

Sixth Floor
1250 H Street, N.W.
Washington, D.C.
20005-5937
(202) 626-3463
FAX (202) 626-3453

Sections EventLine
(202) 626-3455

SECTIONS

THE DISTRICT OF COLUMBIA BAR

TO: Board of Governors
Steering Committee Member Designated to Receive Public
Statements

FROM: Carol Ann Cunningham *Carol Ann*

DATE: September 23, 1997

SUBJECT: EXPEDITED PUBLIC STATEMENT by the Antitrust, Trade
Regulation and Consumer Affairs Section report with
recommendations to the "Public Roundtable on the Business
Regulatory Reform Commission's Recommendations on Improving
Business Regulation in the District of Columbia"

**48-hour Expedited Consideration Requested on behalf of the
Antitrust, Trade Regulation and Consumer Affairs Section**

Enclosed for your review is a one-page summary of a public statement prepared by the Antitrust, Trade Regulation and Consumer Affairs Section. Copies of the full public statement will be provided upon request by calling the Sections Office at the phone number above. If you wish to have this matter placed on the next Board of Governors' agenda on Tuesday, October 14, please call me by 5:00 p.m. on Thursday, September 25, 1997.

Please note that according to the Guidelines on public statements (pp. 30-39), your telephone call "must be supplemented by a written objection lodged within seven days of the oral objection."

Enclosure

cc: w/full public statement:
Carolyn B. Lamm, Esq.
Andrew H. Marks, Esq.
Daniel F. Attridge, Esq.
Thomas N. Bulleit, Esq.
Shelley G. Robinson, Esq.
Katherine A. Mazzaferri, Esq.
Cynthia D. Hill, Esq.
Carol Ann Cunningham



Thomas N. Bulleit Jr.
Chair, Council on Sections

Shelley G. Robinson
Vice Chair,
Council on Sections

Carolyn B. Lamm
D.C. Bar President

Andrew H. Marks
D.C. Bar President-Elect

Katherine A. Mazzaferri
D.C. Bar Executive Director

Cynthia D. Hill
D.C. Bar Assistant
Executive Director,
Programs

Carol Ann Cunningham
Sections Manager

**BEFORE THE
COUNCIL OF THE DISTRICT OF COLUMBIA
Public Roundtable on the
Business Regulatory Reform Commission's
Recommendations on Improving Business Regulation in the
District of Columbia**

**REPORT OF THE CONSUMER AFFAIRS COMMITTEE OF THE
ANTITRUST, TRADE REGULATION AND CONSUMER AFFAIRS SECTION
OF THE DISTRICT OF COLUMBIA BAR**

**D.C. Bar Antitrust, Trade Regulation and
Consumer Affairs Section**

Emily B. Myers, Chair
Deborah M. Zuckerman, Vice-Chair
Andrew D. Eskin
Marc Gary
Pamela B. Gilbert
Ray V. Hartwell III
Lisa Jose Fales
Lewis A. Rivlin
Andrew J. Strenio, Jr.

Principal Authors:

Margaret M. Leonard
Carl Messineo
Mark Steinbach
Mara Verheyden-Hilliard

STANDARD DISCLAIMER

The views expressed herein represent only those of the Antitrust, Trade Regulation and
Consumer Affairs Section of the District of Columbia Bar and not those of the D.C. Bar or of its
Board of Governors

SUMMARY OF COMMENTS

The Consumer Affairs Committee of the Antitrust, Trade Regulation and Consumer Affairs Section has prepared a report entitled "Consumer Protection in the District of Columbia Following Suspension of DCRA Enforcement of the Consumer Protection Procedures Act: Report with Recommendations." The report was originally intended for submission to the D.C. City Council as well as the D.C. Financial Responsibility and Management Assistance Authority (the Control Board) and other interested agencies.

The D.C. City Council has announced a "Public Roundtable on the Business Regulatory Reform Commission's (BRRC) Recommendations on Improving Business Regulation in the District of Columbia." The roundtable consists of three public hearings, the first of which will be held on September 29, 1997. This hearing will address business licensing and registration; business inspections; and automation and dedicated funding for the Department of Consumer and Regulatory Affairs.

The Antitrust, Trade Regulation and Consumer Affairs Section would like to submit the Report at the September 29 hearing. The report, which was drafted over the course of the past year, does not respond to specific findings in the BRRC report, but addresses the same issues. The Steering Committee requests **expedited review** of the report because sign-up to present testimony closes 24 hours before the hearing.

The report recommends revival of core consumer protection enforcement by the Department of Consumer and Regulatory Affairs (DCRA). Such enforcement was suspended under cost-saving legislation that was enacted in 1994 and will expire in 1998. The legislation amended the Consumer Protection Procedures Act (CPPA), the law under which District citizens were entitled to redress of consumer complaints through DCRA and under which they have a private right of action in consumer cases through Superior Court.

The report recommends revival of DCRA consumer protection enforcement by a small staff dedicated solely to consumer protection matters. To enhance DCRA's ability to provide meaningful enforcement despite limited resources, and to support the consumer's private right of action, the report recommends the following measures: Provide DCRA with discretion in determining which consumer cases to pursue, as opposed to a monetary "cap" limiting the number of cases DCRA must address; "private attorney general" legislation, whereby DCRA could "deputize" private counsel to represent both individual complainants and DCRA; statutory provision for minimum damages to a consumer injured by a merchant's deceptive or unfair practices; and increased bond requirements for motor vehicle dealers and home improvement contractors.

**Consumer Protection in the District of Columbia Following Suspension of DCRA
Enforcement of the Consumer Protection Procedures Act:
Report with Recommendations**

Executive Summary

The Antitrust, Trade Regulation and Consumer Affairs Section of the D.C. Bar recommends revival of core consumer protection enforcement by the Department of Consumer and Regulatory Affairs (DCRA). Such enforcement was suspended under cost-saving legislation that was enacted in 1994 and will expire in 1998. The legislation amended the Consumer Protection Procedures Act (CPPA), the law under which District citizens were entitled to redress of consumer complaints through DCRA and under which they have a private right of action in consumer cases through Superior Court. The Section recommends revival of DCRA consumer protection enforcement by a small staff dedicated solely to consumer protection matters. To enhance DCRA's ability to provide meaningful enforcement despite limited resources, and to support the consumer's private right of action, the Section recommends the following measures: Provide DCRA with discretion in determining which consumer cases to pursue, as opposed to a monetary "cap" limiting the number of cases DCRA must address; "private attorney general" legislation, whereby DCRA could "deputize" private counsel to represent both individual complainants and DCRA; statutory provision for minimum damages to a consumer injured by a merchant's deceptive or unfair practices; and increased bond requirements for motor vehicle dealers and home improvement contractors. The Antitrust, Trade Regulation and Consumer Affairs Section offers its assistance to the City Council and to the District of Columbia Financial Responsibility and Management Assistance Authority in its consideration of this and other consumer-related legislation. The Section welcomes input regarding additional measures that might be taken to aid D.C. consumers.

I. Background

The District of Columbia is among many jurisdictions that have reduced or eliminated services to consumers because of budget shortages.¹ In the context of reductions in government services, citizens increasingly must rely on self-enforcing statutes and a private right of action through the court system to obtain redress for consumer complaints. In the District as well as elsewhere, these complaints are both numerous and substantial, involving unfair and deceptive trade practices and other violations of law in, for example, home improvement contracting, automobile sales and repair, credit, and many other cases. Of particular concern in the District is the effect on consumers with low to moderate income of chronic exploitation by unscrupulous merchants. A single transaction may leave a consumer without a vehicle with which to drive to work, with an overwhelmingly high interest loan, or even homeless as a result of a transaction in which home equity was unknowingly placed at risk. Further complicating the problem is the increasing frequency with which dishonest

¹See "Dark Days for Consumer Agencies," *Consumer Reports* (May 1993).

merchants exposed or even prosecuted successfully in one jurisdiction move to another and resume operation under a different name.²

II. History of Consumer Protection in the District of Columbia

The Department of Consumer and Regulatory Affairs Office of Compliance was established by statute in 1976 to receive and investigate complaints from consumers of services provided or goods sold by businesses operating in the District. Complaints were mediated or, if unresolved, litigated by the government before the Department's Office of Adjudication. In effect, District citizens were provided with investigative and legal services with which to pursue consumer complaints. While the demand for the services at times exceeded the Department's ability to resolve complaints quickly, strategies were implemented in the early 1990s to pursue large numbers of complaints against the same merchant. By 1993, Office of Compliance recorded for the year over 2,000 of 3,447 consumer complaints closed and a cost savings to consumers of over \$1.5 million dollars in refunds and judgments.³ To a significant extent, the high volume of complaints filed annually, ongoing staff reductions, and lack of discretionary enforcement authority hindered the Department's abilities to meet the needs of District citizens in this area.

On December 8, 1994, the D.C. Council's Consumer and Regulatory Affairs Committee issued a report that included, among other cost-saving measures, a proposal to suspend for three years DCRA enforcement of the Consumer Protection Procedures Act (CPPA) and the Automobile Consumer Protection Act of 1984. In response to this proposal, the D.C. Bar's Antitrust, Trade Regulation and Consumer Affairs Section sent a letter on December 19, 1994 to then-Council-Chairman Clarke and Councilmembers (attached), urging that the Council not suspend all enforcement efforts, but rather use DCRA's limited resources in ways that would preserve core functions essential to public safety and a viable business environment. On December 29, 1994, emergency legislation took effect that included the suspension until October 1, 1998, of DCRA's consumer protection enforcement. The December 1994 suspension of these services was followed by elimination of 12 employee positions supporting consumer protection in March 1995 for a cost savings of some \$300,000.

In March 1995, the Section received responses to its December letter from Council Chairman Clarke and Councilmember Lightfoot, both of whom expressed interest in a proposed D.C. Bar Task Force to examine consumer protection and other DCRA issues. The Task Force, assembled through the Section's Consumer Affairs Committee, undertook a number of community outreach and education projects in an attempt to fill some of the void created by budget cutbacks. The Task Force also undertook to examine issues raised by the suspension of DCRA enforcement of these consumer

²See Shut Down in Va., Store Owner Opens Md. Shop," *The Washington Post*, March 15, 1997.

³"DCRA Consumer Protection--Then, Now and Future: DCRA CPPA Statistics," Miriam Hellen Jones, Esq., Chief, Office of Compliance, DCRA, January 30, 1997, D.C. Bar Program, "The State of Consumer Protection in the District of Columbia."

protection laws, evaluate the impact of the budget cuts on consumer protection in D.C., and make and develop recommendations, including proposed legislation.

This report is the result of the Section's efforts. It contains the Section's findings regarding existing problems faced by D.C. consumers, a description of some practical measures taken by the Section to help D.C. consumers, and recommendations for specific legislative measures that, at little or no cost to the District of Columbia, will significantly improve consumers' ability to pursue their private right of action in consumer cases. It is the view of the Section that certain legislative measures can also serve as a substantial deterrent to deceptive and unfair trade practices that otherwise may be unchecked in the absence of DCRA enforcement of the Consumer Protection Procedures Act.

Specific interim measures taken by the Task Force to aid D.C. Consumers include the following:

- Call-In Radio Program on Automobile Consumer Protection Issues, February 1995
- Community Outreach Program on Consumer Rights and Remedies under the Consumer Protection Procedures Act and the Automobile Consumer Protection Act of 1984, May 1995
- Call-In Radio Program on the Suspension of DCRA Enforcement, Derek McGinty Show, WAMU, Spring 1996
- Developed and distributed an updated pamphlet on how to proceed with a case in Small Claims Court, Spring 1996
- Developed and distributed an updated list of alternative resources for citizens with consumer problems (i.e., legal clinics, government agencies and other organizations that provide assistance with consumer cases), Spring 1996
- Worked with D.C. Appleseed Center for Law and Justice, the Better Business Bureau, and DCRA to direct consumer complainants from DCRA to the Better Business Bureau for mediation or possible referral for litigation, or to Small Claims Court, as appropriate, Summer 1996
- Implemented an internet web site for consumer issues with information on using Small Claims Court in D.C. and on the laws governing motor vehicles, Fall 1996
- Surveyed legal services providers and other consumer advocates to determine effect of suspension on D.C. consumers, Winter 1996-97
- D.C. Bar Program and discussion of current D.C. consumer problems and possible solutions, January 1997

III. Current DCRA Services Benefit Consumers But Provide No Redress

The Office of Compliance continues to investigate business license applicants and complaints of unlicensed activity, conduct investigations of occupational and professional licensees at the request of the Boards and Commissions, survey businesses for compliance with regulations, and issue tickets for violations under the Civil Infractions Act. The Office's primary goal is to bring businesses into compliance with District of Columbia laws. It conducts follow-up visits to businesses that have been issued certificates of occupancy in order to confirm that the business is in compliance with all licensing requirements. It conducts and participates in seminars and training sessions to inform businesses and citizens of regulatory requirements. Other limited consumer protection enforcement

is performed by the Weights and Measures Branch, the Food Protection Branch, and the Alcoholic Beverage Control Division of DCRA's Business Regulation Administration. Although these services provide certain benefits to consumers, mainly by setting and enforcing standards for goods and services providers, they do little to help individual consumers when problems arise, and do not provide an avenue for redress of individual consumer complaints against D.C. businesses.

IV. Consumers' Private Right of Action Under the CPPA and ACPA

Under the CPPA, consumers retain a private right of action against merchants who commit unlawful trade practices. These cases may be brought in D.C. Superior Court, 500 Indiana Avenue, N.W. Claims of up to \$5,000 may be filed in Small Claims Court. For mediation and possible referral for litigation, consumers may call the Better Business Bureau at (202) 393-8000.

V. 1997 -- The State of Consumer Protection in the District of Columbia

On January 30, 1997, the Consumer Affairs Committee of the Antitrust, Trade Regulation and Consumer Affairs Section held a forum on "The State of Consumer Protection in the District of Columbia." Panelists from Department of Consumer and Regulatory Affairs (DCRA), Neighborhood Legal Services Program (NLSP), Superior Court's Multi-Door Dispute Resolution Division, Better Business Bureau of Metropolitan Washington (BBB), and United Planning Organization (UPO) described their work on behalf of D.C. consumers as well as the gaps in consumer protection facing D.C. residents. They also described problems their organizations face as the result of reduced government, Legal Services Corporation, and other funding. A discussion moderated by Mark Steinbach of O'Toole, Rothwell, Nassau & Steinbach generated suggestions of possible solutions for consumers' most pressing needs.

Miriam Hellen Jones, Chief of DCRA's Office of Compliance, described DCRA's posture with respect to the suspension of CPPA enforcement. She stated that under the then-current plan for reorganization, there would be no employees to revive the suspended program; therefore, that office planned to draft legislation to eliminate the role of government, other than the injunctive powers of the Office of the Corporation Counsel, in the CPPA. She also described DCRA regulatory enforcement that, while it does not provide redress for consumer complainants, does benefit D.C. consumers.

Roy L. Pearson, NLSP's Assistant Deputy Director for Legal Operations, described the severe reduction in services by that organization, necessitated by drastic cuts in Legal Services Corporation funding. Reductions included the closing of all but three neighborhood offices and consolidation of many services in NLSP's Fourth Street, N.W., center.

Proposed possible solutions included the following, among others: Miriam Hellen Jones suggested that attorneys and other advocates should, in conjunction with business groups, identify regulations that need modernizing, draft legislation, and lobby for their passage and implementation; Dave Johnson, Director of Operations of the BBB, suggested that the Antitrust, Trade Regulation and Consumer Affairs Section produce and distribute educational materials for use by consumers before they enter into transactions; Kitty Huggins, Program Officer of Multi-Door Dispute

Resolution Division, likewise emphasized the importance of getting pre-purchase information to consumers, possibly through Advisory Neighborhood Commissions and local religious institutions, as well as increasing efforts to publicize avenues of consumer redress such as BBB or Multi-Door; Theresa Howe-Jones, Public Policy Analyst with UPO, suggested setting up a counseling service for consumers making large purchases and offered UPO's community outreach network as an avenue for distribution of consumer information fact sheets. Additional solutions were proposed by members of the audience.

VI. What Will Happen in 1998?

DCRA's authority to enforce the Consumer Protection Procedures Act and the Automobile Consumer Protection Act was suspended until October 1, 1998. Of great import to consumers is what will happen at that time. In the interim, additional DCRA staff positions have been eliminated. Department officials have stated that it is no longer possible to "shave" positions from offices and distribute to the remaining staffers those additional responsibilities.⁴ If budgetary trends continue, and no funding is provided to staff even a core consumer protection office, it appears likely that the role of the government will be eliminated, other than the injunctive powers of the Office of Corporation Counsel, in the District's Consumer Protection Procedures Act, leaving D.C. citizens to fend for themselves in consumer matters. Experience has shown that this leaves citizens vulnerable to exploitation and renders legitimate businesses subject to unfair competition by unlawful businesses.

VII. Recommendations of the Antitrust, Trade Regulation and Consumer Affairs Section

1. Revive Core Consumer Protection Functions

The Section recommends revival of an Office of Consumer Protection, however modestly funded, dedicated solely⁵ to pursuing, on a discretionary basis, consumer complaints against D.C. businesses.⁶ After one or two years, funding may be generated in part by penalties assessed against businesses in administrative judgments and consent decrees if provision for this is made by legislation (such penalties have been paid into the General Fund under the CPPA).

Previously, DCRA was required by law to accept and attempt to resolve every consumer complaint. In today's fiscal environment, this is no longer possible. The Section believes strongly that

⁴"DCRA Consumer Protection--Then, Now and Future: DCRA CPPA Statistics," Miriam Hellen Jones, Esq., Chief, Office of Compliance, DCRA, January 30, 1997, D.C. Bar Program, "The State of Consumer Protection in the District of Columbia."

⁵In prior years, consumer protection enforcement staff had regulatory responsibilities as well; this increasingly led to diversion of resources from CPPA matters as staff reductions were implemented.

⁶Discretion for the Office of Compliance to set priorities as to which consumer complaints to pursue was not available under the CPPA.

DCRA must be given discretion to determine which problems merit use of its limited resources, both in determining which cases it will attempt to mediate or otherwise resolve, and in determining which cases to prosecute. To provide this discretion, the CPPA must be amended. This legislation also should make it clear that DCRA's attorneys, as well as the Corporation Counsel, may represent the Department in court.

One way to limit the number of cases DCRA must address would be to prohibit the Department from considering cases in which the amount in controversy is below a stated amount, such as \$500 or \$1,000. This is sometimes referred to as the "cap" approach. The Antitrust, Trade Regulation and Consumer Affairs Section strongly opposes such a restriction. In our view, it is far more preferable to confer discretion on DCRA to identify matters worth pursuing. Such discretion will enable the Department to avoid squandering its resources on matters that should not be pursued. It is easy to imagine a scenario in which a large number of consumers are victimized by a scheme that results in relatively small losses for each D.C. resident, such as \$300 per person. If DCRA is given the discretion this Section recommends, it will have -- as it should -- the discretion to pursue injunctive and restitutionary relief to deal with such a widespread problem, even though the damage to any one individual might be below the threshold at which the Department normally acts. It would be a mistake to prohibit DCRA from acting against merchants who victimize a large number of consumers for small amounts of money.

Because there will be many consumers whom DCRA will be unable to assist, it is important that the Department develop useful, meaningful referrals for those who will still need help. This Section will be glad to work with DCRA and others to develop appropriate referrals.

The Section recommends that the Office of Adjudication be preserved. If funded appropriately, it can provide a relatively quick hearing for the parties involved and help reduce the expense to both consumers and merchants.

In order to revive core consumer protection functions, the Section believes that an adequate staff should be funded, with a mission to devote full time to consumer protection enforcement. Experience has shown that when DCRA's consumer protection lawyers and other staff also have regulatory enforcement responsibilities, high-visibility or otherwise pressing regulatory cases too often take precedence over consumer matters. The best way to assure that core consumer protection needs are met is to assign specific staff members whose time will be dedicated solely to those functions and who can then be held accountable for fulfilling them.

2. *Implement "Private Attorney General" Legislation*

Even if some functions and personnel are allocated to support core consumer protection efforts, it is extremely unlikely in the present fiscal situation that sufficient resources will be available to accomplish what needs to be done. To provide additional consumer protection, both to enforce the CPPA and to deter merchants from violating it in the first instance, the Section recommends that DCRA be allowed to designate "private attorneys general" to pursue consumer cases on behalf of DCRA. The phrase "private attorney general" has been used by courts for many years as a shorthand description of an attorney in private practice who seeks to vindicate a client's rights conferred by

consumer, environmental or anti- discrimination statutes, acting much as a state attorney general would act on behalf of residents of the state.

Under current law, D.C. residents already may hire counsel to pursue their individual claims arising from deceptive practices prohibited by the CPPA. The Section recommends that DCRA be authorized to "deputize" private counsel to represent both individual complainants and DCRA. Private attorneys so deputized would be selected by DCRA; any actions taken in the name of DCRA would be subject to DCRA approval.

This approach presents substantial advantages. First, it may enable DCRA to obtain enforcement of the CPPA where little or no enforcement by local government is now occurring. Second, the availability of "deputy attorneys" may serve to deter merchants currently taking advantage of the suspension of local government enforcement of the CPPA. Third, the District of Columbia could avoid the expense that hiring additional staff attorneys at DCRA would entail. Attorneys approved and designated by DCRA would be authorized to collect reasonable counsel fees and expenses from merchants whose conduct was found to violate the CPPA.

Some drawbacks, disadvantages or concerns exist as well. Someone at DCRA would have to approve the private attorney general and monitor each case to assure that DCRA's interests are properly represented (however, the cost of attorney time expended to do so may be recovered in successful cases). There is potential for conflict of interest between the individual client and DCRA's interests; such potential conflicts may have to be waived by both DCRA and the complaining consumer. To induce counsel to accept designation as a deputy attorney general, adequate provision would have to be made to ensure that DCRA did not waive counsel's right to collect fees and expenses from merchants against whom claims are successfully brought.

On balance, the Section believes that once the initial administrative questions are resolved, the benefits to D.C. consumers and legitimate businesses of implementation of a private attorney general system will be well worth the effort and minimal expense to DCRA and D.C. taxpayers.

3. Provide for Minimum Damages for Violation of the CPPA

At present, a consumer injured by a merchant's unfair or deceptive practices is not entitled to any minimum statutory recovery. Many consumer protection laws recognize that important public purposes are served by establishing a minimum statutory award or penalty. For example, the Federal Odometer Law, 49 U.S.C. §32710, provides for minimum damages of \$1,500 or three times actual damages, whichever is greater; the Truth in Lending Act, 15 U.S.C. §1640(a)(2)(A), awards twice the amount of the finance charge but not less than \$100 or more than \$2,000 as a penalty for certain violations. Too often, merchants engage in small wrongs, secure in the belief that the amount in controversy is too small for any individual consumer or attorney to pursue. An unscrupulous merchant may harm many consumers in this way at great gain to the merchant. Providing for a minimal recovery would be an important step in deterring wrongful conduct and helping to "level the playing field" for honorable merchants. Provisions should be included to ensure that "technical" or unintentional violations of the law do not result in penalties that could drive legitimate businesses out of the District of Columbia.

4. Increase the Bond Required of Motor Vehicle Dealers and Home Improvement Contractors

Evidence gathered by the Consumer Affairs Committee of the Antitrust, Trade Regulation and Consumer Affairs Section showed overwhelmingly that the two largest sources of consumer complaints in the District of Columbia today are car dealers and home improvement contractors. Presently, both motor vehicle dealers and home improvement contractors must post a minimal bond in order to obtain a license. In general, the amount of the bond required is \$5,000.00. That amount has not been changed, although the cost of both motor vehicles and home improvement jobs has increased substantially. Today, the typical consumer seeking redress against a motor vehicle dealer or home improvement contractor may face a loss several times greater than the bond.

The Section recommends that the amount of the bond be increased to provide greater consumer protection. It may be possible to allow merchants who do only small home improvement jobs to maintain a smaller bond. However, contractors and motor vehicle dealers who regularly deal in larger sums should be required to post a bond commensurate with the potential damage to the consumer. Although the cost of the bond may be a hardship for some businesses, residents are paying far larger costs when, for example, home improvement contractors walk off the job after being paid most of the contract price, or motor vehicle dealers fail to disclose accident damage before selling high-priced used cars. Providing realistic bond protection may also encourage consumers to hire D.C. home improvement contractors and to purchase cars in the District rather than go outside its boundaries for purchases of expensive goods and services.

The Antitrust, Trade Regulation and Consumer Affairs Section of the D.C. Bar offers its assistance to the City Council and to the District of Columbia Financial Responsibility and Management Assistance Authority in its consideration of this and other consumer-related legislation. The Section welcomes input regarding additional measures that might be taken to aid D.C. consumers.