way to the Bronx to do their grocery shopping. Interview with Paul Katzoff, East Harlem Tenants' Council, July 10, 1966.

60. It has been suggested that the differences in price levels are due to higher insurance costs and shoplifting rates. The BLS advanced this second explanation, although no empirical evidence was offered to substantiate it. Study of Prices, summary. It is anomalous that the Study of Prices accepts the existence of a serious pilferage problem in low-income areas while denying the existence of price differences dependent on location alone. The only instance in which the BLS could find that insurance was unusually hard to get or expensive was in Watts after the 1965 riot. Id. Some time ago a consumer boycott was used to force down prices at an East Harlem grocery. Had there been any economic justification for the price levels the store would soon have gone into bankruptcy; in fact the store did better than ever before. Proceedings 48 (remarks of David Borden); Hearings on H.R. 7179, supra note 6, at 172 (statement of David Borden).

61. The Poor Pay More 16-17, 49-57, 80-98; Proceedings 45, 46 (remarks of David Borden); Mobilization for Youth, The Choiceless Shopper 8 (1966) (television prices 25 per cent to 70 per cent above list, up to 100 per cent over middle-income areas); N.Y. Bureau of Consumer Frauds and Protection, Ann. Rep. 7 (1965) (food freezers
as 100 per cent of the value of the goods. Notwithstanding the resulting preclusion of comparative shopping, the poor buy a substantial portion of their furniture and appliances from door-to-door peddlers. Because of this preclusion, and because peddlers prey on the least competent of the poor shoppers, peddler prices are uniformly substantially above those of store owning merchants.

(2) Quality: The low value which the poor receive for their money results not only from these above average prices, but also from the below average quality of the goods which are sold in low income areas. Grocery stores in the low income areas are less sanitary than their middle income counterparts; fruit and vegetables are more often damaged, meat commonly brown around the edges, and milk and eggs occasionally sold past the time recommended by the producer. As with prices, variations in the condition of food exist between stores of the same chain, the branch in the low income area generally having the lesser quality. Durables purchased by the poor are of a similarly low

sold at 167 per cent to 300 per cent above fair market value); S. Margolis, A Guide to Consumer Credit 5 (Public Affairs Pamphlet No. 348, 1963) (stainless steel tableware worth $15 sold for $65, over 300 per cent above value); Buy Now, Pay Later 126 (religious medal marked up 5000 per cent over wholesale); The Autobiography of Malcolm X 192 (1964); Hearings on S. 2755, supra note 51, at 101 (peddler markup over retail “conservatively” estimated at 100 per cent); People v. Abbott Maintenance Corp., 11 App. Div. 2d 136, 139, 201 N.Y.S.2d 895, 898 (1960) (waxing machine worth $102.50 sold for $936, more than 800 per cent above its fair market value). Even Kenneth B. Wilson, President of the National Better Business Bureau, has felt called upon to point out that the poor pay markups “as high as 400% for a shoddy product that won’t last half the time it takes to pay it off.” N.Y. Times, Sept. 28, 1966, at 30. See also N.Y. Times, Nov. 5, 1966, at 20 (poor receive less value for the rent dollar).


63. See p. 781 infra.

64. More than half of the low-income families in New York City have bought something from peddlers. See generally The Poor Pay More 58-80. The typical low income area peddler, once thin and unshaven, has grown a paunch and makes collections in a late model car. Buy Now, Pay Later 131.

65. Mobilization for Youth, The Choiceless Shopper 9 (1965); The Poor Pay More 58-80. That many of the poor know they are paying peddlers higher prices and do so anyway is indicative of the motivational problem. Cf. id. at 78, 79-80.

66. Study of Prices, summary; Morris, supra note 54, at 6.

67. Study of Prices 12-13. Morris, supra note 54, at 6-7; Ridgeway, supra note 54, at 6; interview with Paul Katzoff at the East Harlem Tenants Council, in New York City, July 15, 1966. It is nonsense to maintain, as the Study of Prices does, that the poor do not pay more in stores of comparable size, and yet admit that the goods at the “same price” vary in quality.

68. Study of Prices 13; Morris, supra note 54, at 7. There have been allegations that this variation in quality within a single chain is due to purposeful dumping of low quality goods or items that failed to sell in middle income stores. Ridgeway, supra note 54, at 7; interview with Paul Katzoff, in New York City, July 15, 1966. The BLS “took no position” on the dumping issue, but raised the possibility that differences in quality were due to a slower turnover rate in low income areas or a mishandling of display.
quality; both appliances and furniture have to be replaced or repaired frequently. Neighborhood stores and peddlers rarely deal in brand name goods, in part because a markup comparable to that on the low quality goods they normally sell would make brand name goods prohibitively expensive. Service on the purchased items is inadequate, warranties are rarely given, and the merchants often disclaim responsibility for goods, asserting that the salesman is no longer with them or that the line has been dropped. Often the firm is no longer even in business, at least under the same name.

(3) Sales Methods: A number of questionable merchant and peddler techniques are used to maintain high prices and poor quality. In low income areas of New York City food prices rise abruptly and temporarily on the 1st and 16th of each month, when wel-

merchandise. No evidence is offered to support these suggestions, nor, for example, is any explanation offered why slow turnovers could not be compensated for by smaller stocks. The Bureau's willingness to consider these rather exotic explanations is consistent with its generally lenient attitude toward chain stores.

60. Hearings on S. 2755, supra note 31, at 107-08, 115 (discarded new furniture constantly has to be removed from public housing; a local cobbler would not repair the shoes of the people in the project because they were of such low quality); Mobilization for Youth, Proposal for a Community Program in Consumer Affairs 1, June 1966, on file in Yale Law Library; The Poor Pay More 36, 39 (durables owned by the poor are more likely to be recently purchased than those owned by the average consumer, suggesting that those owned by the poor do not last as long).

70. The Poor Pay More 18. Similarly the high food prices indicate low quality food being sold at premium quality food prices. Morsus, supra note 54, at 11. See also N.Y. Times, Nov. 5, 1966, at 20 (clothing and other items).

71. 2 COLUM. J.L. & SOC. PROB. 1, 2 (1966).


73. Id. at 400; Hearings on S. 730, supra note 6, at 126 (a New York firm had six names and four locations in two years). One merchant in the Lower East Side, after selling overpriced, poor quality phonographs and television sets, filed a petition in voluntary bankruptcy and then resumed business under another name. Mobilization for Youth, Consumer Affairs Program, April 22, 1966, on file in Yale Law Library.

74. The most critical commentators upon these practices regard them as the techniques of purposeful and widespread exploitation. See generally The Poor Pay More. Others have taken milder positions, arguing, for example, that only a few businessmen want to use these techniques, and the rest are forced to use them to compete. Consumer Frauds, 114 U. PA. L. Rev. 395, 397 & nn.18, 20, 399 n.30 (1966); AFL-CIO, In Your Interest 9 (undated); Hearings on H.R. 15,440 Before the House Comm. on Interstate and Foreign Commerce, 89th Cong., 2d Sess. 21, 28 (1966) (statements of Representatives O'Neill and Helstocki). No explanation is offered of why the Better Business Bureau, presumably formed to deal with precisely such problems, has not acted. It has been urged that low income area merchants are no worse than merchants generally. Equality in the Marketplace 8-9. Fortunately for the middle income consumer this does not appear to be the case. Some businessmen are prepared to rationalize unethical practices on the theory that you cannot cheat an honest man. Consumer Frauds, 114 U. PA. L. Rev. 395, 397 n.20 (1966). Perhaps the most sensible approach is that suggested by Senator Hart. It makes little difference to the economy and consumer whether price comparisons are made difficult or impossible because of fraud, deception or only confusing practices. The seller's intent is not the important point—the practice and its effects are. Hearings on S. 983, supra note 21, at 719. Whatever the merchant's motive, the effect and the justice of laws curbing these practices are the same.
fare payments are made and the poorest (and least competent) of the poor do most of their shopping. Prices are not generally marked on furniture and appliances sold in poor neighborhoods, and the prices quoted verbally are tailored to the customer. One recent survey found differences as great as 60 per cent for the same item; Negro and Puerto Rican shoppers were charged the higher amounts. Both merchants and peddlers commonly use high pressure techniques, while the law often penalizes those few customers who change their minds and revoke the contract before delivery. Customers are lured into a store by an advertised bargain which the merchant had little or no intent of actually giving, and are talked into a much more expensive purchase. Salesmen frequently misrepresent the nature of items being sold, their prices, the nature of documents being signed, and other relevant facts, and pur-

75. Hearings on H.R. 7179, supra note 6, at 174-75 (statement of Mrs. Gladys Aponte); Interview with Dorothy Orr, Director of Bedford-Stuyvesant Youth in Action, in New York City, Aug. 5, 1966. The problem might be solved by not mailing out all the welfare checks at one time. Similarly the price of carp and pike in New York City rises sharply during the Jewish High Holy Days when these items are extremely popular. Interview with Sheldon Fink, Intern in the Office of the Mayor of New York, in New York City, Aug. 9, 1966.

76. THE CHOICELESS SHOPPER, supra note 65, at 8; THE POOR PAY MORE 17.

77. THE CHOICELESS SHOPPER, supra note 65, at 8. See also Hearings on H.R. 7179, supra note 6, at 182-83 (statement of Mrs. Florence Rice, Director of the Harlem Consumer Education Council); Mobilization for Youth, Proposal for a Community Program in Consumer Affairs 1, 4 (1966) (on file in Yale Law Library).

78. N.Y. BUREAU OF CONSUMER FRAUDS AND PROTECTION, ANN. REP. 9 (1964); 2 COLUM. J.L. & SOC. PROB. 1, 2 n.9 (1965); THE POOR PAY MORE 64 (peddlers), 145 (merchants).


80. BUY NOW PAY LATER 140-49; THE POOR PAY MORE 143-46; CONSUMER FRAUDS, 114 U. PA. L. REV. 395, 398-99 & n.50 (1966). One New York City merchant commented, "I don't know how we do it. We advertise three rooms of furniture for $149, and the customers swarm in. They end up buying a $400 bedroom set for $600, and none of us can believe how easy it is to make these sales." PROCEEDINGS 7 (statement of David Caplovitz). It is interesting to note that this statement was freely made several years after New York passed a statute purporting to ban bait advertisements. N.Y. GEN. BUS. LAW § 396 (1966).

81. Reconditioned goods are commonly sold as new, THE POOR PAY MORE 23, 151, although there have been no criminal fraud prosecutions for this in New York City for several years. Telephone interview, New York City District Attorney’s Office, Aug. 2, 1966. A Brooklyn firm recently sold freezers by fraudulently telling buyers that the sale included a complete food plan. N.Y. BUREAU OF CONSUMER FRAUDS AND PROTECTION, ANN. REP. 7 (1965).

82. THE MOST FOR THEIR MONEY 7; S. MARGOLIUS, A GUIDE TO CONSUMER CREDIT 5 (1963); THE POOR PAY MORE 147-51.

83. BUY NOW, PAY LATER 137-40; PROCEEDINGS 8 (remarks of David Caplovitz); N.Y. BUREAU OF CONSUMER FRAUDS AND PROTECTION, ANN. REP. 8 (1964); THE POOR PAY MORE 146.

84. One peddler selling encyclopedias told his customers that he was from their children’s schools or teachers and that the children might be expelled from school if the encyclopedias were not purchased. Equality in the Marketplace 6; Mobilization for Youth, Consumer Affairs Program (Apr. 22, 1966) (circular, on file in Yale Law Library).
possibly deliver goods other than those purchased by the customer.\textsuperscript{85} Low income consumers are particularly susceptible to these and other forms of fraud, since they are less likely to detect it and to act to protect their rights.\textsuperscript{86} There is evidence to suggest that low income area businessmen and merchants occasionally resort to price fixing.\textsuperscript{87}

(4) \textit{Resulting Losses}: The effect of area sales techniques and price and quality levels is compounded by the low income consumer's failure to shop around even within his neighborhood\textsuperscript{88} or to buy in large economic quantities.\textsuperscript{89} As a result of selling practices and poor shopping habits the typical low-income consumer is probably paying one-third to one-half more for his food than he would if he shopped with diligence in a middle income area.\textsuperscript{90} Durables\textsuperscript{91} probably cost the poor at least one and one-

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\textsuperscript{86} The Most for Their Money vii, 6, 7. Also responsible are outdated legal doctrines putting the defrauding merchant in a different position than an ordinary thief. See Seavey, \textit{Caveat Emptor as of 1960}, 58 Texas L. Rev. 439 (1960).

\textsuperscript{87} \textit{Hearings on H.R. 7179, supra} note 6, at 170 (statement of David Borden); L. Berson, \textit{Case Study of a Riot: The Philadelphia Story} 34-35 (1966). A group of poor consumers in West Virginia, unhappy with the high cost of food, set up their own grocery store. One spokesman for the group referred to the store as an instance of "poor power." A local businessman explained it was "all a Communist plot." Whatever it was, within a week food prices in the other area stores tumbled sharply. \textit{N.Y. Times}, Dec. 16, 1966, at 31. Why the prices had theretofore been so much higher may be a matter of speculation, but tacit price fixing is perhaps the most obvious explanation.

\textsuperscript{88} The Most for Their Money 5. The need for credit may force the poor to shop at the local grocery store where they are well known. \textit{The Choiceless Shopper, supra} note 65, at 2; \textit{Study of Prices} 17; Mobilization for Youth, Proposal for a Community Program in Consumer Affairs 1 (June, 1966) (on file in Yale Law Library). Failure to shop outside of the neighborhood is of even greater importance, since discount food and appliance stores are generally restricted to middle income areas. \textit{Study of Prices} 10; \textit{The Most for Their Money} 5; \textit{The Poor Pay More} 85, 87; \textit{Proceedings} 25-26 (statement of Paul Katzoff). For proposals to alter this situation see \textit{N.Y. Times}, June 12, 1966, at 56, col. 1.

\textsuperscript{89} The Most for Their Money 5; \textit{Study of Prices}, summary; \textit{The Choiceless Shopper, supra} note 65, at 3; \textit{Ridgeway, supra} note 54, at 7.

\textsuperscript{90} Fifteen per cent could be saved by shopping at middle income area discount stores or co-ops. See note 60 \textit{supra}. Fifteen per cent could probably be saved by simply choosing the best buy in a given store. See 112 Cong. Rec. 12,169-72 (1966) (even college-educated shoppers with an unusually long time to shop overpay by 10 per cent). Another 5 per cent saving could be accomplished by buying in large quantities and avoiding the use of credit. A consumer could thus buy equivalent food for 65 per cent of what he is now paying. The cash saving would be substantial, since the poor spend almost a third of their income on food. \textit{The Most for Their Money} 2; \textit{Bureau of Labor Statistics, Consumer Expenditures and Income, New York, New York, 1960-61}, at 9 (BLS Rep. No. 237-54, 2d Advance Rep., 1963).

\textsuperscript{91} Despite differences in funds available for current consumption, the low income consumer is at least as active a purchaser of appliances as is his middle income counterpart. \textit{The Poor Pay More} 32-38. Expenditures on furniture, however, vary with income. \textit{See Consumer Expenditures, supra} note 90, at 9. Total expenditures on furniture and appliances vary with income; since expenditures on appliances do not vary greatly, it must be furniture purchases that cause this difference. This may reflect in part the fact that when furniture breaks or wears down it may be used or repaired by the owner.
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half to two times as much as they would if they bought in more affluent neighborhoods, especially at discount houses.\textsuperscript{62}

Credit and Loans

Two thirds of the purchases of major durables made by low income consumers involve the use of credit or loans, a portion comparable to that for middle income consumers. Seventy-five per cent of low income consumers have used credit for at least one purchase of a major durable, and a lesser number of them use it for food or clothing.\textsuperscript{63} Most low income families are presently in debt and will remain in debt;\textsuperscript{64} for them, the only bill which never comes is the last one. The cost of credit is thus an important element in the budgets of most low income families.\textsuperscript{65}

Lending practices vary widely with the relevant state laws. New York has perhaps the best system of credit and loan regulation in the country;\textsuperscript{66} the problems in other states are generally worse. State law sets maximum rates for both credit\textsuperscript{67} and loans\textsuperscript{68} in New York, with penalties for overcharges.\textsuperscript{69} The Retail Installment Sales Act voids any clause in a credit purchase agreement which provides for an acceleration of payment in the absence of default, a power of attorney, a confession of judgment, an authorization to breach the peace in repossessing goods, or a waiver of defenses against the seller,\textsuperscript{70} and provides that the contract must clearly state the cost of the goods and of the credit.\textsuperscript{71} “Balloon payments”—progressively larger payments often intended to force the purchaser into default—are discouraged.\textsuperscript{72} All

A broken television or washing machine, on the other hand, must either be replaced or repaired by a commercial serviceman.

92. See note 61 supra.

93. See generally The Poor Pay More 94-104. See also Study of Prices 17-18 (grocery store credit).

94. See generally The Poor Pay More 105-15.

95. One couple agreed to buy a “custom made” orthopedic mattress and box spring for $22 apiece. With taxes and carry, delivery and credit charges the final cost was $247. Equality in the Marketplace 6. This is also true of middle income consumers. One family with an annual income of $15,000 was paying $1,150 a year in interest and finance charges. Margolius, supra note 82, at 3.

96. Hearings on S. 750, supra note 6, at 125, 249. See generally Trends in Consumer Credit Legislation.


98. N.Y. Banking Law § 352 (1964).


these provisions have, however, fallen far short of adequately protecting the low income consumer.

The ceilings on credit charges are high. In theory the maxima are 10 per cent for the first $500 and 8 per cent for the rest of the debt, but since the interest can be computed in advance and added to the amount due ("discounted") the actual ceilings are close to 20 per cent and 16 per cent where the debt is to be paid within one year. Even these limits, however, do not appear to affect significantly the cost of low income consumer credit. Local stores frequently charge a higher price for goods being sold on credit in lieu of being able to openly charge a higher credit fee. Testimony before the Senate Committee studying the Truth-in-Lending Bill suggested that Negroes and Puerto Ricans are systematically and automatically charged a higher rate of interest than whites, and this regardless of their individual credit rating. This pattern is confirmed by the finding that non-whites buying on credit from local dealers and peddlers pay higher prices (i.e., higher covert credit charges) than do low income whites making similar purchases, although the non-whites are not substantially more likely to default on their obligations. The high de facto rates reflect not only deliberate exploitation, but also the loss incurred when the customer's promise to pay is sold to a bank or finance company for 70 per cent or 80 per cent of its face value.

In other instances exorbitant interest rates on credit or loans involve violations of the letter as well as the spirit of the law. Senator Douglas' committee, several years after the passage of the Retail Installment Sales Act, discovered credit charges in excess of 100 per cent in New

103. N.Y. Pers. Prop. Law § 404 (1962). The Internal Revenue Service allows a deduction for income used to pay interest on loans, but in practice limits this to an interest rate of 6-10 per cent. Hearings on S. 750, supra note 6, at 200. This is one of the more glaring instances of government action being totally out of touch with the realities of the consumer market.

104. See generally The Poor Pay More 17. In other areas of the country merchants disguise interest charges in the form of investigation and other "fees." Ross, When You Borrow, When You Buy—Watch Those Interest Rates, READERS DIGEST, Nov., 1963, at 104, 106. New York retailers opposing the Truth in Lending Bill argued that passage would only result in a reduction of overt fees and a hiding of credit charges in increased prices. Hearings on S. 1740 Before a Subcomm. of the Senate Comm. on Banking and Currency, 87th Cong., 2d Sess. 259 (1962). A number of New York firms advertised free credit. They obviously could not afford to do so unless credit charges were built into their prices. Cf. Hearings on S. 750, supra note 6, at 209.

105. Hearings on S. 750, supra note 6, at 142-43, 146 (statement of Mrs. Gladys Dixon, former credit investigator for a New Jersey firm); In Your Interest, supra note 74, at 5; 111 Cong. Rec. 16,428 (daily ed. 1965) (remarks of Senator Douglas).

106. The Poor Pay More 92.

107. In Your Interest, supra note 74, at 5. Most credit contracts are sold by merchants to banks, finance companies, and other financing institutions. TRENDS IN CONSUMER CREDIT LEGISLATION 5-7.
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York City. Loan sharks, often charging as much as 1000 per cent a year, continue to work and flourish in low income areas.

These exorbitant rates, yielding profits far above the normal level, continue to exist for several reasons:

1. Many low income consumers do not and cannot engage in comparative shopping for either credit or loans.
2. Those who do so are more concerned with the size of the weekly payments than with the total cost or interest that they will have to pay.
3. Low income consumers are often totally unaware of the interest or the service charge which they are paying, either from a failure to request it or because of a purposeful concealment by the merchant.
4. Where any information is given it is usually the total credit charge, as required by law, rather than the interest rate which is much more important for comparative shopping.
5. Even those low income consumers who do feel that they are paying excessive credit charges are not aware that a violation of the law may be involved.
6. Low income consumers are unwilling to endanger what may be their only source of credit by complaining to the lender, let alone to the law.

108. Hearings on S. 750, supra note 6, at 156 (over 50 per cent), 161 (100 per cent), 183 (55 per cent), 185 (168 per cent), 189 (54 per cent); 111 Cong. Rec. 16,425-26 (daily ed. 1965) (remarks of Senator Douglas; charges of 107 per cent and 143 per cent).
109. Hearings on H.R. 7179, supra note 6, at 170 (statement of David Borden, Director, Block Communities, Inc.). See also Mobilization for Youth, Proposal for a Community Program in Consumer Affairs I (June 1966) (on file in Yale Law Library); 111 Cong. Rec. 15,850 (daily ed. July 12, 1965) (remarks of Senator Douglas, also suggesting that organized crime may be getting involved in the loan sharkling business). The interest rates charged by loan sharks vary widely. U.S. DEPT. OF AGRICULTURE, A GUIDE TO BUDGETING FOR THE FAMILY 15 (1965) (42 per cent to 1200 per cent).
110. Default rates in Harlem for example range from 5 per cent to 20 per cent, depending on the merchant involved. The Poor Pay More 17 n.5; 2 COLUM. J.L. & SOC. PROB. 1 n.1 (1966). Collection attorneys for Harlem merchants get default judgments in 97 per cent of the cases they bring, and successfully execute 75 per cent of their judgments. Id. at 9 n.57, 10. Thus even the merchants with the highest default rates will recover the money owed them in 74 per cent of their sales.
112. Hearings on S. 2755, supra note 31, at 113 (statement of William Kick); The Poor Pay More 97 n.3.
114. In Your Interest, supra note 74, at 6.
115. Cf. Hearings on S. 750, supra note 6, at 492.

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The penalty provision of the Retail Installment Sales Act in New York is emasculated by a provision permitting the seller to avoid all penalties if he reforms the contract in conformity with the law within 10 days of written notice by the buyer of the violation.\footnote{116}

Beside the credit charge itself, credit raises the costs of goods indirectly in other ways. The unavailability of credit outside of the low income area forces low income families to shop at the more expensive stores.\footnote{117} Banks encourage consumers who do have savings to borrow for their purchases anyway in order to leave their savings "intact."\footnote{118} The remoteness of the ultimate payment for goods and services induces low income consumers to spend more than they can afford.\footnote{119}

\textbf{Post-Sale Legal Conflicts}

Existing legal institutions and practices fall far short of insuring reasonable protection for the low income consumer.

Where the low income consumer is the potential plaintiff, it is most unlikely that suit will even be brought. Most low income consumers are unaware of the existence of either legal aid or the small claims court and simply do not think in terms of invoking legal processes on \textit{their} side.\footnote{120} Where the low income consumer is sufficiently irate to take action, he is likely to stop payment as a form of pressure on or retaliation against the merchant—and usually just worsen his own position thereby.\footnote{121} For those few who do attempt to invoke legal pro-

\footnote{116. N.Y. Pers. Prop. Law § 414(3) (1962).}{117. E.g., \textit{The Poor Pay More 98}.}{118. Bowery Savings Bank, How Much Will It Cost You to Borrow the Money for Your Next Major Purchase? (reprint of an advertisement in New York City newspapers, May, 1966; copy on file Yale Law Library). See, Margolis, \textit{supra} note 82, at 1. Borrowing in such circumstances is not limited to the least astute consumers. Interview with a chagrined student at the Yale Law School who asked that her name be withheld, in New Haven, Feb. 20, 1967.}{119. \textit{The Poor Pay More 98}; \textit{Hearings on S. 2735, supra} note 31, at 102. See, e.g., Williams v. Walker-Thomas Furniture Co., 350 F.2d 445, 448 (D.C. Cir. 1965). A survey by a major finance company found that the likelihood of repossession increased as down payments were lowered and repayment periods were lengthened; the more remote the ultimate payment for the goods, the less likely a consumer would carefully weigh their cost against his income. Margolis, \textit{supra} note 82, at 18. Credit clearly facilitates impulse buying. \textit{The Poor Pay More 59}. Well aware of this fact low income area firms advertise "instant," "one hour" and "immediate" credit, stressing for example that "You can drive in one hour." See any N.Y. Daily News, e.g. Aug. 11, 1966, at 67. Notwithstanding the problems resulting from the use of credit the federal government continues to stress its advantages. E.g., \textit{Guide to Budgeting for the Family, supra} note 111, at 12. More seriously, welfare departments force their clients to buy on credit by forbidding savings.}{120. \textit{See generally The Poor Pay More} 137, 171-75.}{121. Id. at 173; \textit{Consumer Frauds}, 114 U. Pa. L. Rev. 395, 400 (1966). Some merchants
cesses the obstacles that must be overcome are substantial: (1) The merchant may have gone out of business (and re-entered under a new name).122 (2) Legal aid societies may be reluctant to help because they do not in general take plaintiffs' cases. (3) Private attorneys' fees would often be so high as to eat up any possible gain.123 (4) Alleged warranties may not have been in writing. (5) Frequently written documents will have been lost.124

When merchants or finance companies wish to sue, rather than invoke extra-legal pressures,125 the situation is very different; for them the legal process is a broad and easy road to garnishment. Merchant-initiated suits virtually never come to trial; the overwhelming majority—97 per cent in the case of Harlem merchants126—end in default judgments because the defendant never answers the summons or complaint. In most cases—legal aid attorneys estimate 75 per cent127—this is because the defendant never received the summons. The common procedure has come to be known as "sewer service."128

In the few instances where process is actually served on the defendant it may still go unanswered, because he does not understand it, because he is unwilling to take time off from work to go to court, because he is afraid of all legal institutions, because he knows of no source of legal help, or because he feels that he will lose anyway. Clearly none of these reasons, except possibly the last, has anything to do with the usual theories behind refusal to re-open most default judgments.

Once the default judgment has been obtained the merchant proceeds as quickly as possible to garnishment of the defendant's salary. Often repossession and/or attachment of the defendant's property may have to precede garnishment, but the value of repossessed property usually falls far short of the price, and the impoverished debtor rarely has valuable property to attach.129 As a result of sewer service, default judgments, and failure to attach property, the defendant frequently first

appear aware that this is one of the main causes of defaults; a recent advertisement read in part "Now give your credit a new lease on life. We believe in you. We believe . . . that anyone who has received a 'fair shake' will make his payments faithfully." N.Y. Daily News, Aug. 11, 1960, at 70.

122. See note 73 supra.
125. See generally The Poor Pay More 23-25; Buy Now, Pay Later 53-61.
129. Often neither repossession nor attachment are attempted. The Poor Pay More 189-90.
hears of the proceeding against him when he is served with a notice
of wage garnishment. In some states the judgment debtor must be
notified before the garnishment is served, but in practice this is not
often done.

The general effect of this system is to make the court system an
indiscriminate stamp for all creditor claims against the poor.

In addition to his original debt, the low income consumer who is
subjected to a default or other judgment will also be liable for sizeable
costs and attorney's fees. In New York for example, where these addi-
tions are limited more than in most states, the total costs and fees
on a debt of $100 will be $40 excluding interest.

The few low income consumers who do get a trial of their case may
find that most of their defenses, such as fraud by the seller or delivery
of the wrong goods, are unavailable because they are being sued, not
by the original merchant, but by a bank or finance company. Merch-
ants in both middle and low income areas commonly sell the cus-
tomer's promise to pay to a financing institution in order to get
working capital and to avoid the trouble of collecting the debt them-
selves. In most states virtually no defenses are available against such a
"holder in due course." In a few states the buyer can raise against
the bank or finance company any defenses he could against the seller.
However, another provision of these states' laws provides that the
debtor may be given 10 or 15 days after proper notice in which to
notify the finance company or bank of any mistake in the contract, of
nondelivery of the goods specified, or of any other nonperformance
by the seller. The consumer waives any defenses of which the holder in
due course has not been notified. In practice this second provision vi-
tiates the protection given by the first; consumers are unlikely to report
any such nonperformance or error, either because defects in the product
may not have yet appeared, or because they do not understand or

130. 2 COLUM. J.L. & SOC. PROB. 1, 11 (1966); Hearings on H.R. 7179, supra note 6, at
191 (statement of Barnett Levy).
131. 131. E.g., THE POOR PAY MORE 159-60; 2 COLUM. J.L. & SOC. PROB. 1, 14 (1966).
132. See generally TRENDS IN CONSUMER CREDIT LEGISLATION 170-72, 278-88, 311-23.
133. 2 COLUM. J.L. & SOC. PROB. 1, 12-13 (1966).
134. This has become such a problem for poor consumers that stores on 125th St. in
Central Harlem have begun to put up signs reading "No finance companies; No banks." See also the "Cars-a-poppin" ad, N.Y. Daily News, Aug. 11, 1966, at 66 ("No loan co.'s
involved.").
135. See generally TRENDS IN CONSUMER CREDIT LEGISLATION 6 n.3.
136. Id. at 812-22, chart 19, cols. 1-3.
137. CAL. CIV. CODE § 1804.2 (West 1965 Cum. Supp.) (all goods); DEL. CODE ANN. tit.
6 § 4312 (West 1964 Supp.); REV. LAWS HAWAI'I tit. 24, § 201 A-17(d) (1965 Supp.); N.Y.
PERS. PROP. LAW § 403(1) and (3) (1962); PA. STAT. ANN. tit. 73 § 500-208 (1965 Supp.).

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read the notice. Only Oregon and Massachusetts adequately protect consumers against such holders in due course.

Problems of the Affluent

The affluent as well as the poor buy without asking prices shop for status or games rather than value, purchase food on credit and do not know the cost of the credit they often use. The high motivation assumed by the new consumer legislation is often lacking among the middle classes. Advocates of the Truth-in-Lending Bill argue for it on the ground that people do not know the cost of the credit that they are using—but if those consumers really cared about the cost they could often find out what it was by refusing, for example, to complete an agreement until the cost and interest rate were stated.

140. Hearings on H.R. 7179, supra note 6, at 49 (statement of Professor R. T. Morris); Peterson, Pennywise Teenagers, 2 American Education 24 (April, 1966). “Food advertising has swollen to such a volume that it has virtually eliminated price competition . . . Instead of competing through price, food processors compete through advertising, and food retailers compete through showmanship, trading stamps, free parking, and Musak.” Dowling, To Market We Go . . . Like Lambs to the Slaughter, New Republic, Jan. 26, 1967, at 19, 22.
142. Safeway, the second largest food retailer in the country, used “Bonus Bingo” to raise its sales 14 per cent and its earnings 35 per cent during the first nine months of 1966. The game was dropped shortly after an FTC investigation of the practice was announced. A&P also offers bingo, carefully controlling where customers will win so as to spur sales in those stores where business has lagged. New Republic, Jan. 21, 1967, at 10. Gasoline station advertisements have come to be dominated by references to games like “All Pro” (American), “Tigerino” (Esso), “Batman” (Merit) and “Americana” (Shell).
143. Packard, supra note 141, at 121.
144. Presidential Message on Consumer Legislation 2 (1962); AFL-CIO, In Your Interest 3 (undated). The problem is as common among well-to-do college graduates; many of them believe that the cost of installment credit is under 6 per cent. Buy Now, Pay Later 77. See also Hearings on S. 710, supra note 6, at 184-35.
145. Advocates of informational bills try to rationalize this problem away: Unfortunately, it is frequently very difficult for you to find out the true cost of what you pay to borrow money or to buy on an installment plan. You know how it goes. You and the family really want that new TV or that late model automobile. By the time you get to looking seriously, you want it and need it right then—not later after you have taken the time to read the fine print in the sales contract. And the salesman or loan official makes those small monthly payments sound like a “breeze” to repay. In Your Interest, supra note 144, at 3. The urgency of acquiring a new car or T.V. and the smooth line of a salesman would hardly deter a hardened shopper at all interested in the cost of buying on time; it usually doesn’t stop him from finding out the price of the car or television. Senator Douglas argued: [I]t is claimed that most consumers do not care about interest rates. This claim is directly contrary to the statements of many witnesses who related their sad experiences before our committee. Many of these people said they never would have agreed to a particular transaction if they had known the interest rate was as high as it was . . . The average person usually gives up when confronted with the problem of computing a rate of interest from the meager information supplied by a fast talking salesman, and accepts instead his bland assurance that the rate is the lowest in town.
Similarly Senator Hart stressed that Truth-in-Packaging legislation was needed because college-educated shoppers told to get best buys and given almost 2½ minutes per item, still could not do so with consistency.146 But elsewhere in the debates it became clear that housewives were spending far less shopping time per item than this, perhaps 30 seconds or less.147 Clearly such consumers allow themselves no time to compare prices among ten or twenty varieties; they simply grab their “usual brand” and run.148 The proverbial slide rule149 which food shoppers would need to compare food prices has remained just that; no one has suggested that shoppers do or should try to compute prices per pound from available information, or to ask their grocer to do it for them. Appliances, among which only an occasional engineer could decide without detailed research,150 annually sell in the tens of millions while Consumer Reports sells hardly 950,000 issues.151 It seems clear that the vast majority of the country does not exert itself to make informed and rational purchasing decisions.

111 Cong. Rec. 16,426-27 (daily ed. 1965). But consumers who really cared about interest rates would not accept those assurances. As for the difficulty of computing interest rates, Senator Douglas stressed in the same speech that a 4¢ pocket-sized slide rule issued by the Consumer Union Supply Co-operative would make the task a simple one. Id.

146. 112 Cong. Rec. 12,169-72 (daily ed. June 9, 1966) (based on a study by Monroe P. Friedman of Eastern Michigan University). The thirty-three subjects all had at least one year of college and no less than a year of regular shopping experience. They missed the best buys 43 per cent of the time, and as a result spent an average of 10 per cent more than was necessary.


There is clear evidence that most consumers, most housewives, are not at all confused in the supermarket. A comprehensive study of buying habits in supermarkets showed that the average shopper sweeps past the 8,000 products found in the store and buys 32 items in 15 to 18 minutes—hardly the pace of a confused shopper.

Hardly the pace of a shopper; this leaves less than one-ninth of a second per product if comparisons are to be made.

148. Senator Hartke was exaggerating more than he knew when he remarked: “The American consumer has developed an All-New, Low-Low Poly-Unsaturated disgust with misleading packaging claims.” 112 Cong. Rec. 11,539 (daily ed. June 2, 1966). Similarly Senator Hart oversimplified and overestimated the typical American consumer when he said, “[W]hen the American consumer steps into the supermarket and swings his cart into the aisle, he is undertaking a job that at first blush seems simple enough: He wants to buy the maximum amount of what he wants and needs at the lowest possible price.” Id. at 11,543.

149. Presidential Message on Consumer Legislation 4 (1966); Hearings on H.R. 15440 Before the House Interstate and Foreign Commerce Committee, 89th Cong., 2d Sess., pt. 1, 19 (also a computer and an M.I.T. graduate), 23 (also a note pad and a magnifying glass) (1966); Hearings on H.R. 7179, supra note 6, at 53; 112 Cong. Rec. 12,211-12 (daily ed. June 9, 1966) (articles from the Houston Post). Other suggestions include a mathematical whiz kid and a pocket-sized computer.

150. “Ninety per cent of the prescriptions written today are for drugs that were unknown 20 years ago. Many of the new products used every day in the home are highly complex. The housewife is called upon to be an amateur electrician, mechanic, chemist, toxicologist, dietitian, and mathematician . . . .” Presidential Message on Consumer Legislation 2 (1962).

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The remedies proposed below will thus be of help to the average American consumer as well as to the poor.

Legislative Remedies

The orthodox statutes already proposed and passed in a few states are certainly worth enacting. The law should prohibit retail sales contract provisions containing waivers of defenses, permission to breach the peace to repossess, powers of attorney, acceleration of payments in the absence of a default, legal fees for the merchant, a confession of judgment, or extra credit charges. Balloon payments, add-on installment sales contracts and garnishment firings should also be forbidden. A Truth-in-Lending law and a stronger Truth-in-Packaging statute would certainly be of some use. However, those provisions which are informational will only help a motivated and educated minority, and the prohibitive features will not eliminate the principal forms of abuse.

The most promising solution as yet attempted for these problems is consumer pressure on the retailers through community action. To judge by the business community’s outrage at the recent supermarket boycott, such pressures are as painfully coercive as the worst bureaucratic interference with free enterprise. But for lasting success, community action requires greater motivation and stronger habits of group cooperation than exist in most low-income areas. Moreover, many businesses are invulnerable to pickets or boycotts. One cannot, for example, picket a peddler; each consumer will have to be convinced in advance not to buy from him, and if that is done the result is not a boycott but a permanent change in buying habits.

Because these techniques as well as existing forms of legislation are inadequate to deal with the problems of low income consumers, a dif-

152. See generally TRENDS IN CONSUMER CREDIT LEGISLATION.
153. See note 102 supra.
155. See note 6 supra.
156. The most logical and effective Truth-in-Packaging bill would simply require all supermarkets and grocery stores to label every item with both the price and the cost per pound or per quart. It is obviously more efficient for the grocer to make the calculation once than for each of his customers to make it for themselves, and the danger that even facilitated computation will be too great an inconvenience for the consumers is avoided.
fert type of legislative solution is suggested below. Although the statute is designed for state enactment, parts of it are adaptable to the forms and limitations of city ordinances, FTC regulations, and federal laws. The Act has two goals: (1) to restore competitive shopping conditions in low income areas and increase the likelihood of sound shopping practices by the poor; (2) where this is infeasible, to act directly on prices and quality. To insure the effectiveness of the substantive provisions of the Act, three avenues of enforcement are provided: (1) state action in the form of prosecutions and suits for injunctions; (2) legal weapons for community activists; (3) generous punitive damages for the consumer on whom a merchant has employed an illegal technique.

AN UNFAIR SALES PRACTICES ACT

§ 1. This Act may be cited as the [name of state] Unfair Sales Practices Act.

§ 2. The State of [name of state] declares it to be its policy in
enacting this Act to assure the consumers of the State a fair return for their money.

§ 3. Definitions
(a) "Person" means any individual, corporation, partnership, association or other organized group of persons, or the legal successor or representative of the foregoing.
(b) "Goods and services" shall include any and all goods and services, including but not limited to personal property, real property, automobiles, and leases, but excluding professional services.
(c) A person is a "consumer" inasmuch as he purchases or rents goods or services primarily for personal, family or household purposes, rather than for business, including farm and professional purposes. 159
(d) "Merchant" means a person who deals in goods or services or otherwise by his occupation holds himself out as having knowledge or skill peculiar to the goods or services involved in the transaction, or to whom such knowledge or skill may be attributed by his employment of an agent or broker or other intermediary who by his occupation holds himself out as having such knowledge or skill peculiar to the goods or services involved in the transaction, or to whom such knowledge or skill may be attributed by his employment of an agent or broker or other intermediary who by his occupation holds himself out as having such knowledge or skill. 160
(e) "Advertisement" means any statement, written or otherwise, on radio or television, or in a newspaper, periodical, pamphlet, circular, telephone directory or other publication, or on any sign, which reveals the existence of or gives any information about any merchant or any goods or services thereof.

§ 4. Credit and Loan Charges
(a) No merchant shall charge or attempt to charge any consumer for the sale of goods or services on credit a total credit charge, including all investigating, insurance, set up, or other fees not contingent on default, which exceeds 12% per annum.

(b) Also deemed part of the credit charge shall be the difference in any case between the retail price charged and the price charged any other customer at that time for the same or comparable goods or services, excluding sales to relatives or employees of the merchant.

(c) No merchant shall arrange or help to arrange for loans for his customers where the total charge for those loans is in excess of what he could charge for credit under subsection (a).

(d) No lender shall charge or attempt to charge any consumer an interest rate in excess of 36% per annum.

(e) No debt management service shall charge or attempt to charge a fee in excess of 6% of the total payment received by the debtor's creditors through the debt management service.

Limitations on credit and loan charges are not uncommon. In most states, however, the ceilings on loans are lower than those on credit sales, thus forcing the bad credit risk to buy on credit, to risk above-ceiling charges because of fees built into the price of the goods or services involved, and to restrict his shopping to low income areas. The reverse is true under this section. Anyone who is such a bad risk that a 12 per cent charge is not economically feasible will be forced to get a loan instead of buying on credit. In particular, most of the poor will have to use loans rather than credit. This is intended to permit and encourage low income consumers to shop for durables outside of their area, and perhaps to curb the irresponsible attitude toward financial commitments born of signing credit contracts instead of paying cash. Subsection (b) plugs the traditional loophole in credit ceilings.

Debt management or pooling services, which are presently unregulated in four out of five states, charge fees comparable to those for loans and provide in their contracts that any money received from their client must be used to pay the fee before being passed on to the creditors. Subsection (e) limits the fee for a service of such dubious value.

161. Extremely low limits on both credit and loan charges will give business to loan sharks. See Buy Now, Pay Later 150-78.
162. Id. at 142-44.
§ 5. Price Tags and Lists

(a) Merchants shall place on or conspicuously near all goods on display usually bought by consumers a tag or other label clearly stating their price.

(b) The prices of any undisplayed goods commonly purchased by consumers shall be conspicuously posted.

(c) No merchant shall sell goods or render services to any consumer at prices other than those displayed or placed on price tags, except that this provision shall not include sales to employees or relatives of the merchant or to discounts because of the quantity of goods or services purchased.

(d) This section shall not apply to watches or jewelry with a wholesale price in excess of $50.

This provision has three purposes. (1) Prevention of purposeful exploitation to or inability to evaluate the price of basic consumer goods. The merchant is forced to choose between pricing his goods for the incompetent shoppers and driving the better ones away, or pricing for the better shoppers and extending the benefit to all. A compromise by the merchant will be of value to the poor shoppers while still tending to drive away the others, thus producing pressure on the merchant to lower his prices. (2) Enforcement of the maximum credit rate provision, serving to back up section 4(b) where problems of proof or a feeling on the part of the merchant that he could “get away with it” would otherwise lead to building credit charges into varying prices. (3) Giving a notice of cost that will increase the buyer’s awareness of the actual cost of the goods or services, thus aiding those who, from shyness, blind faith in the retailer, or an unwillingness to show concern with cost, might otherwise fail to inquire as to the price before buying.

Previous legislation requiring price tags or cost lists has generally been of a narrow sort, aimed at specific businesses like hotels, motels, parking lots, and new car dealers. Although in some of these statutes there is concern to protect car-driving consumers in need of information in order to decide where to stop, the principal

163. E.g., Adams v. Miami Beach Hotel Ass’n, 77 So. 2d 465 (Fla. 1955).
165. E.g., State v. United Parking Stations, Inc., 235 Minn. 147, 50 N.W.2d 50 (1951).
167. See notes 163-65 supra.
goal is preventing the exploitation of the unwary. Such legislation often covers situations where even the most knowledgeable and motivated consumers need help; it is clearly very difficult to engage in comparative shopping for parking lots or motels when this involves each time parking one's car and making verbal inquiry. This section, on the other hand, not only provides information where an ideal middle class shopper could be relied on to get it for himself, but goes beyond informational goals to the regulation of sales practices by requiring the charging of a uniform price. Of course even "informational" statutes bar in effect if not in letter the charging of prices greater than those stated.

§ 6. No merchant shall use differences of type, size, style, location, lighting or color so as to obscure any essential information in any advertisement or sign. Essential information includes but is not limited to any part of a price which exceeds by 10% or $10 that part of the price in larger type also includes, but is not limited to, terms such as "and up" and "down" after a price. Such essential information shall be deemed obscured if, but not only if, the type of such essential information is less than 1/2 the size of any provision or statement it modifies, or otherwise less than 1/3 the largest type in that advertisement.

Although there are numerous statutes barring "misleading" advertisements, these have not been construed to cover size discrepancies. In a strikingly parallel problem area—signs on motels and hotels—there are "similar size" regulations. As with stores in low income areas, a weary traveler's first choice of a hotel is likely to be his only one. These regulations, however, are limited to the size of lettering and do not specify the standards which will pass the rather vague "similar size" test.

§ 7. Notice of Wholesale Prices

(a) Merchants shall include on the section (5) price tag the wholesale price of any item if the merchant sells the item

168. Cf. Ala. Code tit. 2 § 425(2) (held in Alabama Independent Service Stations Ass'n v. Hunter, 249 Ala. 405, 51 So. 2d 571 (1947) to be beyond scope of state police power and therefore violative of Alabama state constitution).

169. See generally 56 COLUM. L. REV. 1018 (1956).


171. In City Center Motel, Inc. v. Florida Hotel & Restaurant Comm'n, 134 So. 2d 856 (Fla. 1961), the court held that the statute had been violated when the largest lettering was visible from sixteen hundred feet, while the smallest, one-eighth the size, could only be seen from within two hundred feet of the sign.
(i) for more than one dollar and less than five dollars, and
the wholesale price is less than \(33 \frac{1}{3}\%\) of the retail price, or
(ii) for more than five dollars and the wholesale price is
less than 50\% of the retail price.

(b) In computing that wholesale price there shall be included a
sum equal to one and one half times the cost of any addi-
tional service being provided, such service not to include
any sales cost, general overhead, or any service traditionally
provided with goods of the sort in question.

(c) This section shall not apply to watches or jewelry with a
wholesale price in excess of fifty dollars.

Because of the political, economic and administrative difficulties
which such regulations would entail, the Act does not provide for
direct price controls. The notice requirement of this section is in-
tended to have the same sort of effect as direct regulations, on the
assumption that even the most inept shopper would be disgruntled to
learn that he was paying a 200 per cent markup. Since higher mark-
ups on items selling under one dollar, such as newspapers, are often
needed to make a reasonable profit, and since excesses on such items
are unlikely to do much harm, this section does not apply to goods
under that amount. For similar reasons a higher markup rate is tol-
erated for items selling for between one and five dollars.

§ 8. No merchant shall use any fraudulent scheme or technique to
sell or lease any good or service. Such prohibition shall include
but not be limited to:

(a) misrepresentation, by commission or omission, tacit or ex-
licit, oral or written, including any label or advertisement,
of
(i) the price of the goods or services,
(ii) any reduction therein,
(iii) the nature or size or quality thereof,
(iv) any other material fact, or
(v) the nature of documents being signed;
(b) the purposeful delivery of goods other than those requested
or purchased. Refusal by the merchant to take back misde-
lerived goods shall constitute prima facie evidence that the
misdelivery was purposeful.

Consumer frauds rarely result in criminal sanctions or civil liability,
in part because the statutes do not clearly define the proscribed fraudulent technique.\textsuperscript{172} This section plugs that loophole, while later provisions insure more effective enforcement than has heretofore been typical.

\section*{§ 9. Bait Advertisements}
\begin{itemize}
\item[(a)] No merchant shall purposely use any advertisement to offer any good or service when he does not intend to sell that good or service, but intends to sell instead some other good or service.
\item[(b)] The following\textsuperscript{173} shall constitute prima facie evidence of such illegal intent:
\begin{itemize}
\item[(i)] refusal to show, demonstrate or sell the good or service offered in accordance with the terms of the offer,\textsuperscript{174}
\item[(ii)] the disparagement by acts\textsuperscript{175} or words\textsuperscript{176} of the advertised good or service, or of the guarantee, credit terms, availability of service, repairs or parts, or of anything in any other respect connected with that advertised good or service,
\item[(iii)] the failure to have available at all outlets listed in the advertisement a sufficient supply of the advertised good or service to meet reasonably foreseeable demands\textsuperscript{177} unless the exact quantity of available goods or services and/or the unavailability of certain goods or services at certain outlets is stated,\textsuperscript{178}
\item[(iv)] the refusal to take orders for the advertised merchandise to be delivered within a reasonable period of time,
\item[(v)] the showing or demonstrating of an advertised product or service which is known to be defective, unusable, or unsuitable for the purpose represented or implied in the advertisement,\textsuperscript{179}
\end{itemize}
\end{itemize}

\footnotesize
\textsuperscript{172} See note 158 supra.
\textsuperscript{173} In general subsection (b) follows the FTC "Guides Against Bait Advertising," 2 \textsc{Trade Reg. Rep.} \textsection{7993} (1965).
\textsuperscript{174} \textit{E.g.}, People \textit{v.} Glubo, 5 \textit{N.Y.2d} 461, 158 \textit{N.E.2d} 699, 186 \textit{N.Y.S.2d} 26 (1959).
\textsuperscript{175} \textit{E.g.}, \textit{id}.
\textsuperscript{176} \textit{E.g.}, \textit{id}.; Electrolux Corp. \textit{v.} Val-Worth, Inc., 6 \textit{N.Y.2d} 556, 161 \textit{N.E.2d} 197 (1959);
People \textit{v.} Levinson, 199 \textit{N.Y.S.2d} 625, 23 Misc. 2d 483 (1960); National Home Food Service Co. [1963-65 Transfer Binder] \textsc{Trade Reg. Rep.} \textsection{16,617} (FTC 1963).
\textsuperscript{177} \textit{E.g.}, Walter Zulawinski, [1948-52 Transfer Binder] \textsc{Trade Reg. Rep.} \textsection{13,187} (FTC 1948); Robert W. Bailey, [1942-45 Transfer Binder] \textsc{Trade Reg. Rep.} \textsection{13,201} (FTC 1945).
\textsuperscript{179} \textit{E.g.}, People \textit{v.} Glubo, 5 \textit{N.Y.2d} 461, 158 \textit{N.E.2d} 699 (1959).

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(vi) the use of a sales plan or method of compensation for salesmen or of any plan penalizing salesmen, designed to prevent or discourage them from selling the advertised product, 180

(vii) the use of practices described in either (ii) or (v) after the sale of the advertised goods in an attempt to sell something else instead, 181

(viii) failure to make a delivery of the advertised good or to provide the advertised service within a reasonable time after the sale, together with a failure to offer a rescission of the sale and a complete refund of any sum paid by the consumer.

Although some form of "bait advertising" is banned in a number of states 182 and by the Federal Trade Commission, 183 these prohibitions have done little to curb the practice. In New York City, where bait ads are barred by both the state and the FTC, 184 such advertisements continue to flourish. 185 Enforcement of the FTC prohibition has been almost nonexistent; there has been only one case before the FTC in the last two years, 186 and former FTC Commissioner and General Counsel Kintner did not even mention this aspect in surveying the Commission's advertisement regulations. 187 State laws tend to go unenforced for several reasons. (1) State authorities, rather than looking for violations, generally wait for consumer complaints, 188 (2) Con-


182. ARIZ. REV. STAT. ch. 10, § 44-1464 (1959) (no bait ads where the goods are advertised at less than cost); CAL. BUS. & PROF. CODE §§ 17044, 17030 (1964) (no bait ads where the goods are advertised at less than cost); COLO. REV. STAT. ch. 55, § 55-2-12 (1964); N.Y. GEN. BUS. LAW § 396 (1966 Supp.); UTAH CODE ANN. tit. 13, § 13-5-8 (1953); WIS. STAT. ANN. tit. 12, § 100.30(3) (1961) (no bait ads where the goods are advertised at less than cost and the sale is thus injurious to fair competition).

183. See note 80 supra.

184. Advertisements on New York City radio and television and in New York City newspapers will be seen or heard in New Jersey, thus falling under the FTC's jurisdiction as interstate commerce. Concerning the breadth of the "interstate commerce" limitation see Bankers Securities Corp. v. FTC [1960-61 Transfer Binder] TRADE REG. REP. ¶ 29,258, at 37, 645 (FTC 1961), aff'd, 297 F.2d 403 (3d Cir. 1961).

185. See note 80 supra.


188. See, e.g., N.Y. BUREAU OF CONSUMER FRAUDS AND PROTECTION, ANN. REP. (1965). Even when violations are brought to their attention by consumer complaints these bureaus are primarily concerned with mediating the consumer-merchant dispute, rather than in prosecuting the violating party. Comment, Commercial Nuisance: A Theory of Consumer Protection, 23 U. CHI. L. REV. 590, 591 n.5 (1966).
sumers in these states do not realize bait advertisements involve a violation of the law, and it is the rare consumer who objects strenuously if the advertised goods are "out" or if the merchant tries to sell him something else instead. (3) Often the sanctions available against violators are negligible. In New York, for example, the statute only empowers the Attorney General to seek an injunction against bait advertising, which he may not succeed in doing until countless violations have occurred. The Attorney General may also seek to have the corporate charter (if there is one) revoked because of the advertisement, but in many cases the owners of the corporation may have been planning to dismantle it themselves, and they are quite free to establish a new corporation at their convenience. Although it is not possible to legislate governmental vigor, this Act does insure substantial sanctions for violations when found and provides for additional consumer incentive and knowledge essential to private and public policing.

§ 10. Peddling

(a) In the case of any sale by means of peddling the buyer may, regardless of delivery, rescind the contract by written or oral notice to the peddler or his firm if such notice (i) is received no later than or (ii) made by means of a letter postmarked no later than, (i) midnight on the next business day after the sale was made, or (ii) midnight on the next business day after the day on which the buyer is given the address to which such notice can be sent or (iii) midnight on the next business day on which the buyer is given a written notice by the seller of his right to rescind, whichever is later. In the case of goods delivered before or in spite of such notice, the buyer shall not be subject to any liability for any use or consumption of such goods occurring more than five business days after the sale.

(b) No merchant shall, by means of door to door peddling, sell any good or service on credit.

189. E.g., Lefkowitz v. Great Minneapolis Surplus Store, Inc., 251 Minn. 188, 86 N.W.2d 689 (1957).
190. N.Y. GEN. BUS. LAW § 396(b) (1966 Supp.).
192. See note 73 supra.
Subsection (b) shall apply to any sale where the merchant makes any demonstration of goods or services which are or might be sold, or where a substantial part of the negotiations leading to the sale, takes place in the home of the consumer, except where:

(i) the customer has visited the merchant's place of business and has assented to the use of his home in this manner, or

(ii) the customer is unable without substantial inconvenience to visit the merchant's place of business, and has requested the use of his home for negotiations or demonstrations without the merchant's solicitation of that request.

The "Yankee Peddler" played an important role in the economic growth of 18th and 19th century America, often being the only convenient source of manufactured goods for the rural population.\textsuperscript{193} As early as 1835,\textsuperscript{194} however, state governments became concerned with peddlers' activities and regulations were enacted. Early legislation was particularly concerned with the fact that peddlers could "unfairly" undersell local merchants,\textsuperscript{195} because they had no fixed place of business and were not subject to the same pressures: the need for goodwill and the danger of lawsuits. The peddlers were thus thought to be more likely to engage in unscrupulous and fraudulent practices.\textsuperscript{196} Other provisions regarding peddlers were prompted by the nuisance they caused housewives,\textsuperscript{197} their obnoxious ways of gaining entry to the home,\textsuperscript{198} their failure to pay taxes in the area where they worked,\textsuperscript{199} and their presence in the home.

\textsuperscript{193} J. DOLAN, THE YANKEE PEDDLERS OF EARLY AMERICA 10 (1964); see generally id., passim.
\textsuperscript{194} Cf. Higby v. People, 5 Ill. (4 Scam.) 165 (1849) (involving an 1835 statute regulating clock peddlers).
\textsuperscript{198} Sawyer, supra note 196, at 87; 95 Just. P. 600 (1932).
the inherent objectionableness of using the public highway as a place of business,200 and the possible connection between door-to-door peddling and burglaries.201

The resulting legislation took a great variety of forms. Peddlers were at times prohibited,202 licensed,203 subject to a deliberately burdensome license fee,204 forced to submit to a character test,205 compelled to put up sizeable bonds to pay taxes and civil judgments206 and even had the times when and places where they could work limited.207 Occasionally regulations or prohibitions were directed at the peddling of specific goods where abuses were felt to be especially likely or dangerous.208 With the exception of some of the blanket prohibitions enacted to protect privacy209 and of legislation discriminating against nonresident peddlers,210 these statutes were widely upheld.

This section of the Act is concerned with three aspects of peddling:

(1) **High Pressure Tactics**: Although high pressure tactics are not limited to peddlers, they are especially effective against a lone housewife trapped in her own home. It is far easier to walk out of a store when faced by an overzealous salesman than to talk an obstinate peddler into leaving one's living room,211 and, unlike store salesmen, peddlers can return at their convenience to pursue the course of brainwashing begun at an earlier time. A general restriction on peddlers is needed since problems of

201. 96 Just. P. 600 (1922).
203. E.g., ALA. CODE tit. 51, § 611 (1958); MASS. ANN. LAWS ch. 101, § 3 (1945).
204. E.g., ARIZ. REV. STAT. § 42-1136 (1956) ($200 per county per year for a peddler using a car); ALA. CODE tit. 51, § 611 (1958) ($100 per county per year for peddlers of medical supplies); IDAHO CODE § 31-1303 (1963) ($300 per county per year for a peddler using a car). See *Ex parte* Heylman, 92 Cal. 492, 28 P. 675 (1891) (upholding a $300-per-year fee for meat peddlers when vegetable peddlers paid only $46 per year).
205. E.g., ARIZ. REV. STAT. § 42-1136 (1956).
206. E.g., ARK. STAT. § 84-2406 (1960) ($500 for fees and taxes, $1000 for penalties for fraud against the public); IDAHO CODE §§ 31-1303, 1306 (1963) ($500 for taxes and tort and contract judgments arising from business in the county); MASS. ANN. LAWS ch. 101, § 8 (1954) ($200 for fines, penalties, and civil judgments).
208. E.g., IND. STAT. ANN. § 63-1010(d) (1962) (eye glasses, eye examinations and all optometric services); MASS. ANN. LAWS ch. 101, § 16 (1954) (jewelry, furs, wines and liquors, small artificial flowers, miniature flags); DEL. CODE ANN. tit. 16, § 2501 (1953) (contraceptives).
209. E.g., City of Osceola v. Blair, 231 Iowa 770, 2 N.W.2d 83 (1942); City of Mt. Sterling v. Donaldson Baking Co., 287 Ky. 781, 155 S.W.2d 237 (1941); DeBerry v. City of LaGrange, 62 Ga. App. 74 (1940). For comment on the constitutional problems see Sawyer, supra note 196.
210. E.g., *Ex parte* Deeds, 75 Ark. 542, 87 S.W. 1030 (1905).
211. Cf. THE POOR PAY MORE 143.
definition and proof would make a provision directed at high pressure tactics\textsuperscript{212} unenforceable if not incomprehensible.

(2) \textit{Inconsistency with the Principle of Comparative Shopping:} The inherent incompatibility of peddling with the idea that consumers should “shop around” before buying was explained years ago by no less a friend of the peddling industry than the founder and president of the Fuller Brush Company. Speaking of a sort of consumer who is regrettably rare in even middle income areas, A. C. Fuller remarked:

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

This shopping impulse arises the moment she considers buying anything, and the house-to-house salesman \textit{must stifle it}, if he can. He is giving his customer no opportunity to compare values or to postpone buying. “Do it now,” he tells her, “I won’t be back this way for a couple of months.” She buys, when she buys, against an inner voice of discretion which tells her to wait until she can compare values.\textsuperscript{213}

The Act will provide protection for the majority of housewives for whom that voice has grown soft or been silenced altogether.

(3) \textit{High Peddler Prices:} The level of peddler prices resulting from high pressure tactics, lack of comparative shopping, and deliberate exploitation is described above. To the limited extent that the higher prices represent payment for conveniences such as the avoidance of dealing with unfamiliar salesmen, the policy of the Act is that these are conveniences which most people, particularly the poor, simply cannot afford, and which, in any case, are impossible to distinguish administratively from the other factors causing the high price levels.

The subsection (a) “cooling off period” is similar to laws already in force in Massachusetts\textsuperscript{214} and the United Kingdom.\textsuperscript{215} It differs from

\textsuperscript{212}. \textit{But cf.} 79 \textsc{Harv. L. Rev.} 1299, 1300 (1966).

\textsuperscript{213}. Fuller, \textit{Where Are We Headed in House-to-House Selling?}, 52 \textsc{Magazine of Business} 703, 705 (1927), quoted in part in Sawyer, \textit{supra} note 196, at 92. See the same problem as viewed from a non-business perspective in \textit{Some Notes on Selling (And Buying): In-the-Home Nuisances}, 20 \textsc{Consumer Reports} 435 (1955).

\textsuperscript{214}. Mass. Retail Installment Sales and Services Act, § 9(D)(6), 1A C.C.H. \textsc{Instal. Credit} Guide (Mass.) § 1162, at 27,775 (1966).

\textsuperscript{215}. Hire-Purchase Act 1964, ch. 53, §§ 4-9.
them in two respects: (1) the cooling off period cannot begin until the buyer knows where he ran reach the seller to notify him of the rescission, and (2) it destroys any incentive the seller might have to deliver the goods despite the subsection in the hope of collecting their price because the consumer did not know his rights. Even so modified this sort of provision will not be sufficient by itself to protect the poor from peddlers. It deals with a very limited sort of problem: the peddler’s use of a sales technique which will wear off within the length of time provided for cooling off. But the opportunity provided for a fast-moving consumer to rescind his contract will often not be used by the more undermotivated and ill-informed of the poor. The provision does not deal with several of the principal causes of excessive peddler prices. It is most unlikely that in the cooling off period many consumers will come to dislike their “friend” the peddler, to find another source of easy credit, or to discover by comparative shopping that similar goods can be purchased elsewhere for less.

Because of the limited value of provisions such as subsection (a), stronger measures are needed. Since most door-to-door sales to the poor are on credit, this is added by the subsection (b) prohibitions against credit sales by peddlers.

The section is designed to minimize the interference with unobjectionable door-to-door methods. Cash sales predominate in middle income area peddling; neither of the two largest firms engaged in “direct selling” offers credit. Subsection (c) is designed to include certain operations of firms, particularly large department stores, in both middle and low income areas; consumers are encouraged to engage in comparative shopping by being forced to visit a firm before they can obtain from it a “home demonstration.” In some cases this will render such a demonstration, with the attendant risk of high pressure tactics, unnecessary, at least from the consumer’s point of view.

§ 11. No merchant shall include in any advertisement any information concerning the size of credit or down payments, or the date on which credit payments will begin, unless he also specifies:

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(a) The cost of the credit, in terms of simple annual interest,
(b) The total cash cost of the credit for any advertised good or service, and
(c) The total cost, including the credit costs, of any good or service which the advertisement states or implies can be bought on credit.

If, in the case of (a), (b) or (c) there is a range of costs, the merchant shall specify both the upper and lower limits of that range, and shall not emphasize the lower limit.

Since low income consumers have a strong tendency to buy at the first store they enter, in part because of the high pressure techniques of salesmen, the criteria by which that first store is chosen are crucial. If the store is picked because of the "ease" of its credit terms, a purchase is likely regardless of the price or quality offered. If, however, the store is chosen because it advertises low prices, there is not likely to be a sale unless the right credit terms are offered. This section is designed to increase the chance that the consumer will get more than just easy credit terms by helping him to choose the first store he visits (to the extent that he is choosing by signs or advertisements) by some fact about the store or its goods and services other than easy credit terms.

There is some precedent for regulating the content of advertisements and signs in order to affect which stores or offices people decide to patronize and why. Commonly, advertising by members of the medical profession, including dentists, and especially optometrists, is strictly regulated. Particularly frequent are prohibitions against publicizing prices. Like the problem of prices and credit, this is an area where the first "merchant" chosen is likely to be patronized, at least for a while; the policy of these statutes is that while price, like credit in most retail sales, is certainly important, it can be relied upon to take care of itself while the law helps people choose their optometrist, etc., on the more important ground of professional ability. Statutes barring price advertisement also frequently bar advertising credit and

221. Id.
222. Id. at 813: "The obvious purpose of this prohibition is to prevent 'bait' advertising, whereby prospective customers are attracted to an optometrist for reasons other than his professional ability."
223. See note 220 supra.
have been held to prohibit even a reference to “convenient credit
terms.”

§ 12. Violation of this Act shall constitute a misdemeanor. The
violator shall be fined up to (i) §1000 or (ii) the price charged for all
goods and services sold in violation, or (iii) twice the total loss suffered
by the consumers affected, whichever is greater, but no less than twice
the loss suffered by the consumers affected. The loss suffered shall
equal the sum of the difference between the price paid by each affected
consumer for the goods and services involved and the fair market value
of those goods and services.

The minimum fine clause is provided to prevent emasculation of
the Act by permissive courts, and to insure that violations if discovered
are not profitable.

§ 13. Injunctions

(a) On proof by (i) a consumer in the area, (ii) a consumer
affected by the violation, (iii) a merchant in the area, (iv) a
merchant affected by the violation, or (v) the Attorney Gen-
eral, of a continuing violation of this Act, an injunction shall
be issued by any court of competent jurisdiction at the re-
quest of any such party prohibiting such violation. Such
injunction shall issue without proof of irreparable injury.

(b) On proof by (i) a consumer in the area, (ii) a consumer
affected by the advertisement, (iii) a merchant in the area,
(iv) a merchant affected by the advertisement, or (v) the At-
torney General, of a false or misleading advertisement, an
injunction shall be issued by any court of competent jurisdic-
tion at the request of any such party, providing that
the merchant responsible for such advertisements shall
obtain at his own expense advertisements which
(i) admit the false or misleading nature of the earlier
advertisements,

(ii) correct the misinformation in those earlier advertise-
ments,

(iii) are of sufficient number and duration to obtain pub-
licity at least as great as that obtained by the earlier
advertisements, and

224. Louisiana State Bd. of Optometry Exam. v. Pearle Optical, 177 So. 2d 164 (La.
1965).
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(iv) are of a type as similar as possible to the earlier advertisements.

An injunctive remedy has been provided for in other consumer legislation both at the request of the state and at the request of any party being injured. Ignorance, failure to bring suit, limited violator resources and problems of proof will always keep the forfeiture provision from righting all wrongs committed in violation of this Act. Where fear of punishment is not enough to prevent such violations, injunctions should be available and used whenever possible.

§ 14. Licenses and Charters

(a) Violation of any part of this Act shall constitute sufficient basis for
(i) revocation or denial of, or refusal to renew, any license related to business activity in the course of which the violation occurred,
(ii) dissolution or refusal to renew the charter of any corporation in the course of whose business the violation occurred, or
(iii) refusal to grant a corporate charter to a firm largely staffed and/or controlled by persons guilty of a previous such violation,
by the authority empowered to issue, deny, dissolve, revoke or refuse to renew such charter or license.

(b) Conviction of violation shall be conclusive proof thereof for purposes of this section, but the violation may be proved in the absence thereof. Acquittal of an alleged violation shall not bar the appropriate authority from finding a violation and affecting any charter or license accordingly.

(c) In determining whether to take the action authorized in subsection (a), the authorities concerned shall consider:
(i) the accidental or purposeful nature of the violation,
(ii) the amount of injury caused by the violation,
(iii) the extent to which the party committing the violation has voluntarily remedied any such harm,
(iv) the number and nature of any previous violations by the violating party, and

225. See note 158 supra.
Denial or suspension of licenses or corporate charters has been widely used to supplement penalty provisions in other laws. In New York, where the original "bait advertisement" law only provided for an injunctive remedy, the Attorney General has used it to obtain revocation of corporate charters.\textsuperscript{227} Unfortunately charter revocation is only an effective deterrent against reputable firms unlikely to violate the law anyway; corporations of a less certain character are frequently dissolved anyway, its owners often returning to business with a new corporation and a new name.\textsuperscript{228} For such cases the section makes difficult the acquisition of a new charter by persons involved in earlier violations.

\$15.\text{ Civil Remedies}

(a) Except as provided below, in the case of any sale or loan involving or resulting from a violation of any provision of this Act, the goods and/or services in the case of a sale, and the total amount of any loan, shall be forfeited to the buyer, and any payments for such goods, services and/or loan shall be returned to the buyer.

(b) Holders in Due Course

(i) In a suit by a holder in due course against a buyer, the buyer may join the merchant if the buyer has a claim against the merchant arising out of a sale pursuant to which the note being sued upon by the holder in due course was executed.

(ii) If both the buyer and the holder in due course succeed in their claims,

(1) the buyer shall only be liable to the holder in due course to the extent that the judgment of the holder in due course exceeds that of the buyer,

(2) the merchant shall only be liable to the buyer to the extent that the buyer's judgment exceeds that of the holder in due course,


\textsuperscript{228} See note 73 supra.
(3) the merchant shall be liable to the holder in due course for the amount of the judgment in favor of the holder in due course or for the amount of the buyer's judgment, whichever is less.

(iii) If for any reason the buyer cannot with reasonable effort join the merchant in accordance with section 15(b)(i), any defense which the buyer would have had against the merchant may be raised against the holder in due course.

(c) In the case of advertisements in violation of section 9(b)(iii) (bait advertisements, too few of advertised goods or services available), any disappointed customer who came to the place of business shall be entitled to the difference between the advertised price and the going rate for the goods or services advertised.

(d) In the case of violations of section 6 (price tags) this section shall only apply where either
   (i) the buyer was charged more than 10 per cent or 10 dollars more than the price tag or posted price, or
   (ii) the buyer was charged at least 10 per cent or 10 dollars (whichever is less) more than another buyer other than an employee or relative of the merchant or quantity purchaser.

(e) In all cases where the buyer or offeree successfully invokes this section, either as a defense, counterclaim, or an independent cause of action brought by himself, he shall be entitled to reasonable costs and attorney's fees.

(f) The right of any person to bring suit under the terms of this Act or to recover reasonable costs or attorney's fees shall not be affected by his failure to raise that right by way of a counterclaim or cross-claim in any earlier suit brought against him in which a default judgement was entered against him.

(g) Previous convictions
   (i) A previous conviction or plea of guilty or nolo contendere by the merchant shall constitute conclusive proof in any civil suit brought under this section of the violation alleged in the indictment.
   (ii) In the event of such a conviction or plea the Attorney General shall notify any consumer whose rights may reasonably be expected to be affected thereby of such plea
or conviction and of the possible right to damages available to such consumer.

(h) In the event of a conviction involving a court finding of a pattern or practice of violation, the Attorney General may post a notice thereof in any place of business of the merchant where such violation was shown to have occurred. Such notice shall state the violation of which the merchant was convicted and the effect of that conviction on the rights of his customers. Such notice shall remain posted no longer than is reasonably necessary to assure that most of the affected customers will see it and in no case longer than six months.

(i) The Attorney General shall publicize the existence of this section and of the rest of this Act.

There are four basic reasons for this section:229 (1) Because of government laxness or graft the criminal provisions may tend to go unenforced for want of a significant effort to put them into effect. (2) In many cases where effective enforcement would be impossible without consumer cooperation, there are substantial deterrents to such cooperation. This section will alter that situation. (3) The forfeiture will have a significant deterrent effect, one which cannot be emasculated by a court's unwillingness to mete out substantial punishment for violations.230 (4) Any form of consumer protection policed only by the government will suggest to low income consumers that their problems are for the government to solve. Giving consumers a policing role will increase their motivation for both improved personal shopping habits and community action techniques.

Under some existing laws, sales and loans in violation of consumer protection legislation are unenforceable.231 The principle is carried over in subsection (a) with one significant modification. Under similar provisions or case law the consumer is only protected to the extent that the merchant is prevented from collecting more money. The consumer's rights are made to depend on the basically irrelevant factor of when he happened to default and force the merchant to take him to court. It is unjustifiable that the extent of the consumer's protection


230. See note 158 supra.

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and the merchant's civil liability should vary so widely and so gratuitously.

In the absence of subsection (b) there would in each case be two suits; the holder in due course would get his money from the consumer, who would in turn sue the merchant. Subsection (b) avoids such a multiplicity of suits by a liberal joinder rule, and also protects the consumer who might otherwise be without effective remedy against either the holder in due course or the merchant. The effect of the subsection will be to shift back through the financing institution to the merchant the ultimate risk of the merchant's failure to live up to agreements within the confines of the law.

Generally the advertisements of a retail merchant are not regarded in contract law as offers, but as invitations to bargain; there have, however, been cases where an advertisement was held to constitute an offer. In many cases the advertisement is so construed where the acceptance involves more than a verbal assent, such as when the offeree makes a purchase upon which the offer is conditioned. There are also cases holding an advertisement to constitute an offer where the offeree only appeared at the store and tendered the purchase price. This latter point of view seems more sensible, since in the case of most retail advertisements there is nothing to "bargain" about, and it is followed in subsection (c). To talk of "invitations to bargain" in such cases is to overextend notions appropriate to non-consumer transactions. Since the purpose of section 9(b)(iii) is to prevent stores from luring customers into the place of business with one offer and then selling them something else, this subsection only applies where the customer actually comes to the place of business. The limitation also reflects a concern to compensate the customer, albeit generously, for his trip to the store, but not to do so for the negligible inconvenience of a telephoned "acceptance." The provision's measure of damages follows the common law, according to which timely acceptance of an offer entitled the offeree on default to the difference between the market value and the advertised price.

232. See note 136 supra.
233. J. A. Corbin, Contracts § 25, at 75 n.16 (1950).
234. Johnson v. Capital City Ford Co., 85 So. 2d 75 (La. App. 1956) (offeree purchased a 1954 Ford after offeror promised to exchange a 1955 Ford for a 1954 Ford purchased within a limited period); Carlill v. Carbolic Smoke Ball Co., 1 Q.B. 236 (1893) (offeree purchased a smoke ball after an offer by the manufacturer to pay £100 to anyone catching influenza after using the smoke ball).
235. Lefkowitz v. Great Minneapolis Surplus Store, 251 Minn. 188, 86 N.W.2d 689 (1952) (a $139.50 stele advertised for $1) and cases cited 251 Minn. at 190-91, 86 N.W.2d at 691.
236. Id. at 189, 86 N.W.2d 690; Restatement of Contracts § 329, comment b, at 504 (1938).
As a general rule attorney's fees are not given in the United States in the absence of a special court rule, statute, or valid contract provision. In order to facilitate private suits a number of statutes do give plaintiffs such fees, either in all cases arising under the statute or according to the discretion of the trial judge. Subsection (c) is most similar to the mandatory reasonable attorney's fees provision of the Clayton Act, where private suits are encouraged to help enforce the more general commands of the statute. There is clearly no reason to limit such fees to cases where the consumer is the plaintiff, particularly as this would encourage a multiplicity of suits.

Subsection (f) is intended to solve the problem of sewer service and default judgments generally in cases where the merchant has violated the Act by enabling the consumer to acquire a judgment against him of at least an equal amount. However, the Federal Rules of Civil Procedure and the rules of sixteen states provide that counterclaims arising from the facts underlying a suit must be raised at that suit or be lost. Five other states prohibit the defendant who failed to raise such a counterclaim from collecting costs in a later suit. In view of the extensive problem of default judgments in suits involving the poor, the purpose of the section would largely be defeated if such default judgments would bar any civil claims arising from violations of the Act in the sale on which the default judgment was obtained.

Subsection (g) follows the federal anti-trust laws and is included to encourage and facilitate private suits.

§ 16. No waiver of rights created by this Act shall be binding upon any party, regardless of whether the alleged waiver was in writing or for consideration.

§ 17. Nothing in this Act shall be construed as to impair or affect any contract, agreement or negotiable instrument existing or any

242. FED. R. CIV. P. 13(a).
244. Id. at 426-27.
events occurring before, or to create any cause of action or criminal liability because of events taking place entirely prior to the effective date of this Act.

§ 18. The provisions of this Act shall only apply to transactions involving advertisements directed to consumers, except that the Act shall apply to any buyer or offeree regardless of the purpose to which he put or intended to put the goods or services offered or sold where that buyer was not prior to his first contact with the seller or offeree engaged in a business to which the goods and services were directly related.

The idea that complete freedom of contract will generally lead to equitable agreements makes substantial sense, if anywhere, only within the business community, where bargaining power is more equally distributed, de facto monopolies less common, and buyers and lessors generally both more motivated and better informed than is the case when consumers are involved. This generalization cannot, however, be extended to the individual who first evinces an interest in some line of business in response to the advertisements or solicitations of a merchant who hopes to sell him the "necessary" equipment or franchises. Thus in People v. Abbott Maintenance Corp., the defendant enticed a large number of people to his place of business in the guise of offering opportunities for employment in floor waxing, and having gotten them there proceeded instead to enter into a large number of installment contracts for the sale of waxing machines worth $102.90 for $936. Abbott took no further part in the "business" of floor waxing, and the machines were inadequate for the commercial purposes for which they were sold. Such cases are not uncommon and clearly should fall under the protection of the Act.

§ 19. Attorney General Reports and Studies

(a) The Attorney General shall annually submit a report to the legislature detailing:

(i) the efforts that have been made at enforcing the provisions of this Act,
(ii) the number and outcome of civil and criminal suits

245. See the special treatment of transactions "between merchants" in the Uniform Commercial Code (1958).
brought or reaching conclusion during the year and involving violations of this Act,

(iii) efforts done to publicize the provisions of this Act among merchants and consumers,\(^{248}\) and

(iv) recommendations of any additional legislation needed to protect and assist the consumers of this state.\(^ {240}\)

(b) From time to time the Attorney General shall conduct studies to determine the extent to which consumers, especially those of limited means, are aware of their rights under this Act.

§ 20. Nothing in this section 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, or sign maker, who broadcasts, publishes, or prints advertisements or makes signs which constitute or are part of a violation of this Act, unless such person has actual knowledge of the violation.\(^ {250}\)

§ 21. Repeal

(a) ... and all Acts and parts of Acts whether general, special or local, which relate to the same subject matter as this Act, so far as they are inconsistent with the provisions of this Act, are repealed.

(b) Notwithstanding any previous laws to the contrary, the Attorney General may effect such modification in the organization of the Department of Justice as he deems will substantially aid the enforcement of this Act.

§ 22. If any clause, sentence, section, provision, or part of this Act shall be adjudged to be unconstitutional or invalid for any reason by any court of competent jurisdiction, such judgment shall not invalidate, impair or affect the remainder of this Act, which shall remain in full force and effect.

\(^{248}\) See statement of Miss Gladys Aponte, \(\supra\) note 48.

\(^{249}\) Compare \(\text{CAL. Gov't Code} \S\S\ 12030-57\) (West, 1963); \(\text{Consumer Frauds, 114 U. PA. L. REV. 395, 431\ (1966); Draft of Executive Order Establishing a New York City Council on Consumer Affairs, \S 5(g), March 1967, on file in Yale Law Library.}

\(^{250}\) Compare \(\text{N.Y. GEN. BUS. LAW} \S 396(1)\) (Supp. 1966).