

1041

9114
C73/2
91-481 ph.1

CONSUMER PROTECTION

44
.C 73/2
91-481
PT. 1

GOVERNMENT

Storage

RECEIVED

14 1970

THE LIBRARY
KANSAS STATE UNIVERSITY

HEARINGS

BEFORE THE

CONSUMER SUBCOMMITTEE

OF THE

COMMITTEE ON COMMERCE

UNITED STATES SENATE

NINETY-FIRST CONGRESS

FIRST AND SECOND SESSIONS

ON

S. 2246

TO AMEND THE FEDERAL TRADE COMMISSION ACT, AS
AMENDED, BY PROVIDING FOR TEMPORARY INJUNCTIONS
OR RESTRAINING ORDERS FOR CERTAIN VIOLATIONS OF
THAT ACT

S. 3092

TO AMEND THE FEDERAL TRADE COMMISSION ACT TO
EXTEND PROTECTION AGAINST FRAUDULENT OR DECEP-
TIVE PRACTICES, CONDEMNED BY THAT ACT, TO CON-
SUMERS THROUGH CIVIL ACTIONS, AND TO PROVIDE FOR
CLASS ACTIONS FOR ACTS IN DEFRAUD OF CONSUMERS

AND

S. 3201

TO AMEND THE FEDERAL TRADE COMMISSION ACT TO
PROVIDE INCREASED PROTECTION FOR CONSUMERS, AND
FOR OTHER PURPOSES

PART 1

DECEMBER 16 AND 17, 1969; FEBRUARY 3 AND 5, 1970

Serial No. 91-48

Printed for the use of the Committee on Commerce

U.S. GOVERNMENT PRINTING OFFICE

WASHINGTON : 1970

39-278

RECEIVED
MAY 1 1970
THE LIBRARY
KANSAS STATE UNIVERSITY

COMMITTEE ON COMMERCE

WARREN G. MAGNUSON, Washington, *Chairman*

JOHN O. PASTORE, Rhode Island

VANCE HARTKE, Indiana

PHILIP A. HART, Michigan

HOWARD W. CANNON, Nevada

RUSSELL B. LONG, Louisiana

FRANK E. MOSS, Utah

ERNEST F. HOLLINGS, South Carolina

DANIEL K. INOUE, Hawaii

JOSEPH D. TYDINGS, Maryland

WILLIAM B. SPONG, Jr., Virginia

NORRIS COTTON, New Hampshire

HUGH SCOTT, Pennsylvania

WINSTON PROUTY, Vermont

JAMES B. PEARSON, Kansas

ROBERT P. GRIFFIN, Michigan

HOWARD H. BAKER, Jr., Tennessee

CHARLES E. GOODELL, New York

MARLOW W. COOK, Kentucky

FREDERICK J. LORDAN, *Staff Director*

MICHAEL PERTSCHUK, *Chief Counsel*

JOHN CARY, *Staff Counsel*

ARTHUR PANKOFF, Jr., *Minority Staff Director*

J. PAUL MOLLOY, *Minority Staff Counsel*

CONSUMER SUBCOMMITTEE

FRANK E. MOSS, Utah, *Chairman*

PHILIP A. HART, Michigan, *Vice Chairman*

JOHN O. PASTORE, Rhode Island

VANCE HARTKE, Indiana

DANIEL K. INOUE, Hawaii

WILLIAM B. SPONG, Jr., Virginia

JAMES B. PEARSON, Kansas

CHARLES E. GOODELL, New York

NORRIS COTTON, New Hampshire

MARLOW W. COOK, Kentucky

(II)

CONTENTS

Opening statements by the chairman-----	Page 1, 117
Text of bills:	
S. 2246-----	2
S. 3092-----	2
S. 3201-----	4
Agency comments:	
General Services Administration-----	7
Department of the Air Force-----	7
General Counsel of the Treasury-----	7
Federal Trade Commission-----	8

DECEMBER 16, 1969

CHRONOLOGICAL LIST OF WITNESSES

Dixon, Hon. Paul Rand, Chairman, Federal Trade Commission; accompanied by John V. Buffington, General Counsel-----	31
Knauer, Hon. Virginia H., Special Assistant to the President for Consumer Affairs, and Hon. Richard W. McLaren, Assistant Attorney General in charge of the Antitrust Division, Department of Justice; accompanied by Robert L. Meade, Director of Legislative Affairs; Mrs. Betty Bay, Associate Director of Legislative Affairs; Bruce Wilson, Special Assistant to Mr. McLaren; and Jack Pearce, Assistant Chief of the Public Counsel and Legislative Section, Antitrust Division, Department of Justice-----	12

DECEMBER 17, 1969

Elman, Hon. Philip, Commissioner, Federal Trade Commission-----	57
Jones, Hon. Mary Gardiner, Commissioner, Federal Trade Commission-----	102
Prepared statement-----	108
MacIntyre, Hon. A. Everette, Commissioner, Federal Trade Commission-----	70
Prepared statement-----	78, 85
Nicholson, Hon. James M., former Commissioner, Federal Trade Commission-----	113
Tydings, Hon. Joseph D., U.S. Senator from Maryland-----	49

FEBRUARY 3, 1970

Banzhaf, John, chairman, Legislative Action on Smoking and Health; accompanied by Donald W. Salter-----	150
Gordin, George, Jr., National Consumer Law Center, Boston College-----	160
Prepared statement-----	164
Sandbach, Walker, executive director, Consumers Union; accompanied by David Swankin, Washington representative-----	119
Prepared statement-----	130
Weilm, Gilbert H., general counsel, Association of National Advertisers-----	132
Prepared statement-----	145

FEBRUARY 5, 1970

Berlin, Edward, general counsel for the Consumer Federation of America-----	189
Dunkelberger, Edward, general counsel, National Canners Association-----	207
Prepared statement-----	215
Grant, Bess Myerson, commissioner, Consumer Affairs, New York City; accompanied by Harriet V. Robb, former special counsel, New York City Department of Consumer Affairs-----	171

IV

Schiff, Herbert H., chairman of the board and president of Scoa Industries, Inc.; accompanied by Eugene A. Keeney, president of the federation; and James M. Goldberg, vice president, Government Affairs Division-----	197
---	-----

ADDITIONAL STATEMENTS, ARTICLES, AND LETTERS

Department of Consumer Affairs, local laws-----	178
McLaren, Richard W., Assistant Attorney General, Antitrust Division, Department of Justice, letter of February 26, 1970-----	27
Weil, Gilbert H., attorney, Weil, Lee & Bergin, letter of February 11, 1970--	219

CONSUMER PROTECTION

TUESDAY, DECEMBER 16, 1969

U.S. SENATE,
COMMITTEE ON COMMERCE,
SUBCOMMITTEE FOR CONSUMERS,
Washington, D.C.

The subcommittee met at 9:35 a.m. in room 5110, New Senate Office Building, Hon. Frank E. Moss (chairman of the subcommittee) presiding.

Present: Senators Moss and Prouty.

OPENING STATEMENT BY THE CHAIRMAN

Senator Moss. The Consumer Subcommittee will come to order.

We are opening hearings this morning on three related bills that offer the consumer protection against fraudulent practices of unscrupulous operators, S. 2246, the Deceptive Sales Act which I introduced last spring, would give the Federal Trade Commission power to seek preliminary injunctions in order to bring unfair or deceptive practices to an immediate halt while the Commission acts on the case. S. 3092, introduced this fall by Senator Tydings and which I have cosponsored, would permit consumers to bring class actions in Federal courts based upon existing substantive law without regard to jurisdictional amount. S. 3201, the Consumer Protection Act sent up by President Nixon and introduced on December 3, contains provisions analogous to these two bills and has other provisions.

Our principal focus will be upon S. 3201 in these hearings, but we have brought the other two bills into the picture because they are possible alternative formulations of some provisions of S. 3201.

There is little need for me to detail the practices toward which these bills are directed. The case of an elderly couple frightened into purchase of an unneeded and overpriced furnace by a phony "inspector;" the plight of poor and only semiliterate parents paying many times more than the normal price for a set of encyclopedias sold as ready-made education for their children; and the family whose house and possessions are threatened with repossession on a mortgage unwittingly signed as part of credit documents for shoddy house siding, poorly applied—all these cases are too familiar to each of us.

Today we begin to look at measures that may curtail such practices and offer remedy to deceived consumers.

The importance we attach to these measures should be apparent from the immediate attention we are giving to the President's bill. Although it was introduced into the Senate just 2 weeks ago, we have undertaken these hearings to bring it quickly into public discussion.

Staff member assigned to this hearing: John Cary.

These initial hearings are intended to give the administration an opportunity to present its case for S. 3201. In addition, the subcommittee hopes to discover the administration's conception of consumer protection and the goals it intends to reach. We will consider the adequacy of the overall program as well as the value of the specific bill.

I expect that individual testimony of the Federal Trade Commissioners will provide ample basis for assessing the feasibility and impact of the FTC provisions of S. 3201. I expect Senator Tydings to testify tomorrow and to provide us with an opportunity to compare his class action bill with the class action provisions of S. 3201.

We will resume hearings on February 3, 4, and 5, after we have had a bit of time to think about S. 3201 and these initial hearings. At that time we will be able to examine the technical aspects of the bills with specificity and will hear from a wide variety of witnesses.

This session there are a number of consumer bills before the Congress ranging from proposals offering protection against certain abuses of consumers' rights to creation of channels of consumer representation in the Federal Government. I think it is important to see where S. 3201, S. 2246, and S. 3092 fit into the picture.

The bills before us offer general protection against a broad range of deceptive practices and acts. While bills such as the Independent Consumer Council, sponsored by Senator Hart and myself, promise to provide final advancement of consumers' rights, initial reliance must be placed upon legislative steps set forth in bills before us today.

(The bills and agency comments follow:)

[S. 2246, 91st Cong., first sess.]

A BILL To amend the Federal Trade Commission Act, as amended, by providing for temporary injunctions or restraining orders for certain violations of that Act

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That this Act may be cited as the "Deceptive Sales Act of 1968".

SEC. 2. That section 13(a) of the Federal Trade Commission Act (15 U.S.C. 53(a)) be amended as follows:

SEC. 13. (a) Whenever the Commission has reason to believe—

"(1) that any person, partnership, or corporation is engaged in, or is about to engage in, the dissemination or the causing of the dissemination of any advertisement in violation of section 12, or any act or practice in commerce within the meaning of section 5 which is unfair or deceptive to the consumer, and

"(2) that the enjoining thereof pending the issuance of a complaint by the Commission under section 5, and until such complaint is dismissed by the Commission or set aside by the court on review, or the order of the Commission to cease and desist made thereon has become final within the meaning of section 5, would be to the interest of the public, the Commission by any of its attorneys designated by it for such purpose may bring suit in a district court of the United States or in the United States court of any territory, to enjoin such dissemination or the causing of such dissemination or any act or practice in commerce within the meaning of section 5 which is unfair or deceptive to the consumer. Upon proper showing a temporary injunction or restraining order shall be granted without bond. Any such suit shall be brought in the district in which such person, partnership, or corporation resides or transacts business."

[S. 3092, 91st Cong., first sess.]

A BILL To amend the Federal Trade Commission Act to extend protection against fraudulent or deceptive practices, condemned by that Act, to consumers through civil actions, and to provide for class actions for acts in defraud of consumers

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That this Act may be cited as the "Consumer Class Action Act".

SEC. 2. Section 5 of the Federal Trade Commission Act (15 U.S.C. 45) is amended by adding at the end thereof the following:

"(m) Consumers who have been damaged by unfair or deceptive acts or practices in commerce are hereby authorized to bring consumer class actions for redress of such damages. Such actions shall be brought as consumer class actions in accordance with section 4 of the Consumer Class Action Act."

SEC. 3. (1) Congress hereby declares that the protection afforded under the existing Federal Trade Commission Act is not sufficient to prevent unfair and deceptive acts perpetrated against consumers and that consumers should be allowed to sue directly for redress in the case of such practices. Congress, therefore, finds and declares that class actions are the most effective machinery for redress of consumer rights.

(2) Congress further finds and declares that many substantive rights to protect consumers are established in the laws of the States, but there is no remedy by which many persons, each having a small claim, can obtain effective redress under State law. Therefore, it is in the public interest to embrace as Federal law certain State recognized rights and afford a uniform Federal process, by consumer class actions, as an effective remedy.

(3) Congress further finds that the lack of an effective process and remedy in these respects impairs the free flow of consumer goods in commerce and that there is an overriding Federal interest in achieving candor and fair dealing in the marketplace, an interest which, if not protected, clogs the entire economy.

SEC. 4. (a) (1) An Act in fraud of consumers which affects commerce is unlawful and the district courts of the United States shall have original jurisdiction without regard to the amount in controversy to entertain civil class actions for redress of such unlawful acts.

(2) For the purposes of this section an "act in fraud of consumers" is—

(A) An unfair or deceptive act or practice which is unlawful within the meaning of section 5(a) (1) of the Federal Trade Commission Act, or

(B) an act that gives rise to a civil action by a consumer or consumers under State, statutory or decisional law for the benefit of consumers.

(3) "Consumer" means any natural person who is offered or supplied goods, services, interests in land, or intangibles primarily for personal, family, household, or agricultural purposes.

(b) In the case of any class action brought upon the basis that a deceptive Act or practice which is unlawful within the meaning of section 5(a) (1) of the Federal Trade Commission Act has violated consumers' rights, the court shall in construing the terms "unfair or deceptive", give great weight to the interpretation given such terms by the Federal Trade Commission and by the Federal courts in applying section 5(a) (1) of the Federal Trade Commission Act; except that nothing in this Act or the amendments made by this Act, shall be construed to require the court to await administrative action by the Federal Trade Commission before applying Federal law to the facts of the case.

(c) In the case of any class action brought upon the basis of a violation of consumers' rights under any State law the court shall, in deciding such action apply the following criteria:

(1) State law relating to the consumers' rights under State statutory or decisional law is adopted as Federal law.

(2) Federal law applicable to each class shall be fashioned upon the law of the State and the State statutory and decisional construction shall be applied as if jurisdiction of the Federal court were based on diversity of citizenship.

(3) In cases of conflict between State statutory and decisional construction and Federal law the latter shall prevail, and Federal law governing the case shall be fashioned from State law not in conflict, as near as may be, and from Federal law.

(4) If, prior to the date of enactment of this Act, a cause was not subject to removal under section 1441 of title 28, United States Code, the adoption of State law as Federal law by this Act shall not authorize the removal of such a cause on the jurisdictional basis of a Federal question.

(d) Whenever a class of consumers prevails in a class action under this Act, including the amendments made by this Act, the court shall award to the attorneys representing such class a reasonable fee based on the value of their services to the class. An award of attorney's fees is to be made in addition to the damages or relief recovered by the class except that attorneys' fees may be awarded from money damages or financial penalties which the defendant owes to members of

the class who cannot be located with due diligence. Such attorneys' fees awarded by the court shall not exceed 10 percent of the total judgment unless failure to award a greater amount would be manifestly unjust and not commensurate with the efforts of counsel.

[S. 3201, 91st Cong., first sess.]

A BILL To amend the Federal Trade Commission Act to provide increased protection for consumers, and for other purposes

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That this Act may be cited as the "Consumer Protection Act of 1969".

TITLE I—DECEPTIVE SALES AFFECTING COMMERCE

SEC. 101. Section 5 of the Federal Trade Commission Act, as amended (38 Stat. 719; 15 U.S.C. 45) is amended by changing the words "in commerce" whenever they appear to "affecting commerce".

SEC. 102. Subsection (a) of section 13 of the Federal Trade Commission Act (52 Stat. 115; 15 U.S.C. 53(a)) is amended to read as follows:

"(a) Whenever the Commission has reason to believe—

"(1) that any person is engaged in, or is about to engage in, the dissemination or the causing of the dissemination of any advertisement in violation of section 12, or any act or practice which is unfair or deceptive to a consumer and is prohibited by section 5, and

"(2) that the enjoining thereof pending the issuance of a complaint by the Commission under section 5, and until such complaint is dismissed by the Commission or set aside by the court on review, or the order of the Commission to cease and desist made thereon has become final within the meaning of section 5, would be to the interest of the public—

the Commission by any of its attorneys designated by it for such purpose may bring suit in a district court of the United States to enjoin the dissemination or the causing of the dissemination of such advertisement or any such act or practice. Upon proper showing of need, a temporary restraining order or preliminary injunction may be granted without bond: *Provided, however,* That if a complaint under section 5 is not filed within sixty days of the issuance of the restraining order or preliminary injunction, the order or injunction shall be dissolved and of no further force and effect."

TITLE II—ENFORCEMENT OF CONSUMER INTERESTS

UNFAIR OR DECEPTIVE ACTS OR PRACTICES

SEC. 201. As used in this title—

(a) "unfair or deceptive practice" means any of the following acts or practices—

(1) offering goods or services intending not to sell them as offered;

(2) advertising goods or services intending not to supply reasonably expectable public demand, unless the advertisement discloses a limitation;

(3) stating that services, replacements, or repairs are needed with knowledge that they are not;

(4) representing that the consumer is legally obligated to pay for, safeguard, or return unsolicited goods knowing that the consumer is not;

(5) representing that the consumer will obtain any rights, privileges, or remedies knowing that the consumer will not;

(6) representing that goods are new knowing that they are not;

(7) representing that goods are of a particular standard, grade, quality, style, or model knowing they are not;

(8) making statements of fact concerning (i) the reason for, existence of, or amounts of price reductions, or (ii) savings in comparison to prices of competitors or one's own price, knowing that such statements are false;

(9) representing that goods or services are those of another, knowing they are not;

(10) failing to return or refund a deposit or advance payment for goods not delivered or services not rendered, when no default or further obligation of the person making such deposit or advance payment exists; and

(11) knowingly representing that goods or services have sponsorship, approval, origin, characteristics of safety or performance, ingredients, uses, benefits, or quantities that they do not have, or that a person has a sponsorship, approval, status, affiliation, or connection that he does not have: *Provided, however,* That an affirmation by the supplier merely of the value of the goods or services or a statement of his opinion of the goods or services, or similar statements, which do not take unfair advantage of the level of knowledge, ability, experience, or capacity of the consumer shall not be deemed an unfair or deceptive act or practice within the meaning of this paragraph.

(b) "knowing", "knowingly", and "knowledge" refer to actual knowledge, knowledge presumed where objective circumstances indicate that the supplier acted with knowledge, or knowledge presumed where circumstances indicate that the supplier acted in disregard of reasonable safeguards or care in ascertaining the truth of representations made;

(c) "consumer" means any natural person who is offered or supplied goods or services for personal, family, or household purposes;

(d) "supplier" means any person who makes goods or services available to consumers, either directly or indirectly;

(e) "goods" includes real property, but does not include securities or interests in securities; and

(f) "services" includes insurance services and similar provisions of intangibles, but not the providing of credit.

DECEPTIVE ACTS AND PRACTICES UNLAWFUL

SEC. 202. It shall be unlawful for any supplier to commit any unfair or deceptive act or practice as defined in section 201 of this title.

RESTRAINING VIOLATIONS

SEC. 203. The district courts of the United States have jurisdiction to restrain violations of this title upon application by the Attorney General. The court may at any time grant such injunctive relief as it deems appropriate. Whenever it appears to the court that the ends of justice require that other persons should be parties in the action, the court may cause them to be summoned whether or not they reside in the district in which the court is held, and to that end process may be served in any district.

SUITS BY CONSUMERS ADVERSELY AFFECTED

SEC. 204. When a supplier, (i) in any action brought by the Attorney General under section 203 of this title, has been enjoined from committing any act or practice, whether after final adjudication or by consent decree, or (ii) in any proceeding brought by the Federal Trade Commission under section 5 of the Federal Trade Commission Act with respect to acts or practices alleged to be unfair or deceptive within the meaning of section 201 of this title, has been ordered to cease and desist from that act or practice, and the order shall have become final within the meaning of section 5, either after adjudication or by consent decree, any consumer claiming to have been adversely affected by the act or practice giving rise to such injunction may bring suit against said supplier, and may recover actual damages, and the costs of suit, including reasonable attorneys' fees, and, when appropriate, restitution, reformation, rescission, and other equitable relief.

Irrespective of whether an attorney's fee is assessed against a defendant, the court may inquire into the reasonableness of the fee agreed upon between the consumer and his counsel, and revise that fee as the circumstances warrant.

JUDGMENT IN FAVOR OF THE UNITED STATES AS EVIDENCE

SEC. 205. A final judgment or decree rendered in any proceeding brought by the United States under section 203 of this title to the effect that a defendant has engaged in an unfair or deceptive practice within the meaning of this title shall be prima facie evidence against that defendant in any action or proceeding

brought by any other person against the defendant under section 204 of this title, as to all matters respecting which said judgment or decree would be an estoppel as between the defendant and the United States: *Provided, however,* That this section shall not apply to consent judgments or decrees entered before any testimony has been taken.

VENUE

SEC. 206. An action under this title may be brought in any district in which the claim arose or in which the defendant resides, is found, has an agent, is licensed to do business, or is doing business.

LIMITATION OF ACTIONS

SEC. 207. Any proceeding under section 204 of this title shall be brought within one year after the termination of the proceeding under section 203 of this title or the proceeding under section 5 of the Federal Trade Commission Act on which it is predicated.

CIVIL INVESTIGATIVE DEMANDS

SEC. 208. (a) Whenever the Attorney General has reason to believe that any person under investigation may be in possession, custody, or control of any documentary material, or may have knowledge of any fact, relevant to an unfair or deceptive act or practice within the meaning of this title, he may, prior to the institution of a proceeding under section 203, issue in writing, and cause to be served upon such person, a civil investigative demand, requiring such person to produce the documentary material for examination or to answer in writing written interrogatories pertaining to such knowledge.

(b) Each such demand shall—

(1) state the nature of the conduct alleged to constitute the unfair or deceptive act or practice which is under investigation;

(2) describe the class or classes of documentary material to be produced thereunder with such definiteness and certainty as to permit such material to be fairly identified;

(3) propound with definiteness and certainty the written interrogatories to be answered; and

(4) identify the custodian to whom such material shall be furnished, or the person to whom such answers shall be made.

(c) No demand shall—

(1) contain any requirement which would be held unreasonable if contained in a subpoena duces tecum issued by a court of the United States in a proceeding brought under section 203 of this title or if propounded in an interrogatory directed to a defendant in any such proceedings; or

(2) require the production of any documentary evidence, or the disclosure of any information, which would be privileged from disclosure if demanded by a subpoena duces tecum issued by a court of the United States, or by an interrogatory propounded, in any proceeding under section 203 of this title.

(d) Demand may be served at any place within the territorial jurisdiction of any court of the United States.

(e) The provisions of sections 4 and 5 of the Antitrust Civil Process Act (76 Stat. 549, 551; 15 U.S.C. 1313, 1314) apply to custodians of material produced pursuant to any demand and to judicial proceedings for the enforcement of any such demand made pursuant to this section.

REPORT BY THE ATTORNEY GENERAL

SEC. 209. As part of his responsibility to protect consumers against unfair or deceptive acts or practices, the Attorney General shall annually report to the President and the Congress on the effectiveness of this title.

OTHER LAWS NOT AFFECTED

SEC. 210. This title shall not annul, alter, or affect in any manner the meaning, scope, or applicability of any Federal or State law, including but not limited to laws concerning the provision of goods and services to consumers, or limit in any way the availability of rights or remedies under such law.

GENERAL SERVICES ADMINISTRATION,
Washington, D.C., January 22, 1970.

HON. WARREN G. MAGNUSON,
Chairman, Committee on Commerce, U. S. Senate, Washington, D.C.

DEAR MR. CHAIRMAN: Your letter of October 31, 1969, requested the views of the General Services Administration on S. 3092, 91st Congress, a bill "To amend the Federal Trade Commission Act to extend protection against fraudulent or deceptive practices, condemned by that Act, to consumers through civil actions, and to provide for class actions for acts in defraud of consumers."

Our examination of the bill indicates that its enactment would not affect the functions and responsibilities of the General Services Administration. Accordingly, we offer no comment upon its merits.

The Bureau of the Budget has advised that, from the standpoint of the Administration's program, there is no objection to the submission of this report to your Committee.

Sincerely,

ROD KREGER,
Assistant Administrator.

DEPARTMENT OF THE AIR FORCE,
Washington, D.C., February 5, 1970.

HON. WARREN G. MAGNUSON,
Chairman, Committee on Commerce,
U.S. Senate.

DEAR MR. CHAIRMAN: Reference is made to your request to the Secretary of Defense for the views of the Department of Defense with respect to S. 3092, 91st Congress "To amend the Federal Trade Commission Act to extend protection against fraudulent or deceptive practices, condemned by that Act, to consumers through civil actions, and to provide for class actions for acts in defraud of consumers". The Department of the Air Force has been designated to express the views of the Department of Defense.

The purpose of the bill is generally as stated in the title.

It is our opinion that the objectives of the bill are directed toward individual consumers and involve personal, family, and household types of goods and services and that the operations of the Department of Defense would in no way be affected by the provisions of the bill, should it be enacted. Accordingly, the Department of the Air Force, on behalf of the Department of Defense, defers to the Consumer Advisory Council and those other agencies primarily concerned.

This report has been coordinated within the Department of Defense in accordance with procedures prescribed by the Secretary of Defense.

The Bureau of the Budget advises that, from the standpoint of the Administration's program, there is no objection to the presentation of this report for the consideration of the Committee.

Sincerely,

PHILIP N. WHITTAKER,
Assistant Secretary of the Air Force
(Installations and Logistics).

THE GENERAL COUNSEL OF THE TREASURY,
Washington, D.C., February 5, 1970.

HON. WARREN G. MAGNUSON,
Chairman, Committee on Commerce,
U.S. Senate, Washington, D.C.

DEAR MR. CHAIRMAN: Reference is made to your request for the views of this Department on S. 2246, "To amend the Federal Trade Commission Act, as amended, by providing for temporary injunctions or restraining orders for certain violations of that Act."

The bill would authorize the Federal Trade Commission to seek a preliminary injunction or restraining order against any person, partnership, or corporation, who it has reason to believe is engaged in an act or practice which is unfair or deceptive to consumers.

The proposed legislation is not of primary interest to this Department and the Department has no comment to make on the general merits of the bill.

The Department has been advised by the Bureau of the Budget that there is no objection from the standpoint of the Administration's program to the submission of this report to your Committee.

Sincerely yours,

ROY T. ENGLERT,
Acting General Counsel.

FEDERAL TRADE COMMISSION,
Washington, D.C., March 19, 1970.

HON. FRANK E. MOSS,
*Chairman, Subcommittee for Consumers,
Committee on Commerce,
U.S. Senate, Washington, D.C.*

DEAR MR. CHAIRMAN: Reference is made to your letter of March 16, 1970, requesting copies of the recent statement on H.R. 14931 and H.R. 14832 which I presented on behalf of the Commission before the Subcommittee on Commerce and Finance of the Committee on Interstate and Foreign Commerce, House of Representatives, on February 4, 1970. You have also requested copies of proposed amendments to H.R. 14931, embodying the position of the Commission in respect to that bill, which have been presented to that Subcommittee.

Enclosed are two copies of my prepared statement, and two copies of a letter dated March 12, 1970, addressed to Chairman John E. Moss of the House Subcommittee. These documents clearly present the Commission's position with respect to the Consumer Protection Act of 1969. I am very pleased indeed for the opportunity to have these documents made a part of the record of the hearings which the Subcommittee on Consumers, Senate Commerce Committee, is conducting on S. 3201 and S. 3092.

I hope this information meets your request, and if I may be of further assistance, please do not hesitate to let me know.

With kind personal regards.

Sincerely,

CASPER W. WEINBERGER, *Chairman.*

STATEMENT OF CASPAR W. WEINBERGER, CHAIRMAN, FEDERAL TRADE COMMISSION

Thank you, Mr. Chairman, for the opportunity to appear before this distinguished Committee to express the views of the Federal Trade Commission on H.R. 14931 and H.R. 14832.

H.R. 14931

H.R. 14931, the Consumer Protection Act of 1969, is directed at providing increased protection for consumers. It strengthens the Federal Trade Commission Act, declares certain unfair or deceptive acts or practices to be unlawful, provides a right of action by the Attorney General to restrain such unlawful conduct, and provides a remedy by which consumers adversely affected by such unlawful conduct may seek redress.

This bill is identical to S. 3201, upon which each of the Commissioners had an opportunity to comment individually before the Committee on Commerce of the United States Senate in December, 1969. They have requested me to submit at this time copies of their individual statements which they made at that time for inclusion in your record.

EXPANSION OF THE COMMISSION'S JURISDICTION

Title I of the bill would expand the Commission's geographical jurisdiction under the Federal Trade Commission Act to practices "affecting" commerce. The Commission supports this enlargement of the geographic scope of its jurisdiction as it will be helpful in enabling the Commission to proceed against consumer frauds and deception hitherto beyond its reach. This revision should clarify any existing gray areas of jurisdiction and facilitate a more efficient utilization of the Commission's resources.

ADDITIONAL ENFORCEMENT AUTHORITY

A. Injunctions

The Commission is unanimous in its support of this provision in Title I, granting it the power to seek preliminary injunctions aimed at bringing to an immediate halt unfair, fraudulent, or deceptive practices in violation of section 5 of the Federal Trade Commission Act.

It has been the experience of the Commission that the cease-and-desist order is inadequate in many situations. It has proved cumbersome and time-consuming. This additional enforcement tool will provide an effective weapon to the Commission and enable it to take efficient action to protect consumers in those matters where immediate action is warranted. The issuance of the injunction will have the salutary effect of expediting the adjudicative process by discouraging unnecessary procedural delays.

The Commission has long sought such injunctive authority for the substantial additional protection it affords the consumer.

B. Rulemaking

Although not covered by the provisions of H.R. 14931, the Commission believes that its power to issue substantive rules should be made more explicit. Any doubts about its rulemaking authority should be clarified and removed. Any possible ambiguity in its present rulemaking authority between its Labeling Acts and the Federal Trade Commission Act should be eliminated.

C. Assessment of Penalties and Damages

The Commission also believes that it needs stronger and more comprehensive tools to make the threat of a Commission proceeding a real deterrent to a law-breaker. Specifically, the Commission should have authority to assess civil penalties for violations of existing cease-and-desist orders. The Commission should have the authority to assess civil penalties for existing violations of law at the conclusion of its adjudicative proceeding establishing that the law has been violated. Further, the Commission should be empowered to award damages where consumers have been injured by the acts or practices found by the Commission to be in violation of the law. Once the Commission's order has become final and application is made to it by any consumer for redress for injury sustained by reason of the violation of law found to exist by the Commission, the Commission should have the authority to decide the issues raised and if injury is found, to award damages subject to review by a court of appeals.

UNFAIR OR DECEPTIVE PRACTICES

Those unfair or deceptive acts or practices deemed unlawful by the Act are set forth in Title II. While each represents a practice unfair to consumers, the Commission is of the opinion that the listing is not sufficiently comprehensive. There are many practices unfair and deceptive to consumers which would not fit into the specified categories. Credit transactions are specifically excluded, and certain hard core frauds perpetrated on consumers are omitted. In addition, several categories are further limited by requiring proof that the deceptions were knowingly made, or made with knowledge of their falsity. The Commission is of the opinion that these limitations are unnecessarily strict and would effectively eliminate from the scope of the bill too many acts and practices which heretofore have been shown to be injurious to consumers.

SUITS BY THE ATTORNEY GENERAL

The Commission supports that section of the bill which would give the Attorney General authority to institute proceedings to restrain violations of the Act, as well as the provision allowing a court to grant at any time, such injunctive relief as it deems appropriate.

The Commission does suggest that consideration be given to the inclusion of a substantial civil penalty for violation of an injunction in addition to other such relief as the court may consider necessary to enforce its orders.

CONSUMER CAUSE OF ACTION

The Commission supports the consumer's cause of action and the provision for recovery of actual damages, costs, and reasonable attorneys' fees. Under the right of private action authorized by this bill, consumers will be able not only

to bring individual actions, but also to bring class suits under the procedures of Rule 23 of the Federal Rules of Civil Procedure.

Consumers are authorized to bring private actions where the Department of Justice or the Federal Trade Commission has successfully enjoined any unfair or deceptive practice enumerated in the bill. A final judgment or decree entered by the courts in any injunctive proceeding brought by the Department shall be prima facie evidence against the defendant in any private action or proceeding brought by any other person. Thus, the provisions of the bill offer considerable assistance to consumers in the filing and prosecution of consumer actions.

As is presently provided in the bill, Federal Trade Commission proceedings give rise to a private cause of action for damages, but such proceedings are not given prima facie effect in a subsequent consumer suit. This failure to give to Commission orders efficacy equal to that given to injunctions obtained by the Department of Justice deprives consumers of substantial benefits that could flow from Commission proceedings.

We believe that to give prima facie effect to Commission orders would substantially enlarge the protection which this bill affords consumers; it would make two government resources available to consumers to assist them in bringing class actions. Further, because of the substantial advantage which consumers would receive from proceedings by the Department, the Commission would be reluctant to use its powers without reference to the Department, which would have less inclusive coverage than the Federal Trade Commission. Thus, consumers would be injured by the denial to them of the substantial resources of the Commission.

The Commission does not believe that the prima facie effect of a final decree should depend on which governmental department happened to proceed in the first instance. Accordingly, the Commission proposes that the provision of H.R. 14931 be enlarged to provide that any final order, enjoining any unfair or deceptive practice enumerated in H.R. 14931, entered by the Federal Trade Commission on the facts after a full hearing, shall also constitute prima facie evidence in any subsequent consumer proceeding. This amendment to H.R. 14931 would accomplish two purposes: (1) it would render considerable assistance to consumers in instituting private actions seeking redress, and (2) it would place the Commission's enforcement authority under the bill on an equal basis with the Department.

Some members of the Commission would favor enlarging the rights given consumers to maintain private causes of action. They would specifically favor modifying the bill to permit consumers to bring actions for any unfair or deceptive act or practice declared unlawful by the bill without awaiting a previous proceeding by the Department of Commission. On this issue the Commission's position at this time is predicated upon its desire to determine first whether the broad expansion of consumer protection and remedies afforded by this bill, if strengthened in the respects now proposed by the Commission, would be adequate as a major first step in this area. If found inadequate by experience, the Commission believes that any necessary amendment could be proposed in light of such experience.

The Commission is also of the view that the bill could be improved if it were modified to permit the Attorney General to bring class actions on behalf of consumers under the provisions of this bill. The monies collected pursuant to a court decree could be paid into an appropriate fund for the benefit of consumers. Individual consumers who have been defrauded or deceived may apply to the fund in order to recoup their individual losses. The monies not distributed to the individual consumers could be used for programs of consumer protection and education. This procedure would not, however, replace the right to a private class action.

CIVIL INVESTIGATORY DEMANDS

The Attorney General is authorized to issue civil investigative demands for investigational purposes. However, confidential treatment is afforded by the bill to the material produced pursuant to civil investigative demands and accordingly, such material would not be available to the Federal Trade Commission.

The Commission is of the opinion that if it and the Department are to have concurrent jurisdiction in this consumer protection area, the Department's investigative files should be available to the Commission under proper liaison arrangements, just as our investigative files are and have been available to the Department.

H.R. 14832

This bill would amend the Federal Trade Commission Act to provide that consumers who have been damaged by unfair or deceptive acts or practices may bring consumer class actions for redress of such damages.

Section 4 of the bill declares that an act in defraud of consumers which affects commerce is unlawful, and the district courts of the United States shall have original jurisdiction without regard to the amount in controversy to entertain civil class actions for redress. An "act in defraud of consumers" is defined as:

(1) an unfair or deceptive act or practice which is unlawful within the meaning of section 5(a) (1) of the Federal Trade Commission Act; or

(2) an act which gives rise to a civil action by a consumer or consumers under State statutory or decisional law for the benefit of consumers.

In any class action brought upon the basis that a deceptive act or practice which is unlawful within the meaning of section 5(a) (1) of the Federal Trade Commission Act has violated a consumer's rights, the court shall in construing the terms "unfair or deceptive," give great weight to the interpretation given such terms by the Federal Trade Commission and by the Federal courts in applying such Act. However, the court is not required to await administrative action by the Commission before applying Federal law to the case.

In any class action brought upon the basis of a violation of consumers' rights under any State law, the Federal court shall apply State statutory or decisional law relating to consumers' rights as Federal law, and where there is conflict between Federal law and State statutory or decisional law, Federal law governing the case shall be fashioned from State law not in conflict, and from Federal law.

Whenever a class of consumers prevails in a class action brought under this bill, the court shall award reasonable attorneys' fees to attorneys representing the class. Such attorneys' fees shall not exceed ten (10) per centum of the total judgment, unless failure to award a greater amount would be manifestly unjust to such counsel.

This proposed legislation, H.R. 14832, creates for consumers very broad class-action rights; rights which far exceed anything contemplated by the provisions of H.R. 14931. While the Commission is supporting certain enlarging of the rights given consumers under H.R. 14931 to bring class actions, it is not prepared to go as far in this respect as the class-action rights envisioned by H.R. 14832.

Whether such an unlimited class-action remedy would impose undue burdens upon the already congested dockets of the Federal courts; whether such suits, which would not have the benefit of any prior screening of their merits by the Department of Justice or the Commission, could be used to harass legitimate businessmen; whether a class-action remedy, where consumers must proceed entirely on their own and without the assistance of government investigative and prosecutorial resources, and unaided by the benefit of a prior decree or order secured by the government establishing a violation of law, would in reality provide substantial benefits to consumers—all these are questions which the Commission considers to be pertinent to a determination by the Congress whether it should at this time create an unlimited class-action remedy for consumers.

The Commission is of the belief that H.R. 14931, as strengthened by the Commission proposals stated above, should be considered as a major first step in this area. If found inadequate by experience, necessary amendments can be proposed in the light of such experience.

Thank you for the opportunity to appear here today to present the Commission's views on these important matters.

Senator Moss. We will begin our hearings this morning with Mrs. Virginia Knauer, the President's Special Assistant for Consumer Affairs, and Mr. Richard McLaren, Assistant Attorney General in charge of the Antitrust Division of the Justice Department.

If these two witnesses would come forward and be seated at the witness table, we will appreciate hearing from them.

I suppose Mrs. Knauer will lead off, but if you care to reverse that and go the other way around, it is perfectly all right.

Is that Mr. Meade accompanying you?

STATEMENTS OF HON. VIRGINIA H. KNAUER, SPECIAL ASSISTANT TO THE PRESIDENT FOR CONSUMER AFFAIRS, AND HON. RICHARD W. McLAREN, ASSISTANT ATTORNEY GENERAL IN CHARGE OF THE ANTITRUST DIVISION, DEPARTMENT OF JUSTICE; ACCOMPANIED BY ROBERT L. MEADE, DIRECTOR OF LEGISLATIVE AFFAIRS; MRS. BETTY BAY, ASSOCIATE DIRECTOR OF LEGISLATIVE AFFAIRS; BRUCE WILSON, SPECIAL ASSISTANT TO MR. McLAREN; AND JACK PEARCE, ASSISTANT CHIEF OF THE PUBLIC COUNSEL AND LEGISLATIVE SECTION, ANTITRUST DIVISION, DEPARTMENT OF JUSTICE

Mrs. KNAUER. Mr. Robert Meade is Director of our Legislative Division in my office; and he is accompanied, too, by Mrs. Betty Bay, who is his Associate Director.

Senator Moss. Thank you very much. We are pleased to have you.

Mrs. KNAUER. Mr. Chairman, I am pleased to appear before a committee whose record of assistance to the consumer makes so evident our common interest. I am also pleased to have this opportunity to urge your support for S. 3201, the administration's Consumer Protection Act of 1969.

President Nixon personally urged this legislation in his October consumer message to the Congress as part of a far-reaching general program to protect the consumers' interests. Another key part of that package was the Consumer Representation Act which is also now before the Congress. That act proposes establishing my office by statute as well as giving it greater responsibility to serve consumers. In addition, the Consumer Representation Act proposes establishment of a new Division of Consumer Protection in the Department of Justice to act as a consumer advocate before Federal regulatory agencies in judicial proceedings and in government councils.

The bill before this committee today is another vital part of the President's comprehensive consumer protection program. It assigns to the Division of Consumer Protection in the Department of Justice, which is proposed in the Consumer Representation Act, major consumer responsibilities for increased consumer protection from fraud and deception. We recognize, of course, that you, Mr. Chairman, and others on this committee have proposed legislation relating to some of the problems to which this act is directed. But this proposal goes significantly further. We believe it to be landmark legislation in every sense of the word for all American consumers.

Since this law is to be enforced by the Justice Department, Mr. Richard McLaren, Assistant Attorney General, will deal with it thoroughly. I will devote my comments largely to the scope of the problems consumers face which make passage of this bill so imperative, and to explaining why its provisions are so important.

Much consumer fraud and deception is at a local level. This is why the expansion of the Federal Trade Commission's authority to deal with practices which "affect" commerce, as opposed to those that are merely "in" commerce is needed and should be enacted.

Consumers have all too often been required to wait for extended periods of time for Government protection from fraud and deception. You do not need me to remind you, gentlemen, of the years of litiga-

tion in the *Holland Furnace* case. We understand that the time between the opening of an investigation by FTC and the obtaining of a final order has been approximately 1 year. But 2, 3, and more years are not uncommon. This is why it is important to enable the FTC to obtain preliminary injunctions in appropriate cases, as this bill would make possible.

But, with due respect to the FTC, unaided it cannot police the entire American economy. The enforcement strength of the Justice Department and the private bar can multiply consumer protection. This is why title II of this bill is so important. This part of the bill establishes a major new Federal consumer protection law, with provisions for Department of Justice enforcement and suits by consumers to recover damages. As Mr. McLaren will explain in detail, the act prohibits 11 specified types of consumer fraud and deception, including the most common forms of deception. My experience in Pennsylvania certainly bears out that these 11 practices constitute the vast bulk of fraud and deception. For example, the act outlaws on a nationwide basis bait and switch advertising and deceptive pricing which are the two most common deceptive practices in use today.

Upon the termination of a successful Government action against any of these practices, whether by the Justice Department or by the Federal Trade Commission in one of its proceedings, any consumer, including classes of consumers, as defined in rule 23 of the Federal Rules of Civil Procedure, may bring a private action for money damages or for other relief. Reasonable attorneys' fees may also be collected by successful private consumers.

As in antitrust actions by the Justice Department, a final judgment or a decree in the action brought by the Justice Department may be used as prima facie evidence against the particular defendant in a subsequent action brought by consumers.

For years, consumers who were victimized by unfair or deceptive acts or practices have been left without any practical private remedy or means of redress. For the first time, this act will create on a national basis a Federal cause of action for the use of unfair or deceptive practices and will allow the Federal courts and the Federal procedure to be utilized. Nothing whatsoever is cut back by this act, but a whole new consumer protection remedy is added.

The consumer protection afforded by this bill is greatly needed. Consumers in all income levels are among the victims of unfair and deceptive practices, including those of us who may consider ourselves sophisticated in the marketplace. But the victims are most often the poor, the elderly, and those who have had little opportunity for formal education.

For them, it is a vicious circle. They are the ones who can least afford the loss, are least likely to know the legal procedures for recovery and are least able to pay the cost of litigation if they knew the procedure. And their troubles may not end with the fact that they have been deceived as to what they were purchasing or have been out the cost of shoddy merchandise for which they may have to continue paying long after it has fallen apart. Their wages may be garnished. And, as a result, they may lose their jobs.

Violence and crime are major concerns of the American people at this hour in our history. Threaded through the reports of the National

Commission on Civil Disorders and the President's Commission on Law Enforcement and Administration of Justice was the impact which consumer fraud has on our economy and its impact as a causative factor in the unrest in our society. The National Commission on Civil Disorders' report indicated that consumer frustrations were among the 12 most deeply held grievances which fostered discontent and disorder. The Commission declared that, "there can be no higher priority for national action and no higher claim on the Nation's conscience" than the need to develop programs to change the system of failure and frustration that now dominates the ghetto and weakens our society.

The President's Commission on Law Enforcement and Administration of Justice pointed out that estimates of total fraud losses are difficult. However, even the fragmented estimates listed by the Commission point up the magnitude of consumer fraud.

The Food and Drug Administration indicates that about \$1 billion, as a conservative estimate, is spent annually on worthless or extravagantly misrepresented quack devices and drugs, foods, and cosmetics.

Several years ago, a survey by the Arthritis and Rheumatism Foundation disclosed that perhaps \$300 million is spent annually on such worthless arthritis remedies as alfalfa tea, phony "radiation" treatments, and copper bracelets.

The National Better Business Bureau states that during the last 2 years its biggest single source of complaint deals with magazine subscription sales. Fraudulent and deceptive practices in home repairs and improvements are a close second, with television repair following close behind. Losses to these and other rackets may be in the billions of dollars.

Estimates of consumer losses through frauds in the sale of new and used cars are less well documented, but it is apparent this constitutes a considerable expense to the public. Not only are these practices costly in dollars and cents, but in all too many instances they may be costly in terms of the lives and safety of the people defrauded. Bald tires which have been regrooved without the addition of any new rubber may blow out. The so-called new cars created by welding together undamaged halves of wrecked cars may come apart.

The public also bears sizable losses from fraudulent solicitations for charities, phony land promotion schemes, home study rackets, and numerous other schemes.

The report of the President's Commission on Law Enforcement and Administration of Justice concluded that particularly disturbing is the impact of fraud upon the poor or those who live on the margin of poverty. While no comprehensive data is available, what few studies there are indicate the disastrous impact this kind of fraud can often have. In one study of 500 households in four low-income housing projects, more than two of every five families reported being cheated or exploited by sellers or finance companies.

At the same time, consumers feel frustrated and alienated because they have nowhere to turn for effective redress. Generally quite small amounts are involved as far as any one individual consumer is concerned. The cost of private counsel is generally more than the amount involved. This is to say nothing of the time which the individual consumer must take from his job to initiate the case and to see it

through the often long-drawn-out legal process. For the poor, the elderly, and the unsophisticated, this is all compounded by their lack of knowledge of the course of action which is open to them, and their hesitancy to involve themselves with lawyers and the law. But the chief barrier is their lack of money to initiate such actions and carry them through to recover what they have lost. As a result, the consumer's frustration turns to hopelessness and a feeling that the law does not serve him fairly.

In short, gentlemen, consumer fraud is an insidious economic cancer which eats at the very vitals of our society. The fact that it continues to the extent it does erodes the respect of the individual, especially the poor, for law enforcement. It rots their faith in the equal application of the law to the white-collar fraud robber and to the family who cannot pay for shoddy merchandise they were tricked into buying by that self-same operator. It withers our moral fiber. It misdirects our economic resources. It saps the strength of our free enterprise system.

Crime is crime whether it be at the tip of a gun or at the tip of a pen and the tip of a tongue of a fraudulent sales operator. All reasonable forces for years have decried consumer fraud. It is long past time we turned orations into actions, lament into law, exhortation into fraud elimination.

I conclude my statement with a plea for speedy action on this legislation by this committee and the Congress. Through it, President Nixon has committed himself and his administration to break new ground to broaden consumer protection. We hope that Congress will move speedily in passing this bill which will give the consumers of America broad new protection from the perils of the marketplace.

Thank you.

Senator Moss. Thank you very much, Mrs. Knauer. That is a very eloquent and fine statement. And as I tried to underline, we on this committee do believe that there is an urgency to move on in this field, and I assure you we will try to push ahead.

I think I would like to defer any questions I may have until we have heard from Mr. McLaren, and then we may direct questions to either or both of you.

Would you proceed, then, Mr. McLaren?

Mr. McLAREN. Thank you, Mr. Chairman.

I appreciate the opportunity to testify before you about S. 3201, the Consumer Protection Act.

With me this morning are Mr. Bruce Wilson, my special assistant; and Mr. Jack Pearce, our Assistant Chief of the Public Counsel and Legislative Section of the Antitrust Division.

Senator Moss. You gentlemen are welcome.

Mr. McLAREN. The purpose of this bill is—and we believe its effect will be—to afford consumers substantial additional protection against fraud and deception. It does this by expanding the jurisdiction and powers of the Federal Trade Commission; by making certain defined activities by sellers of goods and services violations of Federal law; by placing enforcement authority with respect to these new violations in the Department of Justice as well as the FTC; and by creating in consumers a Federal right of action to recover for damages suffered by reason of such violations.

As Mrs. Knauer has pointed out, the act would be administered by a new Division of Consumer Protection in the Department of Justice. This Division, which would also represent consumer interests before Federal regulatory agencies, would be headed up by an Assistant Attorney General and would be coequal with the Antitrust Division, the Tax Division, the Criminal Division, and so on. In size, I envision that this new Division would begin operation with a staff of 25 to 30 lawyers and economists, and would expand very quickly to at least twice that number. In addition, the Division's efforts would be supplemented by the 93 U.S. attorneys' offices throughout the country. Unfair practices would thus be attacked on both the national and local levels.

Turning now to the specific provisions of this bill—the Consumer Protection Act. It would expand the authority presently vested in the Federal Trade Commission in two different ways.

Under present law, the Federal Trade Commission has no power to enjoin fraudulent practices until its administrative hearings have been completed. The result is that delay and dilatory tactics are encouraged, the consumers must often wait for extended periods of time before the Commission can move to protect their interests.

Section 102 of this bill would remedy this by authorizing the Commission to seek injunctions from the Federal courts without completing its hearings, where it appears that emergency measures are needed in order properly to protect consumer interests. A defendant would, of course, have an opportunity to present his case to the court before an injunction was issued.

At present, the Commission's authority is limited in that it must show that a seller is using an unfair or deceptive practice in interstate commerce before the Commission has power to act. The Commission's jurisdiction is, therefore, not as broad as that provided in many other Federal statutes which apply to activities "affecting" interstate commerce. Examples of such statutes are the Truth-in-Lending Act and the Sherman Act.

Many unfair and deceptive practices, though local in nature, are systematically utilized throughout the country. There is no doubt that such practices harm consumers; they also burden interstate commerce by diverting revenues from honest and conscientious businessmen to their dishonest or careless competitors.

Section 101 of the bill presently before you would close this loophole. It would amend the Federal Trade Commission Act to extend the Commission's authority under section 5 of that act to unfair practices affecting interstate commerce, as well as those taking place in interstate commerce.

Before turning to the substantive law provisions of S. 3201, I would like to call your attention to the fact that, to a certain degree, we have followed the same general scheme as Congress adopted in the Clayton Act. That is, we set up certain substantive offenses; we allow for coordinate jurisdiction in the Federal Trade Commission and the Justice Department; and we create a private right to recover for damages resulting from the prohibited practices.

Section 201 of the act spells out the proscribed practices, which are 11 in number. These are practices which have substantial adverse effects on consumers. They are well known to be unfair and deceptive

practices under section 5 of the FTC Act, as developed by the Commission.

The Justice Department would be empowered to bring suit against such practices, and to obtain a preliminary injunction where it appears that the practices should be suspended pending adjudication (sec. 203).

The Consumer Protection Division would be given investigative authority similar to that of the Antitrust Division under the Antitrust Civil Process Act. This would enable the Division to make speedy and accurate investigations (sec. 208).

Upon the entry by a court of a consent decree or a final decree after adjudication, or upon the entry by the FTC of a consent order or a cease and desist order against a violation of the Consumer Protection Act, injured consumers could bring their own suits to recover damages, to obtain rescission of contracts, or to obtain other equitable relief (sec. 204).

If a court has adjudicated that the defendant has committed an unlawful practice under the act, the judgment will be prima facie evidence of the violation in the consumers' suit.

Under the Federal Rules of Civil Procedure, consumers will be able to bring suit as a group when the unlawful practice has damaged a substantial number of them, and when the other requirements for a class action are met. Since this is a statute regulating commerce, they need not meet any requirement for jurisdictional amount to bring suit. (See 28 U.S.C. sec. 1337.)

The right to bring a class action in Federal court would provide consumers with a powerful new legal tool. Litigation usually costs more than an individual consumer can expect to recover. He presently has little choice but to take his loss.

But if a group of consumers can share the costs of litigation, they may be able to recover most of their money damages. And if a seller must make good to all those he has harmed by a violation, he will have considerably more incentive to abide by the law. The unethical seller can no longer rest secure in the knowledge that few if any consumers can sue him and that public authorities can only, after much effort, issue an injunction.

The bill provides for court control over attorneys' fees. This insures that funds paid to consumers by defendants are not diminished by excessive counsel fees (sec. 204).

Finally, the bill provides for an annual review of the effectiveness of the act by the Attorney General and a report to Congress. This provides a procedure for improving the legislation as we gain experience with it, and as the law of unfair and deceptive practices develops further (sec. 209).

The approach we recommend in this bill differs somewhat from proposals in other bills. Some, for example, would provide a wide range of class suits in Federal courts. Let me explain to you why we think the approach of S. 3201 is better balanced and more effective than other approaches, and why we recommend it to you.

A major new consumer remedy in the Federal courts must meet a number of requirements. The remedy must be effective for consumers. It must be fair to manufacturers and merchants. And it must be manageable by the Federal courts. To meet these requirements we must deal with some very practical problems.

We concluded that both public and private enforcement are needed to make the law effective. Private enforcement against consumer frauds has much to offer. But it is apt to lack effectiveness in some cases, and to generate needless litigation in others.

Where the defendant has little in assets, or damages are hard to prove, neither private lawyers nor aggrieved consumers may find it worth their while to pursue a legal action. This is so even though clear frauds may have been committed, and the seller should be brought before a court. In such a case, public enforcement is needed. The Consumer Protection Division, supplementing the efforts of the Federal Trade Commission, can provide that enforcement.

For the bill to be fair to suppliers and manageable by the Federal courts, some specificity in the acts and practices subject to suit is required. And, we believe, selection of suits by the Government is justified for this purpose.

The very broad language of the Federal Trade Commission Act—declaring unlawful “unfair or deceptive acts or practices”—is appropriate for administration by a specialized administrative agency. The FTC gives case by case definition to this standard in evolving the law governing trade practices.

But a law for direct redress by large classes of consumers entails different considerations. Large class actions in Federal courts can generate very substantial liabilities for defendants, and very substantial fees for plaintiffs’ attorneys. Care must be taken that the inducement to organize suits for large groups does not lead to harassing actions, or “strike suits”. A broad and vague law, we feel, would allow undue scope for such suits.

In addition, large class actions impose very substantial administrative burdens upon the courts. Under Federal rule 23, the court must determine if a class action is warranted, who are proper class members, how they shall be protected at the trial, how they shall participate in the recovery, and so on. Large numbers of such suits, on unclear grounds, could add materially to the already considerable burden which present class actions now placed on the courts.

Finally, if suppliers are to be subject to new and potentially substantial liabilities, it is imperative that they be given clear notice of what their obligations are.

We believe that the specification of the 11 types of proscribed practices, and the provisions for Government selection of cases, meet these problems. The list of practices provides wide coverage—some 85 percent of the types prosecuted by FTC, as we have been informed.

But at the same time, it provides suppliers of goods and services clear and fair notice of their liabilities. The provisions for prosecution by the Justice Department—as well as the expansion of the FTC’s enforcement authority—give the consumer the skilled legal services of the Government in detecting and establishing violations, while providing for a public selection of cases which are both sound and significant to consumers.

And, as stated before, since it is highly likely that the worst offenders will be substantially “judgment proof,” so that private actions would not often be self-liquidating, we believe that this double-barreled Government enforcement provides the most promising prospect of successful consumer relief.

Thus, we think the Consumer Protection Act initiates a major consumer protection program on a prudent and practical basis. But we also want to make provision for improving the act as we gain experience with it. This led us to provide for annual reports to Congress. This will require us annually to examine the questions of how effective the law is, and how it may be improved. And it will permit Congress to make its own annual review of these questions.

Let me now describe briefly why the problems I have referred to led us not to choose some of the other proposed methods of protecting consumers. One approach, proposed in S. 2924, is to overrule the recent *Synder v. Harris* decision. That case held that the individual claims could not be aggregated to meet the \$10,000 jurisdictional amount required when Federal court jurisdiction is based on diversity of citizenship.

This approach, in our view, would do both too little and too much in the consumer protection area. It would open the Federal courts not merely to consumer actions, but also to class actions under a wide range of other State laws. On the other hand, it would not provide Federal court jurisdiction where there is no diversity of State citizenship between the plaintiff and the defendant. It would provide no new Federal rights for consumers. And it would provide no more Government enforcement.

Another suggested approach, embodied in S. 1980, is to open the Federal courts to class actions based on any Federal or State law for the benefit of consumers, without regard to the amount in controversy. This would require the Federal courts to administer class action litigation arising from an undefined and potentially very broad range of laws. Class actions could be based not only upon unfair trade practice laws, but also upon State public utility laws, State health and safety laws, usury laws, landlord-tenant laws, and the like.

While requiring Federal courts to assume much of the burden of State court litigation, it would not create any new, clearly defined consumer rights. Nor would it provide for public enforcement efforts, as does the administration bill.

Finally, some have suggested combining a Federal consumer right of action for violations of the Federal Trade Commission Act with provisions similar to those of S. 1980 for making Federal courts broadly available for State rights of action. This is the approach taken in S. 3092. The practical considerations I have averted to persuade us that this is not the best way to proceed. In particular, I think, we cannot allow our impatience with the variability and frequent inadequacy of State legislation and State procedures to lead us into overloading our Federal court system. The administration proposal provides new rights and new machinery in the Federal courts. It seems to us that what is needed in addition is patient and persistent efforts to upgrade the State laws and the State procedures.

Those efforts are underway. Nineteen States have adopted consumer protection laws modeled on recommended uniform acts. The Federal Trade Commission and others are working to encourage more such laws, and to improve their administration in the States.

Both Mrs. Knauer's office and the new Consumer Protection Division will maintain liaison with State attorneys general and consumer protection offices, and will encourage the consumer protection programs of States and municipalities.

There is much improvement needed in this area. But we believe that in the long run State and local programs must play a central role in consumer protection. This role must include the use of State courts to vindicate consumer rights. Federal courts and Federal agencies cannot substitute for local and State action.

In sum, many responsible legislators and private citizens are now trying to respond to the need for better consumer protection, both here and abroad. Various approaches have been offered for exploration and consideration. We have examined suggestions embodied in bills submitted in Congress. We have consulted persons in private life familiar with consumer problems. We have had extensive discussions among different groups in the administration.

We believe the legislation we recommend here is sound. It takes account of the practical considerations involved. It is workable. It will give consumers very substantial public enforcement assistance and private remedies they have not had before. We believe it will improve the commerce of the United States. And it will provide a firm foundation for further development.

We urge your careful consideration of the Consumer Protection Act, and recommend that it be enacted.

Senator Moss. Thank you very much, Mr. McLaren, for that good statement. We are pleased to have it.

I have maybe a few questions that might help to clarify this a little—in my mind, anyway.

First, Mr. McLaren, where would the primary responsibility for dealing with the individual victimized consumer lie—with the FTC or with the Justice Department?

Mr. McLAREN. Well, jurisdiction would be coordinate and equal, Mr. Chairman; this is the pattern, as you know, of the Antitrust Division's jurisdiction, along with the FTC, under the Clayton Act.

The theory, I think, is that you have greater and lesser effectiveness in the agencies at different times. If one is not handling it, the other will. And also, I think, that it tends to give a little incentive to the agencies in competition with one another to make a good record. With good liaison, it seems to me it can be made to serve the public interest.

In particular, under this bill I would assume that the hardcore kind of violations would probably be prosecuted most frequently by the Justice Department. It would take them into court on such matters.

On the other hand, the Federal Trade Commission would specialize in the development-of-the-law kind of case since they would have a broader enabling statute.

I might say incidentally, Mr. Chairman, that Commissioner Elman in his separate statement in the Federal Trade Commission's Annual Report of 1968, strongly supported this idea of placing enforcement authority in the Justice Department. I will not read it, but I will refer the committee to pages 56 and 57 of the FTC's 1968 report.

Senator Moss. Thank you. We are going to hear from Commissioner Elman sometime later, and we are glad to have that reference. We will, perhaps, discuss that with him a little bit at that time.

Mrs. Knauer might give her opinion on where an aggrieved consumer should turn first, then, the FTC or the Justice Department?

Mrs. KNAUER. As the President conceives this three-pronged attack on consumer problems, I believe he feels that some of the complaints

will come to us directly, and I would refer them immediately to the new Consumer Protection Division and, of course, to the FTC, too.

We get, as you know, about 2,000 consumer communications a month now, Mr. Chairman. Many of these cite examples which, when investigated—as you know, I have no investigative force of my own or power—but when investigated by the new Division of Consumer Protection, the Division could go right ahead and take action where they deemed action was appropriate.

Senator Moss. What would the three prongs be—the local level, the FTC, and Justice?

Mrs. KNAUER. No, I was thinking in terms of the Consumer Representation Act which would set my office up as a statutory office within the White House, working as a nucleus, but working very closely with the FTC and with the new Division of Consumer Protection in the Department of Justice; but working as a coordinating team, as it were, to relay this information back and forth.

Senator Moss. You envision your office as being sort of a coordinating agency to make sure that it gets in the right place?

Mrs. KNAUER. Yes.

Senator Moss. Mr. McLaren, in the Nader report, it was stated that it takes about 2 years between the time the FTC begins investigation to the time that it issues a complaint. S. 3201 provides a preliminary injunction for only 60 days. In view of the usual investigatory period, will the FTC be able to make significant use of preliminary injunctions?

Mr. McLAREN. Well, I think that the Commission has been moving to streamline its procedures; however, I see the problem that you raise there. I think that when you go into court for a preliminary injunction, you frequently get a lot of your case into evidence. I would hope that the FTC might be able to complete action in 60 days. Perhaps they need 90 days.

I think that perhaps I would defer to the commissioners themselves, who have a lot more experience on that.

I know, however, that the FTC would be better able to serve the public interest with this temporary injunction authority.

Senator Moss. Mrs. Knauer, do you think that S. 3201 will offer full protection against fraud and deception for most individual consumers so that additional mechanisms for effectuating individual consumers' rights will not be needed?

Mrs. KNAUER. I feel it will be most effective. As Mr. McLaren has said, this bill offers broad new consumer protection. Based on my experience in Pennsylvania, I feel that the 11 areas that are described as illegal in this act constitute the major bulk of fraud. Certainly they did at the State level, and apparently they do, according to the FTC, at the national level.

But I do not think any of us feel we are frozen in on just 11 categories. Experience, as this law is in effect, might indicate that we would want to add two, three, or more categories. But I think that experience will be our best teacher in this matter.

Senator Moss. Mr. McLaren, you stated that these 11 categories cover about 85 percent of the FTC prosecutions. The FTC has come under some strong criticism recently in which it was alleged that the FTC does not attempt to set priorities for its prosecutions, that many

of its prosecutions are trivial because it relies on the mailbag to generate investigations. Do you have any assurance that the 11 categories cover the most important types of fraud presently practiced?

Mr. McLAREN. I think that the experience that the FTC has had, together with the experience and the background of all the different agencies that have been consulted on this, including some of us who have had experience in private practice, shows that these 11 practices do cover the vast bulk of the most serious consumer frauds. These types of practices can be carefully spelled out and made the kind of thing that a businessman can be made responsible for in damages.

I think we have a delicate balance here. We are taking a new area of the law into the courts. I think that we have to be very careful of the burden we place on the courts because potentially every consumer and every transaction in the United States could form the basis of some kind of consumer action.

I think we need to proceed carefully. I think we definitely need to move forward. I think we have a fair basis for doing it.

We must not on the one hand leave the consumer short; on the other hand, we must be fair to businessmen who will be responsible in damages and will have to defend themselves in court.

We think that we have achieved a good balance here in this bill, and we would like to see it go.

Senator Moss. Let me pose just one or two examples to see whether they are included in the definitions of the 11 categories.

Could chain referrals be stopped? And by what category? This is where consumers are led to believe they will not need to pay for certain merchandise despite signing a contract for it if they supply names of friends who will also buy the merchandise. But the merchandise is not so easily sold to others, or else the company does not keep track of the names submitted by the consumer. That is one of them.

Perhaps the other category that I might suggest would be the "free" gimmick. "This lovely X-cubic foot freezer is yours absolutely free if you subscribe to a food freezer plan." The freezer is free, but the food is so overpriced that it covers the cost of the freezer with a nice profit to boot.

Are either of those covered?

Mr. McLAREN. Well, I think that chain referrals would be covered by No. 5 on the list: representing that the consumer will obtain any rights, privileges, or remedies, knowing that the consumer will not.

I think this may also cover your second example, although No. 8 provides for holding the seller to his statements of fact concerning the reason for, existence of, or amounts of price reductions, or savings in comparison to prices of competitors or his own price, when he knows that this is false.

Senator Moss. Under No. 5, where you say "representing the consumer will obtain any rights, privileges, or remedies," is that a legal right or privilege, or just any suggestion of some benefit coming to him?

Mr. McLAREN. Well, I think that this covers representations that might go along with what, for example, a given lot would carry with it, a real estate lot. If it did not carry those privileges, yes, No. 5 would cover that.

It would also cover representations with respect to perhaps warranty rights that are not included.

Senator Moss. Well, switching to the freezer case again, I suppose it is true that the freezer is free; but the cost of the food is so over-inflated in price—do you think No. 8 gets at that?

Mr. McLAREN. Mrs. Knauer suggests that No. 7 also probably gets at it because they pass off the meat as being grade A, and it is somewhere down the line, substantially less in quality than it would otherwise be.

Of course, in each case, we are not trying to trap the seller. We have the qualification in here that these statements are knowingly made and that they are false and the seller knows that they are false.

Senator Moss. Of course, I think you testified that it was going to take some buildup, perhaps, of case law in these categories. There are several questions that I raise as to where they might fit in.

I have another one on the substandard correspondence and vocational schools that lead one to believe he will acquire a valuable skill, but whose graduates find themselves unqualified for a job when they finish the course. Where is that covered?

Mr. McLAREN. There again I think No. 5 would probably cover it, Senator; and probably No. 11, because these correspondent schools frequently represent that they have some kind of a tieup or sponsorship with a job-providing authority that they really do not.

Mrs. KNAUER. Mr. Chairman, may I point out that No. 6 would strike right at the heart of what I consider a very vicious practice that was evident to me in Philadelphia and in Pennsylvania's inner cities, where goods that are sold are repossessed, then they are repainted, resprayed and sold as new to unsuspecting, less sophisticated people for the full purchase price when they are not new. They are secondhand. Item 6 would strike at what I consider a source of great dissatisfaction in our inner cities among our poorer and low-income people.

Senator Moss. No. 5 would seem to be kind of a general category, category, like No. 5 under the FTC Act. It is broad in its wording and perhaps would cover a great many of these frauds that we are confronted with.

Mr. McLAREN. Mr. Chairman, I wonder if it would be helpful if we would furnish you examples that would fit under these different categories by reference to decided cases?

Senator Moss. It would be very helpful. We would include them in the transcript of the record of the hearing, and it would be helpful to the committee to have it.¹

Senator Moss. I might agree that specific rules are essential to provide manufacturers with notice of unfair and deceptive trade practices, but should not the FTC have express authority to set trade regulation rules to define other prohibited acts? And should not the consumer be able to sue as a class if these rules are violated?

Mr. McLAREN. I think that is something that needs to be developed gradually. It may very well be true that that should be the way in due course.

We think that these 11 points now on the list cover this situation as of the present time. We certainly do not have a completely closed mind on it, but we have made a careful analysis of the defined practices

¹ See letter on p. 27.

that we think need to be legislated against and that have been defined and that businessmen generally know now, I think, are unfair practices. It seems fair to us now to move these out of the developmental stage that they have been in for a number of years—I am speaking of the FTC where there was no damage right arising for commission of these acts—and put them into the Consumer Protection Act. This would provide an action that can be prosecuted in court. And of course, for a second offense, you can get a contempt citation, and criminal contempt if that is appropriate.

Senator Moss. Mrs. Knauer, what role do you see for the private bar in securing remedies for wrongs done to individual consumers?

Mrs. KNAUER. Having the case in effect made by the new Division of Consumer Protection in the Department of Justice would enable the consumer to have a prima facie case already, to move right in; and it certainly should be less expensive. Consumers would not have the heavy expense of investigating. In effect, the Government would prove the case for them, and then they could move right in, certainly, more simply than without this prior action by the Department of Justice.

Senator Moss. Do you believe that the efforts in the consumer protection area should be directed toward providing means for retrieving money lost by consumers through deceptive or fraudulent practices?

Mrs. KNAUER. Yes, I do. I feel not only money should be recovered, if they have lost it; but that there be rescission or reformation of contracts where that is the appropriate remedy.

Senator Moss. And you endorse group action, the class action that is provided here?

Mrs. KNAUER. As spelled out in the administration bill, I most heartily support it, Mr. Chairman.

Senator Moss. Last summer you testified in support of S. 1980 and even suggested that the bill be broadened. At that time you believed the State agencies did not have sufficient resources to protect consumers adequately and that S. 1980 was needed to remedy the consumer situation you described so well today. Have you now changed your mind? You are supporting a much more limited approach to class actions?

Mrs. KNAUER. No, I think there was no real change. When I spoke relative to Senator Tydings bill I said it was a good approach. We felt that perhaps a better approach would be something of this type.

When we actually sat down to the nitty-gritty of drafting a bill with the Department of Justice and we began to see the mechanics of it, we felt that the form it is now in was the appropriate one to give broad new consumer protection to consumers as well as be fair to business. I am completely convinced that this is the proper approach.

Senator Moss. Was there not quite a bit of business or industry opposition to the class action feature?

Mrs. KNAUER. I suppose there is opposition to every bill that is suggested. But I feel that legislation must be made practical, to make it work. Certainly I would rely on the legal advice of the Department of Justice because they would be the ones to implement this new law.

Senator Moss. That was part of the nitty-gritty of writing the bill; is that not so?

Mrs. KNAUER. I had a lot of good legal talent working on it.

Senator MOSS. Mr. McLaren, what role do you see for the consumer class action in the arsenal of consumer protection weapons? Do you think the individual action provided in this bill will often be used? And what role will it play?

Mr. McLAREN. Well, I think that this again comes to the balancing question that I adverted to a moment ago. Basically we have found that treble damage actions normally follow after Government actions. We think probably the same thing will happen here. It would happen here in any event.

On the other hand, we have to protect the jurisdiction of the Federal courts, and we have the question of protecting business from strike suits and simply making this a lawyer's enrichment bill. We think that the way it will work out is that the consumer himself will be able to come to the Justice Department, to the FTC, or to Mrs. Knauer and will be referred to us. Sometimes the consumer will have hired a lawyer or a lawyer will have spotted something that a group of his clients, or maybe that he as a consumer, is concerned about. They will bring the matter to the FTC or Justice, and the incentive to get Justice and FTC to move will be there because after a judgment is entered—there has been a screening process in effect—then they are entitled to go into Federal court, to file a class action, and to recover through the Federal court system.

I think it is a good balanced way of approaching a very difficult question.

Senator MOSS. Will the general practice be that the consumer first goes to Justice to present the case and have it investigated and litigated? The private remedy then will fall into disuse or will be very little needed after that; is that not right?

Mr. McLAREN. I do not think so, Mr. Chairman. I think that there will be a considerable body of interested attorneys bringing these cases to the attention of Justice and FTC, being gadflies, to see that FTC and Justice move on them; then when the judgment is entered, they will be able to go ahead and recover for their clients.

I do not see it falling into disuse at all. Of course, this happens in quite some degree today—that our cases, and I believe FTC's cases, are based on complaints of people who are injured. They come in and they may be up against somebody, as I indicated before, who is pretty much judgment proof; and they cannot afford to go in and use the processes of the court and just get an injunction. It is expensive, and once they prove the violation, they cannot recover damages.

So this will be a way for them to get action to enjoin this activity; and then if there are damages that are recoverable, then they will be able to move as soon as the judgment has been entered, and recover.

Senator MOSS. You indicated that you more or less followed the Clayton Act and the theory in drafting that, but that act does not require prior Government action before an individual can seek private remedy; and in S. 3201 you do require Government action. Why the difference?

Mr. McLAREN. The difference is because you have such a vast possible number of claimants and of possible transactions founding claims and the harm to the courts in flooding them with this kind of case, were there no screening process; and I think we have to face it: if we put out

a kind of a procedure that opens up strike suits against business—and this is a very expensive thing for business—we are going to pay for it. They are going to have to put it in their prices and we will be feeding inflation as the strike suit lawyer gets rich on it.

Senator Moss. What about the consumer, however, whose case is not taken by the FTC or the Justice Department? Assume he still has a valid grievance and he wants to have it adjudicated?

Mr. McLAREN. Senator, I suspect that Mrs. Knauer would be on the necks of the Chairman of the Federal Trade Commission and the head of the Consumer Protection Division, if she did not get action, they would probably be hearing from the President.

Senator Moss. We would hope it would work out that way.

Mrs. KNAUER. I am glad he said that, I did not say it. But it is very, very true.

Mr. McLAREN. And I might add she would do it in a very nice, effective way.

Senator Moss. Perhaps just one final question.

Mr. McLaren, can you point out an instance of fraud that is not covered in these 11 categories? We have been searching around trying to put various frauds into them. Can you suggest one that might not be covered by the 11?

Mr. McLAREN. Well, you have a number of activities that the Commission has found to involve unfair practices in some contexts and not in others.

For example, there have been cases where a sale on a one-free-with-one basis—the *Mary Carter Paint* case is a good example of that—was held to be unfair. And yet in other contexts, a one-free-with-one sale may not be an unlawful practice at all.

I think we have to leave this type of case to the Federal Trade Commission because it is the expert body; and perhaps in time a defined body of law will arise where it would be proper to put it into the statute and make it subject to Justice Department enforcement and the subject of damages for violation.

We do not feel that the present time that it is quite that well defined. I imagine there are other examples, but that is the one that comes to mind.

Senator Moss. Do you envision a time when the frauds have been sufficiently defined in case law that the individual then should be permitted to bring his suit originally without first getting FTC or Justice action?

Mr. McLAREN. I think we have to have experience with that, Senator. Our concern is that even though there is not a really legitimate claim, it can be made to look like a legitimate claim and get by a motion-to-dismiss stage, get into fabulous amounts of discovery which burden the courts and cost tremendous amounts to the defendants. I think we just are going to have to guard continually against that situation.

Senator Moss. You say these 11 categories provide the suppliers with a clear and fair notice of liabilities. Why are there no criminal penalties provided for violation of these provisions? Does this not limit you to securing an injunction?

Mr. McLAREN. Well, this is something that we did consider, Senator. I think that there are two schools of thought, particularly about making economic offenses criminal rather than civil.

In balance, I think that we come out like we do in the Clayton Act where we have civil machinery both for enforcement by FTC and by Justice, and I think that perhaps an argument can be made for criminal penalties. Criminal penalties, of course, involve that much more of a burden of proof—proof beyond a reasonable doubt; and they would involve jury trials. At least in the vast majority of cases, I think it would be a more massive and more unwieldy kind of machinery. I think that maybe it would be fair to have this kind of a civil enforcement machinery and then, for a second offense, you can bring criminal proceedings for violation of the court's injunction, for contempt of court. I think it is a pretty good program.

Senator Moss. Why in these 11 categories is the providing of credit exempted from coverage? There are a number of abuses in the sale of paper by unscrupulous suppliers, financial institutions; and it appears to me that S. 3201 might bar class actions that attack the holder in due course status.

Mr. McLAREN. There is specific legislation, I am sure you will recall, Mr. Chairman, in the Truth-in-Lending Act on that subject.

Senator Moss. Your answer is that it is covered adequately in the Truth-in-Lending Act, so that it is not necessary here?

Mr. McLAREN. At least it is covered, and we think that it would not be well to be duplicating it. If it is not covered fully, I think we ought to amend the Truth-in-Lending Act rather than getting wound up in a duplication.

Senator Moss. I do not believe class actions are permissible under Truth in Lending.

Mr. McLAREN. I think there is a civil right of action there, and then the Federal rules provide that under any Federal civil right of action, under the conditions laid out in the rules, you can have a class action.

Senator Moss. My recollection did not bring that up. Perhaps you may want to annotate that for us, if you could, and send it for the record?

Mr. McLAREN. We will be happy to, sir.
(The information requested follows:)

DEPARTMENT OF JUSTICE,
Washington, D.C., February 26, 1970.

Hon. FRANK MOSS,
Chairman, Subcommittee on the Consumer, U.S. Senate,
Washington, D.C.

DEAR SENATOR MOSS: During my testimony on S. 3201, the Consumer Protection Act of 1969, before your Subcommittee on December 16, 1969, I was asked to supply certain further information: whether the Truth in Lending Act provides civil remedies to the consumer for violation of the Act; and what situations and practices indicated by cases are and are not covered by the eleven unfair or deceptive practices set forth in section 201 of S. 3201.

Section 130 of the Truth in Lending Act, 82 Stat. 157, 16 U.S.C. § 1640 (Supp. IV, 1969), provides such civil remedy to a consumer. Any creditor in a consumer credit transaction who fails to disclose to a customer any information required by the Act to be disclosed to him under the particular type of transaction—open end consumer credit plan, sales not under open end credit plans, or consumer loans—is liable to the customer for double the finance charge (with minimum liability stipulated as \$100 and maximum \$1,000), plus court costs and reasonable attorney's fee. Action may be brought in any U.S. district court or other court of competent jurisdiction within one year of the violation. Actions of this sort are subject to Rule 23 of the Federal Rules of Civil Procedure, and thus consumers may bring class actions when the requirements of that rule are met.

An exception to the right of action is provided for error in disclosure. The remedy is foreclosed if the creditor notifies the customer of the error and makes appropriate adjustment in accounts to insure that the customer will not be required to pay a finance charge in excess of the amount or percentage rate actually disclosed. This exception is operative only if notification and adjustment is made within 15 days after discovering the error and if it precedes institution of suit under this section or receipt of written notice of error from the customer. In any action under this section, however, the creditor may not be held liable if he carries the burden of proof that the violation resulted from bona fide error notwithstanding his maintenance of procedures to avoid such error.

In addition, in any credit transaction involving a security interest in real property, any action which may be brought against the original creditor may be maintained against his assignee where the latter or its affiliates were in a continuing business relationship with the creditor at the time the credit was extended or at the time of the assignment. The assignee may not be held liable, however, if the assignment was involuntary or if the assignee carries the burden of proof that it did not have reasonable grounds to believe the creditor was violating the Act and that it maintained procedures to apprise it of such violations.

As I indicated in my testimony, comprehensive delineation of the scope of the eleven unfair and deceptive practices listed in section 201 of S. 3201 must await a case-by-case analysis of specific factual contexts. The nation's markets are active and diverse. Suppliers employ a wide variety of selling techniques. Therefore, the following situations, with supporting cases, should be taken only as illustrations of problem areas which these listed acts or practices could reach.

(1) *Offering goods or services intending not to sell them as offered*; and (2) *Advertising goods or services intending not to supply reasonably expectable public demand, unless the advertisement discloses a limitation*.—These prohibitions address the practice of "bait and switch," one of the most prevalent types of consumer deception. See, for example, *Better Living, Inc. v. FTC*, 1968 TRADE CASES ¶69, 152, 259 F.2d 271 (3 Cir. 1958) (FTC Dkt. 6920). The second deals with a specific form of the practice—advertising "bargains," which turn out to have been available only in token quantities, as a mere device to get customers into the store to switch them to other purchases. *United States v. George's Radio and Television Co., Inc.*, D.C.D.C., 1962, TRADE CASES ¶70,281 (FTC Dkt. 6140).

(4) *Representing that the consumer is legally obligated to pay for, safeguard, or return unsolicited goods knowing that the consumer is not*.—This deals with situations arising as a by-product of the growing practice of shipping unordered merchandise to prospective purchasers. It would cover situations where accompanying invoices or literature indicate that the consumer has greater legal obligation with respect to the merchandise than is actually the case, or where payment is later demanded or suit for collection threatened when no legal liability exists. *Dorfman v. FTC*, 1944-45 TRADE CASES ¶57,291, 144 F.2d 737 (8 Cir. 1944) (FTC Dkt. 4234); *National Educators, Inc., et al.*, 49 FTC 1358 (1953).

(5) *Representing that the consumer will obtain any rights, privileges, or remedies knowing that the consumer will not*.—Illustrative here are situations involving flat assurance of "unconditional guarantee," "free home trial," the right of cancellation or refund, or the seller's obligation to make replacement or repairs, when under the guarantee, sales contract or terms of offer such rights are not accorded or are carefully circumscribed by terms, conditions and obligations. *Coro Inc. v. FTC*, 1964 Trade cases ¶71,282, 388 F.2d 149 (1 Cir. 1964) (FTC Dkt. 8346); *Goodman v. FTC*, 1957 Trade Cases ¶68,690, 244 F.2d 584 (9 Cir. 1957) (FTC Dkt. 6153); *Alexander-Martin Co. et al.*, 15 FTC 360 (1931); *Excel Automatic Products Inc. et al.*, 50 FTC 1030 (1954).

(6) *Representing that goods are new knowing that they are not*.—This covers the cases of sellers offering as new goods that are deteriorated, used, second-hand, or re-built. *Schachnow v. FTC*, (3 Cir. 1941) 1940-43 Trade Cases ¶56,118 (FTC Dkt. 2047); *Surplus Tire Co., Inc. et al.*, 54 FTC 1789, 1891 (1958).

(7) *Representing that goods are of a particular standard, grade, quality, style, or model knowing they are not*.—Coverage here is self-evident on the face of the prohibition. See, for a case on point *FTC v. Winsted Hosiery Co.*, 258 U.S. 483 (1922) (FTC Dkt. 214).

(8) *Making statements of fact concerning (i) the reason for, existence of, or amounts of price reductions, or (ii) savings in comparison to price of competitors or one's own price, knowing that such statements are false*.—This prohibition encompasses in its various forms one of the most prevalent types of deceptive advertising. It could include such practices as repeated "fire sales"

and "close-out sales," and sales indicating "50% off" or stated dollar savings where these figures are not based either on the seller's regular selling prices or on prices customary in the community for the goods or services. *Giant Food, Inc. v. FTC*, 332 F.2d 977 (CA D.C. 1963) 1963 Trade Cases ¶ 70,810 (FTC Dkt. 7773); *Ed Hamilton Furs, Inc. et al.*, 51 FTC 186 (1954).

(9) *Representing that goods or services are those of another, knowing they are not*; and (11) *Knowingly representing that goods or services have sponsorship, approval, origin, characteristics of safety or performance, ingredients, uses, benefits or quantities that they do not have, or that person has a sponsorship, approval, status, affiliation, or connection that he does not have . . .*—Both these prohibitions could deal with the practice of fraudulently using actual trade symbols or deceptive simulations on goods, in the first case those of recognized brand-name producers (*FTC v. Balme*, 23 F.2d 615 (2 Cir. 1928) (FTC Dkt. 764)) and in the second those of known testing organizations or other recognized authorities. *Erickson v. FTC*, 1959 Trade Cases ¶ 69, 527, 272 F.2d 318 (7 Cir. 1959) (FTC Dkt. 6499). The first could also cover, among other things, the practice of undisclosed substitution of a different product from the one the customer has chosen. *Globe Readers Service Inc. v. FTC*, 285 F.2d 692 (7 Cir. 1961) 1960 Trade Cases ¶ 69, 890 (FTC Dkt. 7490). The second would cover a wide variety of misrepresentations about goods, services, and the persons involved in handling them, provided however that these statements are more specific than mere general "puffery" by the seller. *Nesick Industries, Inc. v. FTC*, 1960 Trade Cases ¶ 69, 625, 278 F.2d 337 (7 Cir. 1960) (FTC Dkt. 6779).

(3) *Stating that services, replacements or repairs are needed with knowledge that they are not*; and (10) *Failing to return or refund a deposit or advance payment for goods not delivered or services not rendered, when no default or further obligation of the person making such deposit or advance payment exists.*—No § 5 FTC Act cases are readily found which are squarely analogous with these situations. These are instances of bare-faced dishonesty, whereas § 5 offenses against consumers usually involve at least some element of deception. In any event, the first would cover the current widespread complaints against servicemen—TV repairmen and auto mechanics, for example—for making unneeded expensive repairs on appliances and equipment. The second could cover situations where the customer encounters undue delays in refunding following cancellation of a purchase after failure of delivery at the promised time or delay in delivery beyond a reasonable time after acceptance of the order. As with (4) above, it could also cover situations where a seller may take advantage of the customer's ignorance of the law, by representing that no legal obligation to refund exists under the circumstances of the transaction.

These eleven proscribed practices were not designed to provide an all-inclusive list of frauds or unfair or deceptive practices in the consumer protection field. Situations not covered could include those excluded by the terms of section 201 itself and a variety of others determined by the FTC in specific cases to be within the terms of Section 5 of the Federal Trade Commission Act. For example, the bill limits the prohibitions to situations where the action of the seller is deliberate, showing actual or presumptive knowledge of falsity of representations or a reckless disregard for the truth. Again, the bill specifically excludes situations involving the sale of securities or interests in securities or the provision of credit. In addition, if it could be shown that a breach of warranty was not related to the forms of misrepresentation described in this bill, such a breach of warranty would not be covered.

However, in an Act providing injunctive powers and subsequent civil remedies to consumers it was not felt desirable or practicable to attempt an inclusive coverage of all practices adversely affecting consumers, either by exhaustive itemization or use of general language which might make application unclear. It was felt best at this time to devise a list of clearly-defined specific practices which have both substantial adverse effects on consumers and are well known by merchants and others to be unfair and deceptive practices under Section 5 of the FTC Act, as developed by the Commission. If after enactment of S. 3201 Consumer Protection Division investigations should identify other specific practices which are found to be sufficiently widespread and to have a substantial impact on consumers, the annual reports of the Attorney General required under section 209 of the Act would provide an appropriate vehicle for bringing them to the attention of Congress for its consideration of amendatory legislation.

Sincerely yours,

RICHARD W. McLAREN,
Assistant Attorney General,
Antitrust Division.

Senator Moss. We are pleased to have Senator Prouty sitting with us this morning.

You did not hear the direct testimony, but you may have some questions or comments you would like to make, Senator Prouty.

Senator PROUTY. Thank you, Mr. Chairman.

I am sorry I was not present when Mrs. Knauer and Mr. McLaren made their statements, but I shall read them with a great deal of interest.

I am not a member of the Consumer Subcommittee, but I do feel it is dealing with questions of great importance to the people of the country, and so I was happy to have an opportunity to be here.

Mrs. Knauer, as one who has been very eminent in the field of consumer protection at the State level, what do you think of the premise that local consumer frauds only affecting interstate commerce can be best handled by the State and local communities?

Mrs. KNAUER. Well, my experience in Pennsylvania proved that once that crooked operator crossed the State line, he was out of our jurisdiction.

Most of the class action provisions in the various states are merely a patchwork where they exist at all. I always cite New York and California as having basically the same class action law; but the courts in New York have ruled in the narrowest definition of that act in New York; whereas in California it is a class action that is, I believe, wide open.

But the thrust of the administration bill is to give equal remedy to all consumers in America, to spell out a new approach to consumer protection in this area as outlined in this bill so that people, regardless of where they lived, would have this new consumer protection.

Senator PROUTY. Did the consumer protection agency which you headed in Pennsylvania rely much on the findings of the FTC? More importantly did it get any real assistance from the FTC?

Mrs. KNAUER. We had a lot of assistance in a good many instances in advice and definitions. But I understand that most of the cases we referred to them, of course, bogged down in their overload, so that I believe that action has not even been initiated in those cases that I referred up to 2 years ago.

Senator PROUTY. When a consumer fraud is detected, either by the local, State, or Federal Government, what is the greatest problem that faces the consumer protection agency? Is it getting knowledge of the fact that a fraudulent practice exists to the consumer?

Mrs. KNAUER. Let me say, Senator, that many of the States do not have adequate consumer protection laws. Our office is currently engaged in a codification of all consumer protection laws, working with the National Association of Attorneys and others, hoping to make available this information as a central resource so when they seek to improve their local laws, they will have this help to which they can refer.

But the thrust of this bill is to give this new consumer protection that will be equal for all citizens at the Federal level.

I think a great deal has to be done in the individual States, not only to set up consumer protection bureaus—there are 33, I believe, on the list, but only half a dozen are truly effective because most of them are understaffed, underfinanced and, of course, without the hard core of consumer law to enable them to be truly effective. Our office is engaged in trying to encourage that in all the States.

Senator PROUTY. Senator Javits and I have introduced S. 861, which provides grants-in-aid for the establishment of consumer programs at the State levels. What is your attitude concerning the merits of S. 861?

Mrs. KNAUER. The administration has not taken an official position on that bill, to my knowledge. We have not been asked to testify on it.

I personally think it is an excellent step in the right direction.

Senator PROUTY. Thank you. I hoped you would say that.

Senator Moss. Thank you, Mrs. Knauer and Mr. McLaren. Because of the pressure of time, we will not ask more questions. I am sure that if we have further questions, you will be glad to respond in writing if we send them down to you.

Thank you. We appreciate your testimony.

We will now hear from the Honorable Paul Rand Dixon, Chairman of the Federal Trade Commission.

Commissioner Dixon, we are glad to have you back here before our subcommittee. We are pleased to have you, Mr. Chairman, and we look forward to your testimony here—primarily on S. 3201; but as I indicated, both S. 2246 and S. 3092 are before us, if you have any comments to make on them.

STATEMENT OF HON. PAUL RAND DIXON, CHAIRMAN, FEDERAL TRADE COMMISSION, WASHINGTON, D.C.; ACCOMPANIED BY JOHN V. BUFFINGTON, GENERAL COUNSEL, FEDERAL TRADE COMMISSION

Mr. DIXON. Thank you, Mr. Chairman. With me is Mr. John V. Buffington, the General Counsel of the Federal Trade Commission.

Senator Moss. We are glad you are here. Welcome, Mr. Buffington.

Mr. DIXON. I have some different thoughts, Mr. Chairman. I thank you for the opportunity to appear before this distinguished committee to express my views on S. 3201, a bill which has been introduced as part of the President's consumer protection program. There is agreement among our people that consumer rights must be recognized and protected. Our marketing economy has long concentrated solely on the movement of goods from maker to user. The result has been an imbalance of privileges and laws favoring the businessman over the consumer. Now, popular feeling demands a readjustment to correct this imbalance. Consumerism—as the President recently stated—is a healthy development and is here to stay.

We at the Commission have been interested in consumerism long before it became popular, and I am proud to state that we have contributed substantially to its present healthy condition.

The views I express here today are my own. My colleagues at the Commission will favor you with their views tomorrow. I expect that our views will differ; differences of opinion between us seem to be the rule rather than the exception these days. Our views will no doubt fully explore all possible consequences of this proposed legislation.

Since this bill involves several different ideas or proposals, I will deal with each one in the order in which they appear in the bill.

Section 101 would amend section 5 of the Federal Trade Commission Act by changing the words "in commerce" to "affecting commerce." This would substantially enlarge the jurisdiction of the Commission. Since the Supreme Court's decision in *Federal Trade*

Commission v. Bunte Brothers, Inc., 312 U.S. 349 (1941), the law has been clear that the Commission's authority to proceed against unfair methods of competition, and unfair or deceptive acts or practices is limited to those occurring in interstate commerce. You would not believe that from reading the ABA report, but that is the law, whether they like it or not.

This amendment would change this and give the Commission jurisdiction over myriads of local businesses if their activities affect interstate commerce.

What I am about to say, Mr. Chairman, may surprise you. Now, I am not in favor of this amendment. I am not in favor of enlarging the Commission's jurisdiction at this time. I realize this position is contrary to views I have expressed at an earlier time on other occasions. I have given this matter serious thought, however. I have struggled with my inner emotions, understandably tugging in opposite directions on this question. But I have reached the conclusion that this is not the time to enlarge the Commission's jurisdiction. My reasons are simple.

I am reminded that many, many times I have been before committees of Congress and they say, "Mr. Chairman, what could the Congress do to make your job easier?"

You can change the words "in commerce" to "affect commerce," but please do not do it unless you give me authority to put the employees in to do it and the money to hire them. Please do not do it unless you do that.

Since 1965, with my encouragement, the Commission has commenced a program of cooperation with the States. And I wish Senator Prouty had stayed. Our idea was to encourage local governments to solve local consumer problems. The States have responded nobly to our overtures.

Twenty-eight States have adopted laws generally similar to the Federal Trade Commission Act. In five of the States, the law reads exactly like the Federal Trade Commission Act, prohibiting use of "unfair methods of competition and unfair or deceptive acts or practices" in the conduct of any trade or commerce. These States are Hawaii, Washington, Vermont, Massachusetts, and North Carolina. The other 23 have slightly different laws which achieve approximately the same results, at least with regard to preventing consumer deception. They are: Alaska, Arizona, California, Colorado, Connecticut, Delaware, Illinois, Iowa, Kansas, Maryland, Michigan, Minnesota, Missouri, New Jersey, New Mexico, New York, North Dakota, Oregon, Pennsylvania, Rhode Island, South Dakota, Texas, and Wisconsin.

Seven additional States have set up a consumer fraud bureau, a consumer complaints clearinghouse, or a study committee to determine the need for new legislation. These are Arkansas, Florida, Kentucky, Maine, Ohio, my home State of Tennessee, and West Virginia. These States are presently considering strengthening their laws to more closely resemble the Federal Trade Commission Act. Thus, it can be said that 35 of the States have taken decisive action toward protecting consumers from deception and preventing unfair practices in the marketplace. We are hopeful that other States will take similar action in the near future.

I think without doubt this activity by the States will go a long way toward not only protecting consumers, but promoting peace and

tranquillity in our country, and harmonious relations between the people in all walks of life.

Our State cooperation program has been so successful that the Commission is initiating a program of cooperation and coordination with local governmental offices in the major metropolitan trading areas.

I propose, therefore, that the work of the Federal Trade Commission be reoriented. Our goal should be to restrict our activity to that of a Federal agency coping with Federal problems while encouraging local leaders in State, city, and county governments to solve their local problems locally. The Federal Government should enter into true partnership with local governments at all levels to aid them in the enforcement of their laws, to offer help on their problems, to furnish expertise, and to enable them to successfully handle these problems. I firmly believe that local consumer problems can best be solved by local governments.

Instead of authorizing the Commission to get involved in local problems—and that is exactly what we are talking about. You are talking about which way you are going in this country; whether you are going to follow the traditional American dream with the division of State, local, and Federal, or whether you are going to encourage that great monolithic Government to solve all problems. That is what we are talking about.

Now, instead of authorizing the Commission to get involved in local problems, I propose that Congress offer financial assistance to local governments to help finance their consumer protection activities. That is what Senator Prouty made mention of. I know that proposals of this nature are pending before the Congress at this time and I endorse the principle because I believe consumer protection work can be most effective at this level.

The expenses of local governments in their antitrust and consumer protection efforts probably exceed those which Congress has authorized at the Federal level. Their commitments have strained their budgets. I would propose a consumer protection funding program which would assist States in financing their antitrust and consumer protection work. Funds advanced would be repayable from proceeds of actions brought. And, as I will cover in detail later, I propose making Federal Trade Commission decisions and orders available to local governments on the same basis as court decrees.

I can think of no earthly reason why Congress does not have faith in the Federal Trade Commission that it created. Rather than have one district judge, they put in a panel of five; and yet you will not even give the decisions of that panel of five the same dignity of the decision of one judge.

I think a continuing program of local law enforcement will be more effective than enlarging the jurisdiction of the Commission.

I see other problems with enlarging the Commission's jurisdiction to include local law violations. It would substantially increase the burden on our already overburdened staff. About the only matters which we have been able to gracefully decline in the past have been complaints which did not involve interstate commerce.

Congress very carefully, when they gave this Federal Trade Commission the broadest of all power to proceed against—what—unfair methods of competition or unfair or deceptive acts or practices—they very carefully must have realized what a grant of authority that was;

and they limited it to "in commerce." They knew what they were doing when they did it. That does not mean the Congress cannot in its judgment change it.

I just have suggested that I think—no—I fear the amendment would involve the Commission too deeply in local matters—matters our critics like to refer to as "trivia." The Commission should concentrate on violations by the larger interstate corporations.

You know, I have played ball in my time, and it is not hard to get hit this way and that way, but one day you are criticized for trivia; and the next day they want you to deal in trivia, you see—the same critics. And the critics accuse the Commission of being involved in trivia, and then somewhere over in the background all of them arrived at one sentence.

However, the Congress should realize the Commission is grossly understaffed. Mr. Nader in all of his wisdom at least said nine to 10 times the number of employees were needed for the consumer work. But no one has ever paid much attention to that sentence.

I realize that with this broadened jurisdiction the Commission could use its discretion and not get involved in too many local matters. In the President's message, he suggested this; and then in the next sentence he said "only use it sparingly." But I have a question.

With the knowledge that the Commission has the jurisdiction, pressure to act will undoubtedly increase. I strongly believe that the better approach is to leave the responsibility with local governments and lend them a helping hand where needed in carrying out this responsibility.

We have sat at the Federal Trade Commission literally for weeks on what we call consumer protection hearings. We have not completed our summation but, as I listened to them I heard things that were tragic; things that were happening on Broad Street, America; things that had the overtone of deception and fraud. They do not belong in a cease-and-desist situation; they belong in jail. They need somebody to tell the mayors and the Governors of these cities and States that they are kidding their constituents. They are not doing their best for them. That is what is needed on consumerism. It is needed right here.

Now, if you want to try to do it all for them, because it is not very popular to be engaged in consumer protection; you very rarely make anyone happy. Certainly the guy you sue is not happy, and probably because the relief is rather hollow, the consumer has been injured, as you say; so it is pretty much left to a bunch of fellows in Washington to do it. It is not popular locally. Every time a local law enforcement officer does something like that, he loses a few friends.

Now, section 102 of the bill would amend section 13 of the Federal Trade Commission Act to provide the Commission with a procedure whereby it could seek a temporary restraining order or preliminary injunction from a district court to enjoin "any act or practice which is unfair or deceptive to a consumer and is prohibited by section 5" of the Federal Trade Commission Act. The restraining order or preliminary injunction would be dissolved if the Commission did not file a complaint against the party within 60 days of such issuance.

I heard you ask that question, Mr. Chairman. Look, the investigation would precede the filing of the complaint and it would not be any more difficult to do it in 60 days, 20 days, or 30 days.

And I have another message for you. We are faster than they are in the district courts. You did not ask Mr. McLaren how slow he was. Ask him sometime. "How long does it take you to get in a district court? When you get in line, how long after you file?" That is the question.

The effect of this amendment would be to enable the Commission to protect consumers from policies of unfair or deceptive acts or practices during that considerable period of time from the date the Commission first has reason to believe the law has been violated until such practices have been enjoined by a final Commission order. You do not have any reason to believe it until you have investigated something, unless you just want to shoot from the hip and condemn people without a trial or due process or anything.

The Commission makes every effort to expedite its proceedings. However, our experience has been that frequently a considerable period of time may elapse from the time the Commission first begins an action until it is concluded with a final order.

If you want to measure it from the time Citizen so-and-so in State so-and-so complains, and from the time we went out and got the evidence and the time we filed the complaint and it was tried and the petition was reviewed in the circuit court; and if we lose, if we were able to persuade the Solicitor to take it to the Supreme Court; or if we won, he had to go—then if you want to measure it that way, it sometimes takes a considerable time under due process in our country.

During the interim, the Commission, if not powerless, is severely handicapped in its efforts to protect the consumer from deceptive practices such as "bait and switch" tactics, misrepresentation of prices, or misrepresentation of products, and bogus contests.

I believe it manifest that the rights of consumers to be free from unfair and deceptive practices should not be subservient to the rights of those who would continue profitable unfair and deceptive practices. I, therefore, strongly support this amendment as providing an effective weapon to the Commission to enable it to take efficient action to protect consumers in those matters where immediate action is warranted.

Mr. Chairman, in 1961 or 1962, I along with Congressman Patman and Congressman Steed, appeared before Chairman Olen Harris of the Interstate and Foreign Commerce Committee of the House and recommended strongly that the Congress pass a bill giving the Federal Trade Commission this power across the board because, as Mr. McLaren talked about patterning this law after the Clayton Act, part of that Clayton Act, as amended, deals with price discrimination—which he does not enforce; which he leaves to us. And for Lord's sakes alive, we have heard over the years about the small businessman that said—

I am being subjected to sales beneath cost now; and if you do not save me now, it will not do any good 6 years from now or 2 years digging me up and reinterring me.

We asked for that and the line was twice around that room with opponents who were against it.

Now the time has changed. Since the consumer movement has come along and it has been painted the way it is. There is support. Now the challenge is the Deceptive Sales Act bill which you rightly passed in the Senate; but it got no farther. This is a different approach, but

at least patterned after powers we already have. You would update this to other deceptive practices under section 5 and let us go to court. It is a good idea. It has long been needed. We have supported it before. I heartily support it again.

The very existence of this authority alone will often obviate the need for its use. It also would deter those fraudulent operators who now deliberately stretch the maximum period of grace afforded by exercising their procedural rights to continue to milk the consumer. Moreover, the issuance of the injunction would have the salutary effect of expediting the adjudicative process by discouraging unnecessary procedural delays.

This is the beauty of it: That great member of the bar, doing the best for his client, knows all the tricks of his trade and he can string one of these things out until you get gray-haired. You pass this law and there is no percentage in stringing it out.

The Commission has long sought such injunctive authority for the substantial additional protection it affords the consumer.

Section 201 is basically a definitions section—defining an “unfair or deceptive practice” to be any of 11 categories enumerated in the bill. Section 202 would declare these listed practices to be unlawful.

I do not agree with this approach of limiting the unlawful practices to specific categories. This was the question I heard you ask Mr. McLaren. I want to tell you why I differ with him. There are many practices unfair and deceptive to consumers which would not fit into these neat pigeonholes.

And you brought up the use of the word “free.” And “payola” is another example. The use of coercion, intimidation, and scare tactics would not be covered. Neither would misrepresentation of employment opportunities or sales opportunities in connection with sales of educational courses, and on and on and on.

Several categories are further limited by requiring proof that the deceptions were knowingly made, or made with knowledge of their falsity. Further, the proviso in section 201(a) (11) would further debilitate these categories. A substantial amount of time would be spent attempting to fit a deceptive practice into the proper category, taking maybe another 40 years to get out and to have the definition of what each one of those eleven things might mean, prove it was knowingly made, and establish that it was not exempt under the proviso of subparagraph (a) (11).

I can see no logical reason for singling out certain unfair or deceptive practices, or trying to categorize the unfair practices, or offering consumers protection against only a limited range of unfair practices. These limitations, in my opinion, would cause substantial problems for everyone concerned. I would propose, therefore, that an “unfair or deceptive practice” be defined simply as any act or practice which is unfair or deceptive to a consumer and which is prohibited by section 5(a) (1) of the Federal Trade Commission Act.

It is just that simple. Congress did this. Congress did this in 1938—and it is now 1969—that is 31 years’ worth of experience. There is a little bit of guidance in there somewhere if you look for it.

The unfair or deceptive acts or practices declared to be unlawful by the Federal Trade Commission Act are readily ascertainable. There is an existing body of law compiled over a 55-year period, consisting of

thousands of Commission decisions, which defines these terms. There are also some 800 court opinions rendered during these 55 years interpreting the act. The term "unfair or deceptive acts or practices" is no more vague than "due process of law," "unsound mind," "undue influence," "schemes to defraud," or "unreasonably low prices," the meaning of all of which the courts have been able to determine. *Sears, Roebuck & Co. v. Federal Trade Commission*, 258 Fed. 307, 311 (1919); *United States v. National Dairy Products Corp.*, 372 U.S. 29, 32 (1963). Further, no supplier need be in doubt as to conduct likely to be declared in violation of the Federal Trade Commission Act in view of this large body of decisional law.

It seems to me that the consumer should be given the broad protection contemplated by this bill as against all unfair or deceptive practices, not just the limited categories enumerated in the bill.

Section 203 gives the district courts jurisdiction to restrain the unfair or deceptive practices declared to be unlawful by the bill upon application by the Attorney General. The courts would be authorized to issue whatever injunctive relief may be appropriate.

Under section 204, a consumer would be granted a right to a private action against any supplier to recover actual damages he may have sustained, costs, and reasonable attorneys' fees, and when appropriate, other equitable relief. This right of private action would arise where—

1. The Attorney General has enjoined such supplier from committing any act or practice declared to be unlawful within section 201 of the bill, whether after final adjudication or by consent decree—that is if justice does it, you see; or

2. The Federal Trade Commission in a proceeding initiated under section 5 of the Federal Trade Commission Act has ordered any supplier to cease and desist from any act or practice declared to be unfair or deceptive within section 201 of this bill, whether by consent decree or after adjudication, and such order shall have become final within the meaning of the Federal Trade Commission Act.

Section 205 provides that a final judgment or decree in any proceeding brought by the Attorney General under section 203, to the effect that a defendant has engaged in any unfair act or practice within the meaning of this bill, shall be prima facie evidence against such defendant in any private action brought by any consumer under section 204.

That is going to be prima facie there, you see. Prima facie effect is not extended to consent judgments or decrees entered before any testimony has been taken.

But under this bill the Attorney General is authorized to seek injunctions, the consumer is authorized a right of private action where an action by the Attorney General results in a decree, and, in successfully litigated cases, the court decree may constitute prima facie evidence for purposes of a consumer suit. Federal Trade Commission proceedings give rise to a right of private action for damages, but such proceedings are not given prima facie effect in a subsequent consumer suit.

Now why should that difference be there—unless you want all these things to go over to Justice. Is that the plan?

This failure to give equal efficacy to Commission decisions results in an obvious dilution of Commission powers. Is that the purpose?

Has the Commission been so maligned that now you are being told the only way to correct this thing is to dissolve or destroy the Commission? Is that it?

Well, there is an easier way to do this than that. Just abolish the agency.

This results in a weakening of the ability of the Commission to protect the public interest. The Commission, which has pioneered in this field, which has developed a body of law as to what is unfair and deceptive to consumers, would become a secondary protector of the consumer. There is no other way to describe it. I say this in all sincerity. Each consumer deceptive practice matter that came to the Commission's attention, each investigation that revealed a consumer fraud, in my opinion, if you really wanted to help the consumer and you pass this bill, a member of this Commission would be obligated in the best interest of consumers, to send the matter to the Department of Justice for action, since the Attorney General's successful prosecution of the matter would result in a decree that would constitute prima facie evidence in a consumer suit. This is a substantial consumer advantage which the Commission could not ignore.

Why are you asking who would get the complaint? It is like playing ring around the rosy. Send it right over there if you are really trying to protect the consumer.

Why should this anomaly exist? I see no substantial reason why the prima facie effect of a final decree should depend upon which governmental department happened to proceed in the first instance. There is no rhyme or reason for that kind of logic.

But permit me to go further. Although some of my best friends are at the Department of Justice, I see no necessity for establishing a Consumer Division at the Department. I see none whatsoever. I know it is going to cost money. But for 9 years I have been coming up here and asking for more money and I have not gotten any, Mr. Chairman. We have gotten a lot of hell put upon our backs. We have been razzed. We have been criticized—and some of it justifiably—but largely the Congress has not supported the Federal Trade Commission with adequate funds. And if you go creating a department over at Justice to duplicate the one over here, well, I do not know; it is going to cost money. It is going to cost money. Maybe that is the easy way to get money out of the establishment. I do not know. But I can see no necessity for it.

I perceive no logical reason for a diminution of the Commission's authority in this field. I do not see any. If this bill becomes law, I visualize not only a transfer of a substantial part of the Commission's authority in the consumer protection field to the Department, but also a substantial part of our budget as well. And it is thin enough. I am of the firm opinion that this transfer of function is not necessary, nor should it be done.

I am not just criticizing. I would propose instead that the Commission be given the injunctive authority provided in section 102 of this bill; that an "unfair or deceptive practice" be broadly defined as any act or practice which is unfair or deceptive to a consumer and which is prohibited by section 5 of the Federal Trade Commission Act; that consumers be given a right of action based on any final Commission order enjoining a practice deceptive to a consumer; and,

finally, that a Commission order, entered after a hearing and on the basis of a finding of violation, constitute *prima facie* evidence for purposes of a consumer suit. That is all you need to do, Mr. Chairman. That will solve the problem. At least you will know where to go if it is not done.

And I will tell you something else. We are an arm of the Congress. We are not the executive branch. We have no secrets from you.

Give to the Commission the funds to do the job, the funds which under this bill would be necessary to establish an effective Consumer Division at Department of Justice, and, in my opinion, you would give the consumer the greatest protection for his tax dollar. The Commission's extensive investigative efforts and factfinding procedures would thus be made available to the consumer. The Commission has the law and the expertise; and I am convinced it can do the job.

Let me say a few words about the consumer's right of private action for actual damages contemplated by this bill. This is a feature which is long overdue as far as consumers are concerned. Securing adequate redress for grievances is presently a major consumer problem. Effective remedies are not available in practice for consumers through present judicial procedures. Administrative remedies, such as those presently provided in the Federal Trade Commission Act, are not adequate since they do not provide for recovery of individual losses.

Under the right of private action authorized by this bill, consumers will be able not only to bring individual actions, but also to bring class suits under the procedures of rule 23 of the Federal Rules of Civil Procedure. Acting as a class, consumers will be able to enforce their rights and recoup their losses as the total amount involved will make it economically feasible to institute an action seeking recovery for the group. Use of class suits will have a significant deterrent effect on the unscrupulous—they will know that there is an increased likelihood they will be required to repay consumers who have been defrauded or deceived. To the extent consumer suits discourage fraud and deception, the burden on law enforcement agencies will be lightened.

There is one aspect of this bill that seems to be adverse to the interests of consumers. I refer to the fact that consumers must await governmental action before they have a right of private action for damages. I can accept this threshold requirement for several reasons.

You asked questions of Mr. McLaren, and you can very well ask them of me. I am here addressing myself to why I think this is proper now.

First, if we can get the broad legislation I have proposed, it will be of substantial benefit to the consumer. Second, this would be the first legislation to my knowledge to authorize consumer suits for unfair or deceptive practices which violate the Federal Trade Commission Act. Its impact on the economy cannot be foretold. I am willing to measure this actual impact before plunging full speed ahead into an uncharted area of consumer class actions. In other words, let us learn to walk before we attempt to run. A journey of a thousand miles must begin with a single step. I, therefore, strongly endorse the principle of consumer class actions, and would be willing to accept at this time the fact that consumers must await governmental action before a private right of action accrues.

There are two other aspects of this bill I feel should be mentioned. Section 207, which provides that private actions must be brought within 1 year after the termination of any governmental action, is silent as to a time limitation based on the date the event giving rise to the cause of action occurred. Further, the bill is silent as to whether governmental action suspends the running of any statute of limitations. In this regard the treble damage provisions of the Clayton Act (15 U.S.C. 15, 16) provide for a 4-year statute of limitations based on the date the cause of action arose, and for suspension of such statute during the pendency of governmental action and for 1 year thereafter. I propose, therefore, that this bill be clarified in this respect along the lines of sections 4 and 5 of the Clayton Act. It would solve all the problems that are in here now.

Finally, one comment about section 208, which authorizes the Attorney General to issue civil investigative demands for investigational purposes. I defer to the Department as to the adequacy of these provisions for purposes of this bill. However, subsection (e) of section 208 makes sections 4 and 5 of the Antitrust Civil Process Act (15 U.S.C. 1313, 1314) applicable to material produced pursuant to any demand authorized by this section. Sections 4 and 5 of the Antitrust Civil Process Act provides for confidential treatment of all material produced pursuant to civil investigative demands, and, accordingly, such material would not be available to the Federal Trade Commission.

Now, I see little logic in keeping such material secret from the Commission. If the Commission and the Department are to have concurrent jurisdiction in this consumer protection area, the Department's investigative files should be available to the Commission under proper liaison arrangements, just as our investigative files are and have been available to the Department. This is one area where reciprocity is to be desired.

Thank you, Mr. Chairman. Those are my views. They did not come easy, but I feel them very deeply.

I kind of visualize that much of our consumer problem is kind of like the crime problem that is confronting the Congress today. We hear a lot about "Congress ought to solve the crime problem." Well, you are going to have to pass a whole new body of laws to do it; because somebody has to violate a law first, and of all of our crimes, most are local crimes. And most of this consumer mess is local. This is where it is.

Now, if you want the Federal Government to do it, you can do it—and I will tell you, when you pass the law, if I am still here, I am going to do the best I can to enforce it. But I will tell you I think that it is in the best interests of the America that we want out yonder somewhere for local people to get in and do their job. Do it on the local level. And where these things are interstate, then the appropriations of agencies like Federal Trade Commission make a little more sense.

Senator Moss. Thank you very much, Chairman Dixon. Your presentation was forceful and eloquent and we appreciate it greatly. Because of your long experience on the Commission and your experience with the Congress before that, we certainly will listen to what you have to say and will give it the greatest of consideration.

Your appeal for local jurisdiction and local enforcement of the consumer protection laws interests me a great deal. As you know, Senator Hart and I have a bill pending for independent consumer councils

which visualizes them being placed in all cities and in all States. Does this fit in with the general plea you are making for local enforcement?

Mr. Dixon. I would certainly hope so. I am very interested in the hearings that are going to come from this proposal.

I know that when an interstate dealer has a scheme that is brought into a State, that this ought to be a Federal job. This ought to be it.

But when you sit and listen to the complaints that come in and the people describe the tragedies and all, if you begin to catalog the complaints, they are "I wanted a little room on my house and I wanted a contractor." Or some fellow came along here, a fly-by-night kind of fellow, the chain letter kind of thing, the referral selling kind of deal—all these things. And the great, great number of these problems are right on the street. The guy that buys secondhand furniture and paints it and sells it for new—we call that in Washington "up and down Seventh and 14th Streets," you know. He lives off the low-income people. It is rather tragic, some of the things they are faced with. Some of those things are not very nice. Some of those things are fraud. I believe they could be prosecuted as fraud.

But I think it is a local law he violated; that is what it is. When you get to Indianapolis or Philadelphia or our great cities, I am heartened by seeing our great cities begin to get interested in this thing.

If it is not going to be done at the State level, let it be done at the local level. But let it be done.

Senator Moss. If the jurisdiction of the FTC is increased as provided in S. 3201 to "affecting interstate commerce," and if the Federal Trade Commission has to undertake enforcement under that broadened jurisdiction, do you have any rough estimate of the size of staff that you would need?

Mr. Dixon. I said rather facetiously 7 or 8 years ago that 10,000 people would not be enough. People laugh when I say that. But there are 50 States in the Union. Anyway you want to call it—major metropolitan areas, from 200 to 500—whichever way you want to carry them. And if you are going to do the job right, we are talking about a massive undertaking. It is a massive undertaking.

Now, let it be said our States have been rather slow to move into this area, but they are moving. They are moving. And I see nothing wrong with the matching funds idea of encouragement. It is done in 25 or 30 other areas. What is wrong with doing it in the name of the consumer? If that what it takes to make a State move, make them move. It is no good to pass a law at a State level and hire one fellow and say, "We are in business." It is like having the Federal Trade Commission with the size of the Deceptive Practice Bureau which we have today, and we are in business; we have been left that way and we cannot get any more money. We are just getting hell for not doing everybody's work.

Senator Moss. I was very heartened, of course, to hear you testifying that you thought the States were moving. Is this a recent innovation—that States have statutes parallel to the Federal Trade Commission Act or something similar to it? Or have they just been put into force?

Mr. Dixon. We started in depth back in 1965, or the early 1960's, on this program. There were some State statutes similar before that, but the great drive has come in the last 4 years. And it is underway. You can hardly go into any State where this is not being discussed in the legislature in one way or another.

Senator Moss. Well, of course, I have a great deal of affinity for what you say because I think you have the best way to get at problems where you have local enforcement. And especially, as you point out, since so many of these are small, rather individualized problems that are hard to work on out of Washington.

Mr. Dixon. This has come a long way, at least in recent times. This consumerism thing started when I was here as counsel to Senator Kefauver. Nobody had even thought about the consumer. After about 3 or 4 years, and after we had the drug hearings, everybody decided it was a good thing. And especially after Senator Kefauver got re-elected—because a lot of people thought it was going to get him defeated, but he got more votes than ever before in his life. And it is a popular subject in America today. The businessman that thinks consumerism is going away is dreaming, because today the consumer is mad, and with very good rational reason he is mad. Wherever he turns—you know, what annoys most consumers, I bet, is what annoys you and me; it is in the service industry. Who is performing these services? If you have to call a plumber or an electrician or you have an automobile or a washing machine repaired, or something like that, is the Federal Government going to straighten this out? Are you kidding? These are mechanics and artisans right on the streets of America. These are local problems and they are the problems that annoy, annoy, until somebody says, "Well, something has to be done for the consumer." So they come to Washington and say, "You solve it."

You tell me how you are going to solve a shoddy job done by a plumber, a carpenter, an electrician, or a television repairman that is an independent businessman. You just tell me how you are going to do it. Because it affects commerce, are you going to go that far? Well, you have got some problems.

I say to you, the honest way is to go right where it belongs. If the consumer is being bamboozled on the local level, then the local government is at fault for allowing it.

If it takes licensing, inspectors or anything else, they ought to do it.

Senator Moss. Would not the consumer protection of the Federal Trade Commission be more effective if the Commission had the power to issue trade regulation rules defining prohibited acts against consumers?

Mr. Dixon. We think we have that power. We put out a trade regulation rule on cigarette advertising, and if anybody does not think we have it, then he can contest us and we will go to court.

We think we have it. If the Congress wants to underwrite that in the law, it would settle it, and maybe it would be wise to do it.

But, mind you, Congress is rather careful about granting legislative powers to regulatory agencies, and so it has to be very carefully within the confines of terms, "how is this unfair methods of competition or unfair or deceptive practices?"

It has got to be material. It has got to be within those things. And it has got to have a basis and purpose within the definition of that.

Senator Moss. What about giving power to the Federal Trade Commission to collect for the consumer in actions where he has suffered a loss, to reimburse him? Would you go that far?

Mr. Dixon. I hope not. I have thought about that. I talked about it and thought about it. I thought maybe that at his step we ought not to

let him recover anything unless we found he should; but then when I thought about that, why should not a consumer who has been deceived, why should a consumer that has bought something represented to him—for instance, an automobile—if you buy an automobile, why should you not expect that that automobile will run, for instance? Or that for a reasonable period of time you do not have to pay to get it fixed or something, you see? Or why, if you buy some little gadget for the home and it does not work, why should you have to suffer that loss? Why should you not get your money back, or get one of those things that works?

Now these are questions. And I am reminded that if we are going to insist that our consumers get all these things, I agree we are going to pay for them.

I will tell you, all this consumerism has a word hidden back in there—"quality." And quality control, more of it. And we will get it.

But I will tell you this, that the consumer is long overdue, in many of the things he is buying, for getting quality and getting performance without having to spend more of his money.

So when I viewed this thing, I said to myself, Well, I think that this is the first step. I see no reason to have two departments. But if we are given adequate funds and if we find something is unfair or deceptive, and if that becomes final, then the burden is upon the one who brings the lawsuit. The burden is upon him to prove that this which was found damaged him, and that is not an easy thing to do. You have to show how you were damaged. For instance, if you bought something and you were deceived, but if it is really worth some value, how much value is that worth? How much were you damaged?

These are questions that will have to come in due time if the class lawsuit is to be brought.

I would not want the Federal Trade Commission to have to serve as such a body. But if this is the will of the Congress and you want to go that way. But I think the time has arrived that the consumer is entitled to recover from the deceptions he is being subjected to.

Senator Moss. We have a bill pending on the product guarantees that would be directed in this area.

Mr. Dixon. We are hopeful at the Commission. We had a long series of hearings on the automobile warranty, and we are hopeful that we will eventually get our report and recommendation in proper form to give you some advice.

I served as a member of President Johnson's Committee on this question in household goods and wares; and President Nixon had a new section in his consumer message that he wanted a report by the end of this year, and that is causing some degree of problems.

Senator Moss. You pointed out in your testimony that the 35 States now have some form of consumer protection, and therefore, a consumer who has been defrauded has a right of action in the State court. And of course, you made your plea for having the actions brought there primarily. So I wonder if you think S. 3201 really gives the consumer any added right, any significant change that he does not already have?

Mr. Dixon. Oh, yes; it does. Against those interstate operators, I would say, the large operator who is very difficult for a State to get a hold of, it would give him the rights and it would give him this right of a class action suit also.

Senator Moss. Is there any procedure for securing an advisory opinion from the Commission now if a manufacturer wonders if he has a problem?

Mr. Dixon. There is, sir. This was a great innovation by the Commission. When I came to the Commission I had long thought that the Commission should render advice where practical on prospective matters. And it fit in with the foundation by President Wilson and other supporters of the creation of the Federal Trade Commission. And when we talked it over among ourselves at the Commission, we were unanimous among ourselves in the adoption of the procedure to offer binding advisory opinions. We updated our whole procedure. We went from case by case to advice and guidance, and to the acceptance of voluntary affidavits of discontinuance where we thought it would serve; and then we turned around and got criticized for doing it.

It is the funniest thing. I told the Congress and everybody 8 or 9 years ago, "Now look, this numbers game is through;" and yet we are held up to ridicule today because they say we have more people doing less things. They pay no attention to the several hundred advisory opinions that may save businessmen millions of dollars and save the Government lengthy lawsuits.

We do render and have rendered advisory opinions.

Senator Moss. Should the consumer be able to pursue his private remedy after the Commission issues assurances of voluntary compliance?

Mr. Dixon. I think not. You could ask me. "Should he do it on a consent?" "Should he do it in those cases?" "Should he be able to sue if we accept a consent agreement?"

Well, this is an age-old argument against consent agreements because most consent agreements are entered into to get away from the private damage lawsuit in the antitrust field. But I would say that, on balance, the consent agreement is well worth it because the public is served faster and the controversy is over with.

Now, somebody may have been harmed and you just cannot use that as a basis for your lawsuit. You have to start over, for yourself, and it is very difficult for a private individual to obtain the evidence in order to be successful in a private lawsuit. Although some of the very best antitrust law we have on the books has come from private damage lawsuits.

But you know, Senator, it seems to me that although too much of ignoring the consumer has gone by, as now he comes into focus I would urge Congress to keep in mind that great business community that is in America. We have come a long way under our system, and I would counsel against any form of possible harassment. And I think the first step of saying that, if you are to pass the bill in its present form, it is either Justice or Federal Trade, once you have it, then you have the basis of a lawsuit—I think that is enough. Because if you take the other route and go whole hog, so to speak, the way the Clayton Act is today and the way the antitrust field is today, then there would be an invitation under this consumer approach to—it is kind of like, well, I laughingly say it would be an excellent bill for the young unemployed lawyers, the fellows that do not want to join the law firms I read about. No one wants to go to business. They want to change the world. They are in a hurry. It would be a wonderful bill for them.

But would it be good for the business community?

I look at both of these things. On this side is this business community that does produce the jobs and the wherewithal for America to grow, and I look over here—we are all consumers. Somehow or other you have to bring them in balance. And I think this bill on that approach is at least the beginning balance. I do not think you should go all the way this time.

Senator Moss. Have you noticed any appreciable change in your caseload in these 35 areas where the States have now moved in with their own consumer laws as against the ones who still are in outer darkness?

Mr. Dixon. Mr. Chairman, it is hard to measure anything any more because our complaints are going up. They have been consistently going up. But remember, the newspapers are full of this. The Congress is debating it. You are on radio and television talking about it. And for goodness sakes alive, people are now aware of this problem and so they are now writing and talking.

So in that kind of climate it is pretty hard to measure whether there is any decrease because the States are getting busy. We are beginning to refer a number of our complaints and things down to the State level where the majority of the problem is there.

This is being done in a cooperative way, but we still have the problem of what do you do about the problem where they do not have a law? What do you do? Just forget them? Or do you do something?

Well, if you do that, somebody says you engaged in trivia. That is trivia because that fellow is raising chinchillas or something out there in one of your States, somebody hooked somebody out there and said they could make a lot of money, and they say that is trivia. Well, it is not trivia to your constituents that wrote you. It is not trivia at all. It is one of the get rich schemes. It would seem \$30,000 to \$50,000 is the most that is involved, and it is in a couple of States. That is trivia.

Should you use the great arm of the Federal Government to do something about that? Or ignore it?

Well, it depends on where you are and on what side you are.

Senator Moss. If we had this "affecting interstate commerce" definition as in S. 3201—

Mr. Dixon. It would make our job much easier. It would be a nice thing to have, to use just when you wanted to. That is one way to say it, "just when you wanted to."

But I tell you that if you put this in the Federal Trade Commission Act and over at Justice, who is going to be the fellow to decide when you want to? You will do it one time because maybe somebody built a fire; and then the next time you will say, "Sorry, we are too busy this time."

If you do it, do it advisedly is what I am telling you, because it will make the burden of proof much easier, much simpler. Nearly everything affects commerce today.

Senator Moss. I was wondering if both the State and the Federal Governments have jurisdiction on almost any offense, would action by the FTC or Justice preempt the State and suspend its jurisdiction?

Mr. Dixon. There is no preemption statute here, no preemption at all. There is nothing preemptive about any laws we enforce.

Senator Moss. You heard Mrs. Knauer, I guess, indicating that she was sort of a coordinator and would perhaps refer cases to the FTC or to Justice, and since you pointed out the advantages of giving it to Justice, do you expect most of them would go there?

Mr. Dixon. If you pass the bill in its present form, I think she would be very intelligent to send them there, because there would accrue to the consumer more through the Justice action than through Federal Trade, unless you change the law and put them on an equal basis. Then if you did that, all you get then is you have two law enforcement agencies; one going through the constitutional court system and one up through the administrative system, handling the same thing and having to work out the daily liaison Mr. McLaren talks about as to who would proceed.

And then you would have less of a reason to ask for appropriations once you get it. The Congress in my opinion would not be likely to give either side enough money.

I tell you, Mr. Chairman, I have been in this business 31 years; 9 years as Chairman of the Federal Trade Commission, outside of a war and working up here in the Senate, there at the Federal Trade Commission; when I came to the Federal Trade Commission in 1938 there was about the same size staff as there was when I went back in 1961 as Chairman.

Just think of the things that had happened in America and the problems that had occurred, and the new businesses. But the Congress had not seen fit to increase the size of the Federal Trade Commission.

Since I have been at the Federal Trade Commission, the Federal Trade Commission has grown about 35 percent, and the appropriation has gone from \$8 million to \$19.5 million. But what did we get for it? We get people; that is all we get.

I will tell you something that ought to make you cry. You took part in the passage of the Truth-in-Lending Act. We heard a lot about it. The Flammable Fabrics Act; they increased that. And you saw to it that the Department of HEW, through Food and Drug, was given money to make some research on over-the-counter drugs. And we were trying to do something about imported woolen garments into this country.

But to make a long story short, we got about \$2 million extra after the long battle. We got it last month. We got it to enforce \$43 billion worth of truth-in-lending questions. This is the Federal Trade Commission's job. That is the principal job. You gave us a little over \$1.5 million to start off with that. As of this date, we have committed 50 or 60 people. I have got the money but I do not dare spend that money because you passed a pay raise bill last July. You increased the travel allowance by \$9 a day. That is \$2 million, just offsetting what I got. Now I am going to have to take that \$2 million and pay those people.

That has been going on ever since I have been Chairman of the Federal Trade Commission. And I keep coming up here and telling people that, and they say, "What are you doing about it?"

I do not know. All I know is if you are going to raise people's pay, you should pass laws to pay the people. If you are going to pass laws on truth in lending, do not tell me to enforce it and then tell me to take the same money and pay people with it.

Senator Moss. Perhaps you could send me to put in the record the difference between your budget requests and how much you got in each of the last few fiscal years.

Mr. DIXON. I heard Ralph Nader said that I had not even asked for it.

Senator Moss. We would like to put in the record how much you asked for.

Mr. DIXON. First you have to send it to the Bureau of the Budget, and it is a secret between you and the Budget. And then if you get turned down there, I can only ask the Congress for what they tell me I can, and that is a secret, too, you see. So everything is a secret.

Senator Moss. Well, I would like to go on with more colloquy. I have enjoyed it immensely, and I do appreciate your testimony. It has been very good, and it has given us a lot of material to think about.

As I said before, we cannot turn to anybody who has had wider experience and who has been grappling with the problems we are talking about.

Mr. DIXON. I warn you my fellow Commissioners have the advantage of my statement. I did not have the advantage of theirs.

Senator Moss. We will be listening to them tomorrow and the day after.

We do appreciate very much, Mr. Chairman, and Mr. Buffington, your coming here.

We will recess now until 9:30 tomorrow morning.

(Whereupon, at 12:05 p.m., the hearing was recessed, to reconvene at 9:30 a.m. on Wednesday, December 17, 1969.)

CONSUMER PROTECTION

WEDNESDAY, DECEMBER 17, 1969

U.S. SENATE,
COMMITTEE ON COMMERCE,
SUBCOMMITTEE FOR CONSUMERS,
Washington, D.C.

The subcommittee met at 9:40 a.m. in room 5110, New Senate Office Building, the Honorable Frank E. Moss (chairman of the subcommittee) presiding.

Present: Senators Moss and Pearson.

Senator Moss. The subcommittee will come to order.

We were delayed just a few minutes until Senator Tydings could get here. I see he has just appeared.

Of course, this is an extremely busy time on the floor and we are on controlled time over there. We are going to have to finish our hearing in time to get to a vote which will come shortly after noon. This is going to press us very much.

We opened the hearings yesterday and heard from Mrs. Knauer and Assistant Attorney General McLaren and the Chairman of the Federal Trade Commission, Mr. Dixon.

Today we are going to hear from Senator Tydings, who is the author of one of the bills that is before us, and the other members of the Federal Trade Commission. I know it will be a very productive hearing and I am sorry we just do not have a long time to devote to it.

I say this at the beginning because we will ask that summarization be made wherever it is feasible in the testimony, and I will make a blanket order that all of the prepared statements will go in the record in full. They are excellent statements.

With that caveat, we will begin the hearing by hearing from the Honorable Joseph D. Tydings, U.S. Senator from Maryland.

I will ask you to go ahead, Senator Tydings.

STATEMENT OF HON. JOSEPH D. TYDINGS, U.S. SENATOR FROM MARYLAND

Senator TYDINGS. Thank you, Senator Moss, Senator Pearson.

For most of our Anglo-American legal history the law has uncompassionately insisted: "Caveat emptor—the buyer beware."

Whatever justification there may have been for such a policy in the early stages of the development of our economy, its chief effect in the complex market of today is to place an undue burden on the contractual party least capable of carrying it. Too often the modern consumer is unable to assess the technical qualities of the product he purchases, to resist sophisticated sales campaigns, or to comprehend

the multitude of credit plans and financial "deals" that he may be offered. Every year billions of dollars are wasted by consumers through the purchase of misrepresented merchandise. Although the least educated and the more impoverished segments of society, those who can least afford it, suffer the most, all levels of society are affected.

Fortunately, in the last few years State attorneys general, private groups, legislatures, and law enforcement officers have begun to recognize the importance of protecting the interests of consumers. Campaigns against those who defraud and deceive consumers have intensified. Consumer councils have developed on State and local levels across the country and the voice of the consumer has begun to receive a sympathetic hearing in legislative halls.

Public awareness of the need for consumer protection programs has had some salutary effect, but has not resulted in a significant reduction in the incidence of fraud. False advertisers, loan sharks, and others of their ilk are still making exorbitant profits at the expense of the unwary consumer.

In sum, despite good intentions and the proliferation of consumer protection laws and agencies, our society continues to require that the "buyer beware."

The activities of the Federal Trade Commission indicate the limitations of the agency approach to the prevention of consumer frauds. Commissioner Philip Elman, of the Federal Trade Commission, charged in September that his agency is marked by "waste, inefficiency and indifference to public interest." Mr. Nader and his researchers had some other comments about the FTC.

However, in fairness to the FTC, delay is inherent in a bureaucracy. Furthermore, administrative budgets and personnel are limited and in some cases the statutory structure or powers of an agency may inhibit its effectiveness. More often than not, such agencies lack effective sanctions to enforce their decrees. Some of these problems can be alleviated, but obviously consumer protection agencies are not in themselves the answer to consumer fraud.

The consumer may, of course, initiate a private action or be forced to consider not only the possible direct economic loss from a class action, but also the potential visibility, publicity, and public reaction and the resulting loss of good will.

Although the dishonest merchant may be able to safely ignore the separate complaints of many individuals, he cannot afford to disregard the public criticism of many voices raised in unison.

Class actions would appear to be an invaluable weapon in the consumer's arsenal; but the class action procedure of many of the States is outmoded and archaic.

Almost all States theoretically or technically provide some form of class actions, but the manner in which they define the procedure too often makes it unavailable in the usual consumer fraud situation. The New York cases, for example, require a unity of interest among the members of a class that approximates the test for compulsory joinder of parties, practically an impossibility standard to meet.

Similarly, in *Spear v. H. V. Green Co.* (140 N.E. 795 (1923)), a Massachusetts court refused to allow 40 plaintiffs to bring a suit on behalf of 60,000 others, although the alleged facts indicated that the defendant company had employed similar fraudulent methods to

swindle many individuals out of sums of money aggregating many thousands of dollars.

The court recognized that "the frauds charged in the bill of complaint are great in magnitude and peculiarly vicious in their nature in that they were designed chiefly to victimize the ignorant and frugal poor."

Nevertheless, the court dismissed the class action, the only feasible means of suit, on the ground that the common interest required for a common law class action was not satisfied. The court interpreted that requirement to mean that the plaintiffs must have suffered virtually identical wrongs, at the same time, in the same transactions; and, of course, they did not. They had, however, been bilked in separate, similar, closely related transactions.

Fortunately for the citizens of Massachusetts, that State has recently enacted strong consumer class action legislation, but the climate for such actions remains inhospitable in most other States.

Moreover, as a result of a recent Supreme Court decision, *Snyder v. Harris* (394 U.S. 332 (1969)), the Federal courts are even less hospitable to consumer class actions than State courts. Prior to *Snyder v. Harris* the provisions of rule 23 of the Federal Rules of Civil Procedure, as amended in 1966, appeared to establish a procedural vehicle for the maintenance of consumer class actions in those cases where a basis for Federal jurisdiction existed. But in that decision, the Supreme Court ruled that separate and distinct claims cannot be aggregated to meet the required minimum \$10,000 jurisdictional amount.

This ruling, in effect, makes the rule 23 action, in itself the most modern class action procedure in the United States, unavailable to the defrauded consumer who has a claim of less than \$10,000, even if he can satisfy the necessary diversity of citizenship requirement for Federal jurisdiction.

It has been suggested that, except for the effects of *Snyder v. Harris* (394 U.S. 332 (1969)), Federal diversity jurisdiction forms a sufficient basis for bringing most instances of mass fraud into Federal court.

I cannot agree that a reversal of *Snyder v. Harris* would in itself be sufficient. First, much mass fraud is perpetrated in localized urban areas and may not involve any diversity of citizenship. A usurious finance company operating in Cleveland may never loan money to anyone who is not domiciled in Ohio. Moreover, even if a borrower from another State could conceivably be located, a lawyer both practically and ethically must work with the client who enters his office. He cannot finance a search for an out-of-State borrower or solicit his business.

Therefore, in my opinion, more is required to assure a meaningful private consumer remedy than the mere statutory reversal of *Snyder v. Harris*.

Last spring, I introduced legislation to provide such a remedy. S. 1980 provided for consumer class actions in Federal courts in cases where State consumer protection laws had been violated. Similar legislation was introduced simultaneously in the House by Congressman Eckhardt of Texas with whom I have worked closely. The bill was designed to reverse the effects of *Snyder v. Harris* and, in addition, to broaden the basis for Federal jurisdiction over consumer fraud. By

doing so, it would afford the liberal machinery of Federal rule 23 for joinder of all persons in like situations involving deception, fraud, or other illegal overreaching of consumers. S. 1980 was assigned to the Judiciary Committee.

In July, the Senate Subcommittee on Improvements in Judicial Machinery, which I chair, held hearings to consider the merits of this legislation.

Testimony was heard from an impressive group of witnesses, including among others, Virginia Knauer, Special Assistant to the President for Consumer Affairs; Ralph Nader, the "consumer watchdog," and Bess Myerson Grant, commissioner of the department of consumer affairs for the city of New York.

Each of the witnesses called for increased consumer access to the broad class action rule available in the Federal courts.

In her testimony, the President's own consumer spokeswoman, Mrs. Knauer, presented a somewhat different approach than S. 1980, suggesting legislation to permit consumer class action suits for the broad range of practices condemned as "unfair or deceptive" under the Federal Trade Commission Act. After close study of Mrs. Knauer's testimony and in-depth discussions between Mrs. Knauer's staff and our own, Congressman Eckhardt and I concluded that her proposal is a valuable one, one that complements the legislation that we introduced last spring.

On October 29, I introduced S. 3092 combining Mrs. Knauer's proposal with that contained in S. 1980. I am pleased that the chairman of this subcommittee, Senator Moss, is a cosponsor of the legislation. Congressman Eckhardt introduced the same bill in the House of Representatives.

Basically, S. 3092, the new proposal, makes unlawful and subject to class actions acts in defraud of consumers that affect commerce, without regard to the amount in controversy. An act in defraud of consumers is defined as including two distinct things: (a) an unfair or deceptive act or practice as condemned in section 5(a) of the Federal Trade Commission Act, and (b) an act that gives rise to a civil action by a consumer or consumers under State, statutory, or decisional law for the benefit of consumers.

That second part I had in the original proposal. The first part I did not. The first part was a suggestion of Mrs. Knauer.

Such a suit in Federal court would apply the laws of the State in exactly the same manner that the Federal courts apply such law in a diversity of citizenship case. Thus, the court in any suit would be dealing with a definite body of law in a manner in which it accustomed to deal with such law.

Moreover, utilization of existing well-developed bodies of State law and of Federal Trade Commission interpretations of section 5(a) prevent the coverage of the bill from being "vague."

Perhaps the most significant provision of S. 3092 is section 4(d) which governs the award of attorney's fees. If an action has been successful, the attorney will receive an award of a reasonable fee based on the value of his services to the class.

Senator Moss, if we really want to do something for the consumer, we should provide an effective class action procedure. As Ralph Nader said, this would be far and away the single most effective tool we could provide for consumer protection.

Class actions are so effective because, quite frankly, they enable a consumer who has been defrauded, no matter how small the claim, how poor the consumer, to acquire competent counsel and to go into court and recover.

Gentlemen, if your wife gets defrauded on a new washing machine or television set or some small home improvement, the court costs and the cost of hiring a good attorney, generally speaking, are substantially more than her potential recovery.

So S. 3092 is designed to insure the ready availability of competent well-compensated counsel. By doing so it guarantees a significant increase in legal muscle for the consumer.

Significantly, that muscle will be in the form of private legal actions, the traditional method of effectively redressing grievances in this country.

A private legal action brought by an injured individual is always more effective, if the individual has competent counsel, than any bureaucracy, whether Federal, State, or local.

The bill does not require the creation of any new agencies with the accompanying bureaucratic expenses and problems. It does not require a single additional line item in the appropriations bill. It depends solely upon existing legal processes.

Senator PEARSON. Do you mean we would have less appropriation work to do?

Senator TYDINGS. That is exactly correct.

Senator PEARSON. That is a most welcome note.

Senator TYDINGS. There are some who have criticized this bill as "ambulance chasing" bill. Those who refer to it as such are, in my opinion, slandering the bar of the Nation, casting disrepute upon our legal processes, and bringing no credit upon themselves.

In conclusion, I think we have an opportunity to redress the imbalance of commercial power which frequently puts the consumer, particularly the impecunious consumer, the uneducated consumer, at the mercy of the unscrupulous merchant. It is my hope that a perfected version of the Consumer Class Action Protection Act will be enacted by this Congress and will operate to provide the consumer with the meaningful remedy that has too long been denied him.

It is more valuable, with all due respect, than a hundred Federal Trade Commissions. The more you study it, I think, the stronger the arguments become in favor of this proposal.

Senator MOSS. Thank you very much, Senator Tydings.

Do I understand that S. 3092 is a refinement of S. 1980, your original bill?

Senator TYDINGS. That is right. It takes the suggestion made by the President's representative at our hearings, that the mere reliance on the State laws themselves might be not enough and that we should utilize the unfair or deceptive acts or practices language of the Federal Trade Commission Act in creating a new private remedy.

What we did was add that as additional coverage, so to speak, to our original proposal. We felt that Mrs. Knauer made a good point, and we worked with her and with her office and we rewrote the legislation.

Senator MOSS. Have you had the opportunity to examine S. 3201, which is the administration bill which was sent up here and is also before us?

Senator TYDINGS. Yes. I must say it is a complete mystery to me how Mrs. Knauer could come before our subcommittee in August and testify in favor of a strong consumer protection bill and then offer as sorry a substitute as the administration proposal.

I think the American people have a right to expect at least a bill as strong as the bill which I proposed, and which Mrs. Knauer indicated was not strong enough.

Unlike my bill, the administration has offered a private remedy that is not self-starting but must be triggered by a successful determination of a Government suit. In other words, they are falling right back upon the bureaucracy. Senator Pearson, there would be a need for more line items in appropriation bills and for an increase in the size of the FTC or some other bureaucracy in the Federal Government.

Not only will it make for excessive delay, but it leaves to a Government agency rather than the injured party the power to determine which consumers are to be protected.

Senator PEARSON. As I understand the administration proposal, upon proper action brought by the Justice Department, they would seek injunctive relief and thereafter a class action would be available under rule 23; is it not about that simple?

Senator TYDINGS. Approximately. Except that they would limit even the Government suits to certain defined forms of fraud.

Senator PEARSON. Pardon me for interrupting you, but after the injunctive relief which would be the triggering mechanism, then a class action can be instituted, as I understood it?

Senator TYDINGS. That is right.

Senator PEARSON. With all of the advantages of private counsel, et cetera?

Senator TYDINGS. Right.

Senator PEARSON. Plus the attorney's fees?

Senator TYDINGS. But with two major restrictions. No. 1, you resort to the bureaucracy first. In other words, if some lawyer in the Department of Justice or the FTC—

Senator PEARSON. They are all sitting behind you, Senator.

[Laughter.]

Senator TYDINGS. That is fine.

Senator PEARSON. I know that does not make any difference to you.

Senator TYDINGS. My grandfather was the first Chairman of the Federal Trade Commission, and we are not bragging too much about it today. And I mean no disrespect, because part of it is not their fault. They have too much to do.

But my point is that even with the finest men in the country, they cannot possibly do the job that the private individual who is trying to remedy his own injury can do. Moreover, Senator Pearson, under the administration's proposal, even the suits the Government can bring are very limited. It is not nearly as broad as the coverage which Mrs. Knauer recommended in our hearing in August, and she did not recommend any bureaucratic approach first. She recommended the direct consumer class action. So, what the administration's substitute is really is:

Let us have the bureaucracy handle it first, and if the bureaucracy decides it is important enough to bring a suit, then we will bring a suit first under a certain limited sphere of action; and then if that suit is successful, then we will permit the private individual to protect himself.

Now, that is just a very, very sorry substitute for meaningful class action protection, if you really want to supply it.

Senator PEARSON. I am trying to think why they utilized that approach. Perhaps the only reason I can suggest—

Senator TYDINGS. It is a compromise with the tremendous opposition brought by certain persons.

Senator MOSS. If I may interject, I think the burden of Mr. McLaren's testimony in answering this particular point is that he just felt that the Federal courts would be deluged and overwhelmed with consumer suits if they were not consolidated in this way, by having either the Federal Trade Commission or the Attorney General first bring the injunctive action, and then let the class suit follow.

Senator TYDINGS. We should have a court system to permit an injured consumer to bring an action.

Senator MOSS. There is one other factor I would like to get your observation on. Chairman Dixon testified yesterday and made a very strong plea for encouraging the States to adopt consumer protection laws similar to what the Federal Trade Act provides on a national level. He pointed out that 35 of the States have now adopted at least some form of consumer protection law.

Senator TYDINGS. Some sort of bureaucracy within the State that is supposed to protect the consumer.

Senator MOSS. The inference that I got from his testimony was that, if those statutes were on the books in the States, and frauds are very often localized anyway—they are in a given area with a TV repairman—then the individual can bring his suit if the complaint or the condition did not have to go to the Federal Trade Commission.

Senator TYDINGS. Mr. Chairman, they can do that now. An individual in any State has the right of a common-law fraud action. You do not need an express statutory provision and, as Mr. Dixon, I think, indicated, a great many States now have, in addition to the common law fraud action, statutes in the State making it illegal to defraud the people. But there are no effective remedies.

The problem is providing some meaningful way to protect the consumer from the fraud.

Now look what happens. Take that case in the Northeast involving the furnaces, which began in early 1930. They were fraudently sending repairmen into homes who were representing themselves as inspectors. They would go down and look in the furnace, tear it apart, and then say, "Your furnace is in bad shape. You need another one, and we just happen to have some to sell." So they would sell them.

Well, after a while, a number of people who had been defrauded brought some individual actions and complained to the Federal Trade Commission. Nevertheless, the company—Holland Furnace Co.—continued its fraudulent practices.

Finally in 1965 the company was heavily fined. But it took something like 29 years before anything effective was done to stop this company's fraudulent operation.

We had hearings a few years ago about some of the fly-by-night home improvement concerns that were preying on the people in the inner city in Washington, D.C. They knew that every now and then somebody was going to take them to court under a statute, such as you just described, making fraud illegal. Well, they take a few of those losses as a part of the cost of doing business.

Now, what does a consumer class action law do? It permits one person who is defrauded to go in and represent all of the others similarly defrauded, to collect for them, and then to distribute the award to each person who has been defrauded. This is an effective tool. This is more effective than 20 consumer agencies in each State, and it is more effective, with all due respect, than 20 Federal Trade Commissions as presently constituted, because it gives the consumer himself a real weapon to protect himself.

Senator PEARSON. How do you get around *Snyder v. Harris*? Do you permit the claimants to consolidate their claims?

Senator TYDINGS. We eliminate the jurisdictional amount requirement. Rule 23 has built-in safeguards that would prevent the courts from being flooded.

Senator PEARSON. If the chairman would yield and let me ask you one other question which interests people like us lawyers.

In your attorney's fees, you know very recently in legislation where we allowed attorney fees, we were departing from the old concept that it would be a matter of discretion with the court and we're beginning to lay down guidelines. I am not sure that is a good practice.

Senator TYDINGS. It may not be. You may have a good point.

Senator PEARSON. You seem to have gone both ways so far.

Senator TYDINGS. We were trying to bend over backward against the criticism that this bill would be encouraging ambulance chasing and would result in unreasonably high fees, and in unscrupulous attorneys drumming up cases, so to speak. That is why we put the guideline language in. You might well put in a modification or strike the language. That is up to you. You know the problem as well as I do. That is why it was in there.

Senator Moss. Thank you, Senator Tydings. I know that you are pressed for time, as we are. I would enjoy continuing the dialog. You are an eloquent defender of your point of view, and I may say I am very happy to be your cosponsor on S. 3092 that we have.

In posing these other bits of testimony heard before, I did not necessarily advocate any of them. I was simply trying to throw them out as testimony that came before the committee.

I think what you have said in criticism of S. 3201, the administration bill, was rather forcefully stated by Chairman Dixon yesterday, too, and in much the kind of language you used.

Senator TYDINGS. Let me say, I do not mean unjust criticism of the Federal Trade Commission. You cannot have one small agency and expect them to protect the entire population of 200 million people against all fraud across the Nation. It is an impossible charge.

I think that this procedure, the class action procedure, would be a very, very effective tool to really protect the consumer.

Senator Moss. And it would have the advantage that I spoke of before, the fear that the courts would be flooded. If you can bring a class action, the court sits on one action that covers an awful lot of plaintiffs.

Senator TYDINGS. And in addition to that just 2 years ago we passed the multidistrict litigation bill which provides the permanent machinery in the Federal court for joining these great multidistrict suits, like antitrust or damage suits, and the courts now really have the machinery to protect against any real inundation.

Senator Moss. Thank you very much, Senator Tydings. We appreciate your testimony.

We have four Commissioners of the Federal Trade Commission. I do not know if you gentlemen want to come up one at a time or want to sit here all at the table and testify one after the other. I will proceed in any way you would like to.

STATEMENT OF HON. PHILIP ELMAN, COMMISSIONER, FEDERAL TRADE COMMISSION

Mr. ELMAN. Thank you, Senator. I am Philip Elman.

Senator Moss. Yes, Commissioner Elman, we are pleased to have you. We will have you go first.

I understand you each individually are giving your reactions, so I do not want to lump you together. I think you might have some differences. I hope you have taken different points of view.

Mr. ELMAN. Each of us has given the matter very considerable thought and study in the light of his own individual experience, and I think each of us has a separate statement, Senator.

Senator Moss. Thank you. You may proceed, Commissioner.

Mr. ELMAN. Mr. Chairman, Senator Pearson, I welcome this opportunity to restate and amplify the various legislative proposals I have made as a member of the Federal Trade Commission for achieving better protection of consumer interests.

We must start from the generally accepted premise that existing Government programs for dealing with marketing abuses do not adequately safeguard the public. As the President noted in his message to Congress on October 30, 1969, "many of the Government's efforts to help the consumer are still geared to the problems of past decades."

What we have now is a body of separate and discrete statutes, each reflecting an ad hoc response to a specific immediate problem, enacted at different times and in various circumstances. What we should have is a code of consumer protection, comprehensive and cohesive in scope and fully responsive to present needs.

Present law is replete with incongruities. Failure to disclose the country of origin on the label of an imported fur or textile product can result in criminal penalties (15 U.S.C. 69); but it is not a crime to violate the Automobile Safety Act, no matter how aggravated the offense or how much the public is endangered (15 U.S.C. 1391).

On the other hand, while violations of the Automobile Safety Act can be significantly deterred by imposition of substantial civil penalties, no civil penalties may be assessed (unless the defendant has previously been enjoined for past violations) under any of the labeling acts or the Flammable Fabrics Act—where, as I shall point out, such penalties in a relatively few cases could bring about a far greater degree of compliance than has been achieved by a multitude of consent orders.

While a new drug cannot be placed on the market without pretesting and advance approval of the Food and Drug Administration (21 U.S.C. 355), other products (for example, laundry detergents containing enzymes) may be freely marketed unless and until they are affirmatively found to be unsafe or unduly hazardous, even though the Government may believe a substantial and unresolved question exists as

to whether their use is dangerous to the health and safety of the public (15 U.S.C. 1261).

Some products (for example, cyclamates) are absolutely barred from the market if there is evidence that they induce cancer in animals (21 U.S.C. 348); while another product (cigarettes) which has been found to cause cancer in humans not only is freely sold, but Government agencies were forbidden to require that advertisements promoting its sale should also disclose the health dangers to the public. (15 U.S.C. 1331.)

A few products and services are subject to stringent regulation, including criminal sanctions and requirements for affirmative disclosure of information: Wool Products Labeling Act (15 U.S.C. 68); Fur Products Labeling Act (15 U.S.C. 69); Textile Fiber Products Identification Act (15 U.S.C. 70); Cigarette Labeling Act (15 U.S.C. 1331); Flammable Fabrics Act (15 U.S.C. 1193); Truth-in-Lending Act (15 U.S.C. 1601).

But, as to most products and services offered to the public, principal protection for the consumer is left to the Federal Trade Commission and its limited power to prohibit unfair and deceptive practices solely through issuance of orders to cease and desist having only a prospective effect. Unless and until an order based on past violations is issued, no penalties, criminal or civil, can be imposed for practices that violate the law, no matter how flagrant and harmful to the public. And even as to respondents under order, they are subject to civil penalties only if violations of the order are proved in a new, separate proceeding brought by the Attorney General in a Federal court.

Finally, while injured consumers are given a private right of action under a few statutes (for example, the Truth-in-Lending Act), no recovery of damages may be had under the FTC Act even when they result from unfair and deceptive practices which violate an outstanding order to cease and desist.

Reviewing the present unsatisfactory situation, I stated in the Commission's Annual Report for 1968 (pp. 60-61) that:

The time has come for Congress to wrap up all the bits and pieces of existing and proposed consumer protection legislation into a single, comprehensive Consumer Bill of Rights. * * * Implicit in the whole panoply of Congressional and Executive actions in this area has been a recognition of certain basic rights of consumers, and of the obligation of government to declare and secure those rights. Without having said so explicitly in legislation, Congress has junked the old concept of *caveat emptor*. In its stead has come gradual and increasing acceptance of the fundamental rights of a consumer buying products in today's markets: the right to receive a product which is safe, which will perform as represented, and is free from defects in materials or manufacture; the right to be sufficiently informed of the material characteristics of a product, so that he will have a basis for making a choice among competing products offered for sale; and the right to be free from unfair, unconscionable, or dishonest sales practices.

A Consumer Bill of Rights would provide explicit statutory recognition of these rights, and affirm their application to all, not merely some, products. It would have the legal effect of making these rights derive from Act of Congress, and thus not depend on the action of sellers. In effect, all sellers of all products would be furnishing a statutory warranty to their customers that the product is safe, free from defects of manufacture or materials, and will perform as represented. The protections to the consumer afforded by such a statutory warranty could not be reduced by an "express warranty," such as is now commonly used by manufacturers of automobiles and household appliances, containing conditions and restrictions which have the practical effect of cutting down the consumer's rights.

The law should also make a new allocation of the responsibilities of government, Federal and State, in carrying out effective vindication of those rights.

I renew that general recommendation now. While many problems of consumer protection, such as product safety, warranties, and consumer credit, require particularized treatment, it is essential that Congress enact a comprehensive and coordinated consumer protection program arming both government and private citizens with the weapons to correct and redress, effectively and swiftly, not only fraud or willful misrepresentation but all dishonest or careless business practices which disregard the basic rights of consumers.

I. CONSUMER FRAUDS

The most glaring deficiency in existing consumer programs is with respect to the kind of hard-core frauds to which the Federal Trade Commission devotes so much of its resources and for which its present procedures and sanctions are plainly inadequate.

As I stated last year: high priority must be given to elimination of hard-core frauds and unconscionable ghetto market practices. The poor, the sick, and the elderly are always the prime targets of swindlers and cheats, whose "salesmen" go from door to door in the ghetto, peddling worthless or inferior merchandise at grossly exorbitant prices, and wheedling the buyer into signing a negotiable instrument which they then sell to a so-called holder in due course who takes it free of any defense the buyer has because of the fraudulent aspects of the transaction. * * * The parasites who exploit and prey upon the poor and the ignorant are not businessmen, even though they may be listed in the "yellow pages" or belong to the chamber of commerce. Not to mince words, they are crooks—and should be treated as such by the law.

I concur fully in the statement made here yesterday by Mrs. Virginia H. Knauer:

Crime is crime whether it be at the tip of a gun or at the tip of a pen and the tip of a tongue of a fraudulent sales operator. All reasonable forces for years have decried consumer fraud. It is long past time we turned orations into actions, lament into law, exhortation into fraud elimination.

Many industries across the Nation are plagued by such white-collar fraud robbers. Where they are subject to Federal jurisdiction, as they frequently are, all of the law enforcement resources available to the Federal Government should be brought to bear. In its present form, the Federal Trade Commission is clearly inadequate for such purposes, essentially because it was designed to deal with another and different type of problem.

When the Federal Trade Commission was created in 1914, Congress and President Wilson were essentially concerned with the problem of monopoly, not with hard-core consumer frauds perpetrated by crooks and racketeers. It was believed then that a new administrative agency was needed to identify and define emerging trade practices which, although undertaken by businessmen in good faith, could, if unchecked, lead to full-blown restraints of trade. Because of the breadth and indefiniteness of the antitrust laws, Congress established the Commission as an agency to advise and guide legitimate businessmen honestly uncertain as to the practices in which they could lawfully engage. The Commission was therefore structured to deal with such problems mainly through informal techniques stressing conciliation and volun-

tary adjustment. After 55 years of operation, the institutional environment and processes of the Commission today reflect the same basic emphasis.

Valuable as these informal techniques may be in handling the kinds of antitrust problems for which the Commission was originally created, they are grossly inadequate for handling consumer frauds that involve fly-by-night operators to whom the Federal Trade Commission in Washington, and its voluntary compliance and cease-and-desist procedures, are distant, meaningless, and unthreatening. Such a swindler does not need to be told by a registered letter from a Washington agency that he is violating the law—he knows it, and his sole purpose is to continue his frauds as long as possible.

The cease-and-desist order, if and when it comes—and frequently it comes after many years—will merely order the respondent to sin no more, and if he does and should be caught, the result will merely be another proceeding. For such racketeers, this is virtually no sanction and thus no effective deterrent.

This "one free bite" approach to crooked operators whose fraudulent practices are in clear violation of law, and have done great harm to consumers, is futile and self-defeating. It is a simple matter for these people to go out of one business, and begin another that is equally dishonest, but not subject to the order.

A Commission order has little effect upon such operators; and those not under an order are unlikely to change their ways out of fear of being placed under such a toothless sanction.

Furthermore, the Commission is not equipped with the nationwide investigative staff, or the kinds of investigative expertise necessary to accumulate the evidence of hard-core frauds, much less locate the whereabouts of all the instigators of such practices.

As I stated earlier this year in a separate statement to the Commission's report on the proposed Deceptive Sales Act of 1969:

It is in this type of case (of hard-core fraud) that the administrative processes of the Federal Trade Commission are least necessary and least effective * * * In its very nature, the Commission functions best not as an investigative prosecutorial body but as a deliberate, more reflective, less dynamic body. Its organization and structure are simply not geared to the vigorous and expeditious discharge of prosecutorial duties.

What is needed, as I have long urged, is the creation in the Department of Justice of a fully staffed Consumer Protection Division, headed by an Assistant Attorney General, to investigate and prosecute these swindlers who prey upon the uneducated, the elderly, and the poor, and to bring to bear upon them every sanction and remedy available from the courts—to "drive the huckster from the marketplace and afford a remedy for his victims."

The Department of Justice has the resources and physical facilities—93 U.S. attorney offices throughout the country, and the services of the Federal Bureau of Investigation—as well as the expertise and experience in criminal investigation and prosecution necessary to bring these fraudulent practices to justice.

At the same time, the courts—not the Federal Trade Commission—have the facilities and expertise for trials which focus not upon complex and difficult technical and economic issues, but upon such traditional issues as knowledge, intent, scienter, and the identity of the

culprit. Of course, the Federal courts are hardly newcomers to this area. They have long handled fraud cases arising, for example, under the postal, securities, and food and drug laws. And the courts, not the Federal Trade Commission, have the authority to impose criminal penalties and grant preliminary injunctions—the kind of relief which so many of these cases demand.

The Department of Justice and the courts must have available a full panoply of remedies and sanctions to correct and deter these fraudulent practices. Above all, there should be criminal penalties where the consuming public is defrauded by practices which are essentially criminal in nature.

And I was frankly puzzled by the references yesterday so frequently to the criminal nature of these practices and yet the omission in S. 3201 of any criminal penalty. There is no reason why a Federal consumer protection law should not make the punishment fit the crime. The thief who burglarizes a home, and the door-to-door salesman who steals a family's savings and security by trickery and pretense, should both be treated as criminals.

On the civil side, the courts should also be able to enjoin such practices, temporarily *pendente lite* and permanently; to impose heavy civil penalties; to place the defendant's business in receivership; to deny him use of the mails to defraud; and to impose any other necessary sanctions.

In the same civil proceeding brought by the Department of Justice, the court, in my opinion, should be empowered—indeed required—to create a fund adequate to redress the damage claims of defrauded consumers. Especially where the poor, the elderly, and the uneducated are concerned, there is no reason to require them to hire a lawyer and to bring a separate lawsuit for recovery of private damages, especially when the case is brought in a court which is 3 to 4 years behind in its docket.

Where a violation of law has been established in a case brought by the Department of Justice, the court should proceed immediately to determine the extent of the damages to the public, and the amount due each member of the aggrieved class. Furthermore, injured consumers should be entitled to intervene in any civil proceeding brought by the Government to establish a violation of law.

As an additional step in this all-out war on consumer frauds, the Federal Government should make matching grants to the States for the establishment of, or strengthening of, existing State and local law enforcement agencies to prosecute and redress these frauds, since as we all know, so many of them occur in a purely intrastate context beyond Federal jurisdictions.

Senator PEARSON. Let me interrupt you, please, Commissioner. When you speak of creating an adequate fund in the courts. Are you talking about a Federal grant or a Federal appropriation from the public Treasury?

Mr. ELMAN. Not at all, sir, no. I am assuming that in the suit brought by the Government alleging the defendant has engaged in fraudulent practices which violate the law, the Government presents its case and the judge finds that the violation of law has been made, has been proved by the evidence—my suggestion is that the judge immediately proceed to the issue of damages to the consumers, individually and as a class,

resulting from those violations of law. The damages would be assessed against the defendants. This would not add a single penny to any Federal Government appropriation.

We are talking now about private damages being consolidated in the same lawsuit as that initiated by the Department of Justice.

Senator MOSS. Might this be a criminal-civil action together then?

Mr. ELMAN. No; the criminal action would have to be entirely separate. This would be on the civil side, where the Government seeks an injunction, as in S. 3201. There is no reason—the Attorney General having made out that violation of law, having presented the evidence—why the issue of violation should have to be tried all over again. He has made out the case. The Attorney General has demonstrated by his evidence that the defendant has violated the law and engaged in fraudulent practices that are prohibited.

Now, if that has been established for the benefit of the Government, why should it not also be established for the benefit of any person who can show that he was damaged by these practices?

Senator MOSS. Well, this is interesting. It is a step forward. However, if the Federal district attorney then proceeds to obtain damages for a whole class of people, he has the further job, I suppose, of sorting them out and having them come in and having each of them establish what part of the pie they are entitled to.

Mr. ELMAN. That could be done by a special master appointed by the court. I could consider it to be a very simple matter of merely receiving the claims.

I mean, if you have bought a product, Senator, in reliance on certain representations made by the seller, and the Attorney General has brought a case against that seller, and he has proved that those representations upon which you relied in buying the product were fraudulent, all you have to do is show that you bought the product and you want your money back, plus damages.

It seems to me there are no issues of fact of any consequence that would have to be determined.

Senator MOSS. That is very interesting, and I do not reject it. I am just trying to be the devil's advocate a little bit. It is a departure from the traditional means of recovering damages where—we are talking now about class suits which are a step forward perhaps—where you have a privately employed attorney who brings a civil case, establishes his case and gets his judgment. This is a little bit different because it moves it over into the public field.

Mr. ELMAN. I think there is some precedent for that in the consent settlement that was worked out in the tetracycline price-fixing case, where in a single proceeding brought by the various States and municipalities which alleged that they were damaged as a result of this price-fixing conspiracy, a provision was made for the assessment of damages to individual consumers who bought the tetracycline, even though they were not parties to the original case. I do not see any difficulties in it.

Senator PEARSON. In the case of an insolvent defendant, have you given any thought to the concept, which is now having wider acceptance than some years ago, of the public responsibility to the injured party?

Mr. ELMAN. I think it is a real problem, Senator.

Senator PEARSON. This was pretty radical about 10 years ago.

Mr. ELMAN. Very frequently, many of these defendants are judgment proof. And just as in the case of a victim of a crime where it has been proposed that there is an obligation on the part of the Government to compensate that victim for crime, it seems to me——

Senator PEARSON. You are talking about criminal proceedings here?

Mr. ELMAN. That is right. It seems to me the same arguments and considerations come in here because, as Mrs. Knauer and Assistant Attorney General McLaren described these acts yesterday, they are criminal; and why should there be any reluctance to deal with them as criminal acts?

You cannot talk about these offenses as economic offenses in the same sense in which you are discussing, for example, failure of a businessman to comply with some sort of requirement under the antitrust law dealing with reciprocity or something of that sort.

Senator PEARSON. I thought you were developing that point when I interrupted you.

Senator Moss. You may proceed, sir.

Mr. ELMAN. A buyer not only has the right to be free from the unfair and unconscionable sales practices embraced in the rubric "consumer frauds," but also has the right, as the President has stated, "to make an intelligent choice among products and services * * * to accurate information on which to make his free choice * * * (and) to expect that his health and safety is taken into account by those who seek his patronage." There should be full agreement with the President that Government consumer programs should be "designed to help honest and conscientious businessmen by discouraging their dishonest or careless competitors."

These basic rights of consumers should be enacted into Federal law as statutory rights. Consumer protection means more than being shielded from intentional fraud and knowing misrepresentation.

In a mass-production, mass-distribution, increasingly impersonal economy, the careless or negligent disregard of consumers' rights—and it may consist of no more than a mere failure to act—can produce substantial harm.

I give some examples of these practices not amounting to fraud but where the consumer should be protected from inadequate or misleading advertising, failure to give material information, products that are effectively designed, products that come off the assembly line with poor workmanship, and so on.

For example, there are the effective and ineffective products which result from modern mass production methods—the \$4,000 automobile with door handles that fall off on the day after purchase; the expensive color television set that quits working on the 91st day of a 90-day warranty. Then there are the products defective in health and safety respects. Sometimes these defects are the result of poor quality control, as in the case of excessive radiation from color television, which is frequently the result of defective workmanship rather than poor design. More often, they are caused by inadequate design analysis and inadequate testing prior to marketing. The fact, for example, that the Federal Trade Commission has seen fit to begin an investigation into the potential dangers of enzyme-containing laundry detergents suggests the possibility that these goods may eventually be found to have been

marketed on a massive basis before adequate testing by their manufacturers.

In addition, marketers often fail to inform the public fully of the possible dangers in using their products. For example, the Commission this year has issued a trade regulation rule regarding the failure of manufacturers to disclose the lethal effects of inhaling quick-freeze aerosol spray products used for frosting cocktail glasses.

However, by far the most prevalent marketing abuses today are in the field of inadequate and misleading consumer information, because of improper labeling or advertising. These practices have filtered into every American home via television, radio, magazines, newspapers, and the brightly colored package bought in retail stores.

A common practice is the advertising and labeling that implies a general usefulness for a product but fails to disclose its limitations. For example, an advertisement for an iron tonic which gives the misleading impression that it is a generally effective remedy for all cases of tiredness, whatever the cause. Often consumers are prevented by nondisclosure from making intelligent comparisons not merely between the products of different manufacturers but between brands sold by the same manufacturer.

An example is the nondisclosure of octane ratings of gasoline, which is now the subject of an FTC rulemaking proceeding.

As I stated last year:

We should all be concerned by the tendency of some advertisers to walk as close as they can to the line separating legal from illegal advertising claims. The result is a barrage of puffery and misinformation that undermines the credibility of all advertisers in the eyes of the public.

How often do we see advertisements extolling the "secret," "distinctive" or "special" ingredient of a product, when a fact the product is chemically identical to competing products and the so-called "secret" ingredient is present in all of them, perhaps under different names? Nor is it unusual that the same products is repackaged periodically and proclaimed each time as "new" or "improved."

The control of these market abuses falling short of fraud is the kind of function which a centralized expert administrative body such as the Federal Trade Commission can perform. It can define and correct those unfair or deceptive trade practices, where fraud is not involved, and where civil rather than criminal, sanctions and remedies are adequate. Staffed by economists, medical advisers, and other technical experts, the Commission could develop a uniform and consistent body of law defining standards of conduct for marketers adequate to satisfy the rights of consumers.

Now, as in 1914, it is a desirable and proper function for an administrative agency to identify and define unfair marketing practices harmful to consumers—and I conceive of that essentially, Senator Moss, as a quasi-legislative function, while the Department of Justice and the courts concentrate on the hardcore frauds for which administrative remedies are inadequate.

However, if the Commission is to fulfill its proper role in this area, it needs much stronger and more comprehensive tools. Experience has shown that the prospect of Commission action resulting only in a consent order or an assurance of voluntary compliance is no real deterrent to a lawbreaker. What the Commission needs is the power to impose substantial civil penalties for initial violations of law, regardless of whether the respondent is under an order, where the requirements of

law have been clearly expressed in prior decisions, rules, or guides. A handful of cases where such penalties are assessed for past violations will yield far better results, in terms of securing general compliance with the law, than a barrel of "sin no more" cease-and-desist orders looking only to the future.

It is, of course, no novelty for administrative agencies to assess civil penalties; so long as penalties are clearly civil in nature, not criminal, there are no constitutional problems. *Helvering v. Mitchell*, 303 U.S. 391, 402 (1938).

In addition, the Commission must be given by statute explicit substantive rulemaking power, so that violation of a validly issued rule shall without question be deemed a violation of law.

With such authority, the Commission would be able to act as a true arm of Congress, exercising delegated legislative power. There is nothing novel in such a delegation of rulemaking power; indeed, Congress has specifically delegated such powers in the various labeling acts enforced by the Commission. Nor is there any constitutional problem with regard to a properly confined delegation, even where willful violation of a lawful administrative regulation is made a criminal offense. See, for example, *United States v. Grimaud*, 220 U.S. 506 (1911).

With substantive rulemaking power and the authority to impose civil penalties for initial violations of law, the Commission would have the tools to enter into a new phase of regulatory activity. Its numerous rules, guides, interpretive statements, and declarations of enforcement policy would no longer be treated as mere "advice," having no legal force or effect. And that is what a substantial segment of the antitrust bar considers that they are.

The Commission could benefit, but only to a limited degree, if it were also given power to request preliminary injunctions from the courts, as contained in S. 3201. This remedy normally would be invoked only in those cases where, as Senators Magnuson and Cotton have indicated, the court finds "obvious, patent, and flagrant" fraud.

As I have stated, such cases, especially where criminal penalties are appropriate, should be handled not by the Commission, but by the Department of Justice. So I would consider that provision in S. 3201 to have marginal significance, at best.

Finally, in any case brought before it where it finds a violation of law, the Commission should be empowered to award civil damages to consumers aggrieved by such violations. This is the same proposal paralleling the one I suggested earlier as to cases brought by the Department of Justice in the courts. There is no reason to spend precious governmental resources in an agency proceeding, only to require injured consumers to begin another lawsuit in an overburdened Federal court. Such duplicative procedure is a waste of everyone's time and resources.

In the same proceeding which adjudicates a respondent's violation of the Federal Trade Commission Act, the Commission should proceed to create a fund to redress injured consumers. Once again, such a power in an administrative body is not novel, nor does it raise any constitutional problems.

May I digress at this point? I listened to Senator Tydings' observations on the bureaucracy and the inability of the bureaucracy, and he was not complimentary to the Federal Trade Commission in that re-

gard. I have the greatest respect and admiration for Senator Tydings, but it seems to me we have long passed the point where we can rely exclusively on lawsuits and courts as a panacea to our problems.

We should not forget that one of the reasons, perhaps the principal reason, why we have these regulatory agencies, why we have agencies like the Federal Trade Commission, is that the courts were unable to perform the functions which these agencies were assigned. I do not think that we can just shift about from one institution of government which has been found inadequate to another institution of government which has been found inadequate, go back and forth, and think that that is going to be the solution. I think we have to improve all of our institutions, and create some new ones. I do not think we can simply say, "Dump it all on the courts."

I suggest if you had the Chief Justice of the United States here, and if you had the members of the Judicial Conference, they would tell you about their problems and burdens and their delays, and I do not think they would respond with alacrity to any suggestion——

Senator PEARSON. I saw the Chief Justice about 2 weeks ago, and he did that very thing.

Mr. ELMAN. I am sure I was not telling you anything you did not know, Senator.

Congress as long ago as 1935 (NLRA, 29 U.S.C. sec. 160(c)) gave the Labor Board the power to award back pay for workers injured by unfair labor practices, and this power was upheld by the Supreme Court in *Phelps Dodge Corp. v. Labor Board*, 313 U.S. 177 (1941). Why should not the Commission, or another Federal agency, if the Congress so desires, be empowered to make consumers whole for damages resulting from unfair trade practices, just as the Labor Board makes employees whole for damages resulting from unfair labor practices?

A major restructuring of the Commission is necessary if it is to be given responsibility for imposing civil penalties and awarding civil damages. Some of this restructuring can be effected internally upon the Commission's initiative; for example, the establishment of an internal appellate review board, a judicial body, to review all cases involving only factual issues, leaving the Commission a discretionary review power befitting an essentially quasi-legislative rulemaking, policymaking body.

But more drastic internal reform is required. Congress should create a new statutory position of General Counsel of the Federal Trade Commission, who should be responsible for the investigation and prosecution of individual cases. However, the General Counsel of the Commission, unlike the General Counsel of the Labor Board (see 29 U.S.C. sec. 153(d)), should be appointed not by the President but by the Commission and be governed by its general policy determinations and program planning. The initiation of investigations and the determination whether to issue complaints in individual cases would be solely the duty of the General Counsel, not the members of the Commission. The Commission would, as now, be able to conduct general studies and investigations.

With internal reform and restructuring, and with additional powers and remedies, the Commission would be able to fulfill an effective and exciting role in a new program for making the consumer's bill of rights

a reality. Wilson, Brandeis, and the other great men who brought the Commission into being, viewed it as a "new experiment on old lines"—offering new hope and challenge. The hope and challenge still exist, albeit in a different form.

I turn now to S. 3201 in the light of the general observations that I have made.

Senator PEARSON. Mr. Chairman, may I ask a question now?

Senator MOSS. Certainly, you may.

Senator PEARSON. If the powers were granted to FTC as you have just proposed and the restructuring as you have suggested, would you still have a judicial review into the Federal courts?

Mr. ELMAN. Yes, indeed. I would see no reason not to have that same kind of judicial review which we have today.

The review would extend not as today merely to orders to cease and desist, and their validity, but it would extend to all orders issued by the Commission, the award of penalties, judgments, damages to individuals aggrieved, classes of consumers, and so on.

Senator PEARSON. Would your procedures under the Administrative Procedures Act need any modification?

Mr. ELMAN. Well, that is a big topic, Senator. There is a whole body of proposed legislation and literature on revisions of the APA.

My own personal view is that the problems of the administrative agencies are not going to be cured, are not going to be remedied by any amendments to the APA. I think they run much deeper.

Senator PEARSON. Do you know of any other agency other than the railroad agency that you mentioned that has such powers today? You indicated that there was an anomaly.

Mr. ELMAN. I was thinking primarily of the Labor Board. Because of the Labor Board experience, it seems to me essential that there be a divorce of this prosecutorial, investigative function on the one side from the adjudicative, quasi-legislative on the other side.

Over the years the Commission has been charged with acting as investigator, prosecutor, sheriff, judge, and jury, all in the same case, and it is a criticism which has to be faced.

If the Commission's powers were increased to the extent I urge, it would seem to me intolerable for the members of the Commission to continue to supervise investigations and make determinations, issue a complaint, take the nominal responsibility for issuing a complaint, and then have the power to impose these very substantial remedies and sanctions and damages, and it seems to me—

Senator PEARSON. Do you see any constitutional issue?

Mr. ELMAN. No, sir. I see these issues as essentially issues of policy and practical judgment for the Congress to determine. I think you have no real due process problems here. I think the problem is one of how you can best accomplish your objectives efficiently and effectively and inexpensively.

Senator PEARSON. Thank you.

Mr. ELMAN. S. 3201 provides a useful framework for the kind of major reforms which I believe are necessary. In its essentials—establishing a new Consumer Protection Division in the Department of Justice, endowing the courts with power to correct and redress defined consumer's rights, and provided a basis for revitalizing the FTC—the bill has a sound foundation.

In addition to the provisions resolving possible doubts as to the jurisdiction of the Commission—and I cite in the footnote some cases which indicate to me that as a practical matter the Commission has never been inhibited because of the present language of section 5 of the FTC act from bringing cases against local so-called sellers using unfair or deceptive practices having any national or interstate aspects or significance. So in my opinion, the proposal to change our jurisdiction from “in commerce” to “affecting commerce” again is of marginal value.

It may be useful to resolve any possible doubts about it and remove any basis for litigating our jurisdiction, but as a practical matter, in any case where the Commission has considered it should take action in the public interest, in my experience we have never been inhibited or deterred because of any jurisdictional problems. We have got a body of case law on that, and I think it would stand up under review from the Supreme Court without any legislation.

But if the Congress can clean up the problem easily by a provision in this bill, fine.

The bill also gives authority to seek preliminary injunctions to the Commission, which I have mentioned, and the Department of Justice is given the power to bring injunctive actions against eleven specific and defined categories of knowing misrepresentations. The bill would also allow consumers to bring simple damage actions for injury resulting from any of the enumerated practices—and this point has been made by others—but only if and when either the Department of Justice or the Federal Trade Commission successfully completes an injunctive proceeding against the defendant. And while a litigated, but not a consent, decree issued by a court would be *prima facie* evidence in a subsequent private action, an order issued by the Federal Trade Commission would have no such effect. With this provision giving judgments in court *prima facie* effect in subsequent actions but not FTC orders, the practical result of this would be to encourage cases to be brought by the Department of Justice, not the Commission. The allocation of work between the Attorney General and the Commission ought not to be based on so capricious a factor. It should be based, rather, upon the respective skills and resources of each agency, and the proper division of function would make maximum utilization of those skills and resources.

Under S. 3201, consumers injured by practices falling outside the 11 enumerated categories are left completely without a remedy. Even if one's injury comes within one of these categories, one must await final and successful action either by the Attorney General or the Federal Trade Commission. If neither agency acts for any reason, the injured consumer is left remediless. This is a serious deficiency in the bill which should be corrected. It is precisely where the Government cannot, or will not, act that the private remedy is most needed by aggrieved consumers. And I think Senator Tydings was absolutely right on that.

The bill also requires not only that private action must await Government action, but that it must be in a new and separate proceeding. As I have already pointed out, the court or the Commission should in

the same civil proceeding wrap up the entire matter, awarding damages to injured consumers where a violation of law is found. It is inefficient and wasteful, as well as unfair to consumers, to require separate and cumulative proceedings litigating the same issues of law violation.

Furthermore, there should be clear incentives to both businessmen and consumers for informal settlement of disputes, by arbitration or other means, to allow both sides a quick, simple, and cheap method of resolving the complaint. The Government should be empowered to supervise the establishment and operation of informal private complaint boards, financed by industry and neutrally staffed, that would arbitrate and settle small disputes between industry members and consumers, and thus avoid having to go to court.

The purpose of such informal tribunals would be threefold: (1) to avoid an influx of suits into the already overcrowded Federal judicial system; (2) to provide consumers with a cheaper, speedier, and more effective remedy than the judiciary could provide; and (3) to provide businessmen with the means for settling claims and thus avoiding the harassment of nuisance suits.

The bill is also deficient in the limited sanctions it makes available to the Government. The bill proscribes knowing misrepresentations clearly in the nature of criminal frauds, yet no criminal sanctions are imposed. Nor is there any provision for assessing civil penalties for violations of law, no matter how willful, by persons not under an outstanding order or injunction.

Nonetheless, the bill is surely a step in the right direction. If modified in the respects I have proposed, it would result in greater protection for American consumers than now exists. Moreover, it could provide the means for bringing about the genuine revitalization of the Federal Trade Commission that the President, the American Bar Association, and others have called for. Congress has the opportunity, which I hope it will seize, to design a new Federal Trade Commission equipped to provide effective protection of consumer rights and interests.

Thank you very much.

Senator MOSS. Thank you, Commissioner Elman, for a very fine statement that has discussed a number of things that are new and certainly that we must address ourselves to.

I have a number of questions, and I am sure Senator Pearson does, too, but I also have a time factor to meet.

I wonder if it would be agreeable to you if I could send down in writing some of the questions that I would like to have your additional response to?

Mr. ELMAN. Yes; indeed. Certainly.

Senator MOSS. If you could, I think I would like to adopt that policy because I think if I started a colloquy with you now—

Mr. ELMAN. I am at your disposal, Senator, any way you wish to do it.

Senator PEARSON. I do not have any further questions. I thank you very much.

Senator MOSS. You are invited to do the same thing, Senator Pearson.

We do thank you. That was a very good paper.

Mr. ELMAN. Thank you, sir.

Senator Moss. Commissioner MacIntyre, would you come forward, sir?

We appreciate having you, sir; and we want to hear from you.

**STATEMENT OF HON. A. EVERETTE MacINTYRE, COMMISSIONER,
FEDERAL TRADE COMMISSION, WASHINGTON, D.C.**

Mr. MacINTYRE. It is a pleasure to be here, Mr. Chairman, members of the committee.

At the outset I would like to say that I certainly subscribe to the quotation from Mrs. Knauer that Commissioner Elman quoted this morning. I agree that the time for exhortations is probably past and action is needed.

I have often advocated this to my colleagues at the Federal Trade Commission. I wish that we could have had more translation of that particular urge of Mrs. Knauer yesterday in the past.

Well, so much for that.

I want to say that I am here in response to an invitation from the committee, and it is a pleasure to appear before this distinguished committee, and to have this opportunity to lend my support to the passage of S. 3201, and also to discuss S. 2246 and comment upon S. 3092.

With respect to S. 3201, section 101 of the bill enlarging the Commission's jurisdiction from unfair or deceptive acts "in" commerce to "affecting" commerce should be very helpful in enabling the Commission to proceed against consumer frauds and deception hitherto beyond its reach. More important, perhaps, it will enable the Commission to proceed with more dispatch in cases obviously requiring corrective action, but where the evidence of the "in commerce" requirement is marginal. Proceedings in such cases where the evidence of commerce was tenuous required a disproportionate and time-consuming effort to gather the necessary facts which frequently had to be marshaled in the context of novel legal arguments in order to satisfy the requirements of the *Bunte* case. In short, this revision should increase consumer protection in previously gray areas and at the same time facilitate a more efficient utilization of the Commission's resources.

I am well aware, of course, of the factual situations that Commissioner Elman referred to this morning, as well as those referred to by Chairman Dixon yesterday. But I am also well aware of what has happened in some of the situations.

For example, the case that is referred to in the footnote at page 20 of Commissioner Elman's statement which was presented to you here this morning was a case that the Commission dismissed over my objection. There the transaction involved was not in interstate commerce. It had to rest upon a theory of bringing S. Klein & Co. into commerce through its advertising, and apparently the Commission felt that it wasn't the proper time to prosecute that case, so it dismissed it. But I objected. I would have liked to have seen that particular theory tried in the courts. The Commission did not choose to do so in that instance.

Later—and this occurred in 1967—the Commission decided that it

would like to undertake some cases involving advertising of housing where the renting is in intrastate commerce, not in interstate commerce, upon the same theory under which the *S. Klein* case was brought.

Senator Kennedy wrote each one of us and asked us about our view on that. I responded to him on this point by letter of May 12, 1967. You will find it in the Congressional Record, the daily Record of December 5, 1967. Senator Kennedy put it in there.

The upshot of that whole thing was that the Commission dismissed all of those cases, after they brought them.

I say that if we do have a theory that we can rest on, to test whether a particular transaction is in interstate commerce, we ought to try it out in the courts. But the Commission has been a little wary of that. This is what I told Senator Kennedy in that letter.

Now coming to the preliminary injunction provision in section 102—

Senator PEARSON. Sir, may I interrupt you? In addition to your correspondence with Senator Kennedy, has the Commission or Commissioners made any representations to the Congress or this committee for modification of the statutory jurisdictional requirements?

Mr. MACINTYRE. There have been times in the past when that was requested, but it did not receive a great deal of consideration. This was particularly true right after the *Bunte* decision was handed down, when the Supreme Court ruled we did not have jurisdiction where the practices affected commerce and were not in fact in interstate commerce. But recently the Commission has not been urging such an amendment to the law.

I would recommend it now, as I am doing here at this time.

The preliminary injunction provision in section 102 I have always favored, and there is no need for extended discussion of this point on my part. Its primary advantage is that it will give the consumer protection at a point much earlier in Commission proceedings than before. I further suspect that the provision in those cases where it is implemented will provide all parties with an incentive for increasing the speed of the Commission's proceedings. Both the Commission and the respondents proceeded against will have a real and practical interest in a quick and efficient disposition of those proceedings where a preliminary injunction has been issued. The provision in those cases where it is utilized may therefore preclude much of the procedural delay which, on occasion, has frustrated Federal Trade Commission proceedings.

Now, some people perhaps will not agree with that, but those who state their disagreement to you, I would ask you to have them to look at the records of the Commission proceedings. One of them was before you this morning by reference to the *Holland Furnace* case. The Commission was trying there, but under the procedures that are available to the respondents under the law, these delays are inevitable before one can reach a final conclusion of the case. So the Commission, doing the best that it can without this injunctive proceeding, will be frustrated, and so will the consumers, by delays.

In my view, the provision of section 203 for suits by the Attorney General to restrain the specific acts prohibited by that section could prove beneficial to the consumer.

I want to say that, however, I agree that what is included there is quite restrictive in those 11 categories. I think that the restrictions are much greater than Mr. McLaren indicated to you yesterday when he said the 11 groups would include 85 percent of the cases.

The *Holland Furnace* case, for example, which was brought into focus this morning probably would not have been successfully prosecuted if it had to rest upon specifications of acts then considered illegal. Case after case coming before the Commission would not fit within the 11 categories enumerated in this bill.

Commissioner Jones will speak to that in her memorandum later this morning.

I endorse section 204 providing for suits by consumers adversely affected by the acts specifically prohibited in this bill by section 201. Part (ii) of section 204 providing for consumer suits subsequent to a Federal Trade Commission cease-and-desist order relating to one of the practices defined in section 201, however, is unduly restrictive, for the reasons I have stated. The Federal Trade Commission's ban on unfair or deceptive acts and practices was left intentionally flexible. The reason for making the statute's ban on unfair or deceptive acts and practices open ended is clear. In the legislative view, "new or different practices must be considered as they arise in light of the circumstances in which they are employed." It is clear this is what Congress had in mind. If it had not been so, we would never have had the *Holland Furnace* case. We would never have had the *Keppel Brothers* case, which developed, of course, the meaning of what is unfair or deceptive within the meaning of that broad framework of the law that is in the mandate from the Congress to the Federal Trade Commission.

The private bar representing consumers should not be excluded from that process by virtue of the narrow scope of section 204 (ii) which is limited to the unfair practices enumerated in section 201. In this connection, it may be noted that in the antitrust area the private bar on many occasions has been more innovative than the Government itself. That stimulus to progress should also be brought to bear on the consumer protection objectives of this bill.

Section 201 to a considerable degree requires as prerequisites to a demonstration of illegality evidence of knowledge on the part of the seller that the practice in question will deceive. That standard of proof may be difficult to meet in the particular case. To the extent that section 204(ii) departs from the previous construction of section 5 of the Federal Trade Commission Act, namely, that intent is immaterial and that the governing considerations are deception and capacity to deceive, the provisions for consumer suits under this bill may not have the wide impact intended.

Finally, limiting section 204(ii) consumer suits to the scope of section 201 may prevent challenges by the consumer to unfair trade practices whose unfairness is not necessarily rooted in the intent or the knowledge of the seller that his act has or may wrong the consumer, but whose inequity stems primarily from the negligence of the seller or from the inequality of bargaining power between seller and buyer, particularly in those markets characterized by imperfect competition. Certainly one thing coming into mind in this connection is the failure of some sellers to take steps necessary to avoid damage to consumers who rely upon sellers' warranties.

In other words, we are talking about wrongs here; not intended wrongs, but wrongs which occur and which occur sometimes as a natural consequence of the acts of the person who set the matter in motion. Although he did not intend the consequences, he had every reason to know that they ought to occur.

But the way the bill is drafted, apparently turning the question of illegality on intent the standard of proof approaches that required in criminal cases and may be very difficult to establish.

With respect to section 205, I favor the provision that a final judgment or decree rendered under section 203 shall constitute evidence of prima facie violation. I believe, however, that consumers would benefit if final cease-and-desist orders by the Federal Trade Commission were also to be given similar effect.

Now, on S. 3201, I have one final comment. I believe that section 208(e) could be improved by a revision granting the Commission access to the records of the Justice Department compiled pursuant to the provisions of this bill. Such a provision would greatly facilitate liaison between the two agencies which would have concurrent jurisdiction under the statute. Clearly, it is in the public interest that both agencies consciously complement their efforts to aid the consumer.

May I explain that briefly?

I served for many years as the liaison between the Federal Trade Commission and the Antitrust Division of the Department of Justice. In fact, the present written agreement between these two agencies was drafted by me more than 20 years ago. It is working very well, except in cases where the Justice Department is prohibited by the Civil Process Act from giving the Trade Commission access to certain data it has on antitrust matters. It is willing to cooperate with us, but Congress has written into that law that it shall not cooperate by exchanging with us information such as we exchange with the Antitrust Division.

In my opinion, it would be a setback for the interests of the consumer for the Congress to now write into this law this same sort of a prohibition against cooperation of two Government agencies; and I trust you will give that very careful consideration.

Now coming to S. 2246. Back near the end of July the Federal Trade Commission prepared a report on that and I prepared a separate statement expressing my views concerning it. That was your bill, Mr. Chairman.

As is provided for by practice, that report went to the Bureau of the Budget. Well, in my attendance here yesterday, I noted that questions were being brought up concerning that bill, and I had been informed by your staff that we were expected to comment on it. Not having had this report released as of yesterday, I called the Bureau of the Budget late yesterday and stated that I would like to make my comment on it. During the night I received permission and clearance to make my separate statement to you as I had made it there in July.

Senator Moss. Very good.

Mr. MacINTYRE. I concur in endorsing the Commission's support of the objectives and provisions of S. 2246 designed to protect the consumer from fraud and deception.

I have been prompted to take this position in part because of my belief that enactment of this legislation will promptly enhance con-

sumer protection from deception and fraud. However, I would not wish to see the approval of this law delayed until Congress concludes its consideration some years in the future on the different proposals that are being made, some of which you have heard here this morning, for different consumer protection measures. Nor would it be in the public interest upon the conclusion of such deliberations for the Federal Trade Commission to be dismembered.

I do not agree that the Federal Trade Commission has failed and failed miserably in protecting consumers from what has lately become known as hard-core frauds. I would add that this agency has proven to be the spearhead of the attack on false and misleading advertising which would bilk the consumer.

For example, since 1966 the Federal Trade Commission has instituted more than 42 formal proceedings regarding activities of this kind of practice in the District of Columbia alone, just one territory out of the 53 of the United States. Practically all of those proceedings have been concluded with orders providing injunctive relief from the practices involved. In one of those cases, *In the Matter of Marlo Furniture Company*, a four-member majority did fail, over my strenuous objections, to enter an order for injunctive relief in a case verging on hard-core fraud, in my view. Clearly, as this instance illustrates, our failures in the consumer area should not be ascribed to this agency as an institution but rather to the individual decisions of the individual Commissioners.

It is significant that the Federal Trade Commission has taken action in these 40 or more cases in the District of Columbia, despite the applicable provisions of the District of Columbia Criminal Code. A provision of this code makes it a crime——

For any person, firm, association, corporation, or advertising agency, either directly or indirectly, to display or exhibit to the public in any manner whatsoever . . . ; or to insert or cause to be inserted in any newspaper . . . any false, untrue, or misleading statement, representation, or advertisement with intent to sell, barter, or exchange any goods, wares, or merchandise or anything of value . . ."

That law provides for penalties of up to 60 days imprisonment or a \$500 fine or both.

This was the sort of thing that Commissioner Elman was just talking to you about. How many times has that been used? I could not find any. We had a conference last fall with the Mayor of Washington, the U.S. attorney, his assistant, the Corporation Counsel, and a number of others, with all the Commissioners sitting there talking with them. This District of Columbia Code provision was called to their attention and they have not used it.

The circumstances we have uncovered through our investigations would naturally lead to the inquiry: Why were the guilty not proceeded against under this criminal law? The probable answer is that the evidence, although sufficient for a civil case before the Federal Trade Commission, would not support a proceeding against these "hard-core frauds" in a criminal suit. Therefore, clearly criminal law alone, as has been suggested to you, is not the answer to combating consumer fraud or deception.

In citing such instances, I, of course, do not take the position that the FTC has always acted with complete effectiveness. The existing

deficiencies, however, do not result from the administrative scheme envisaged or the laws enacted by Congress. Rather such failures as this agency has experienced, and I do not claim a perfect record myself, are attributable to the failures and predilections of those appointed to membership on the Federal Trade Commission.

To sum up, if the Commission's law enforcement activities are to be viewed in perspective, it should be recognized that as on a number of occasions in the history of this agency, "human emotions, beliefs, aspirations, or prejudices are at work in a situation where such non-logical elements are ignored almost as a matter of convention." These factors should not be overlooked by this committee, which is the principal oversight committee for the Federal Trade Commission, and particularly so since it is the confirming committee of those appointed or nominated for appointment to the Federal Trade Commission.

The current policy split at the Commission level on issues involving not only matters directly affecting consumers but also other concerns embracing the public interest, operates as the principal deterrent to the Commission's fulfillment of its mission. This has made it difficult indeed for the staff of the Federal Trade Commission to pursue a coherent and effective policy in making recommendations for Commission action. The voting patterns of individual Commissioners on these matters speak more eloquently than the words of any of us. Consequently, for those who have an interest in such questions, I invite a full examination of the Commissioners' votes for the past 8 years on the issuance of complaints and orders. The complete record is a subject worthy of Presidential inquiry.

I would like to leave with you, Mr. Chairman, for inclusion in this record, without my reading them, the statements that I presented as a member of the Commission to the American Bar Association commission to study the Federal Trade Commission. It covers about 33 pages. I am the only one of the five Commissioners who submitted my answers to their questions in writing. I would like to have it included in your record.

I provided a copy in writing to each of the 16 members of that particular Commission.

Senator Moss. Without objection, it will be included.

Mr. MACINTYRE. I likewise ask that my statement to Senator Kennedy on September 12, 1969, be included in the record. I have copies to hand to your staff for that purpose.

Senator Moss. Without objection, that may be included at the end of your oral testimony.

Mr. MACINTYRE. I want to, in conclusion, say that I am in strong disagreement with Commissioner Elman's suggestion that the Commission could avoid the appearance of being judge, jury, and prosecutor all combined in one, by delegating to its staff the matter of undertaking prosecutions and otherwise handling the Commission's business. The Commission is authorized to do this, you know, by virtue of Reorganization Plan No. 4 of 1961; but when the White House was seeking Senate approval of that particular plan, the Federal Trade Commission Chairman was asked to appear before the chairman of the Senate Committee on Operations and to plead for his approval, or certainly to avoid his opposition to the passage of that plan. It was coming up for a vote on the floor of the Senate.

The Chairman of the Federal Trade Commission gave that chairman of the Senate Operations Committee an assurance that so long as he was there he did not believe the Commission would so delegate its responsibilities and he certainly would never vote for a delegation such as Commissioner Elman is now asking for.

I would say, therefore, that with people in the Congress having acted with a belief that this would not be done, that it should not be done. Certainly if it is to be done, it ought to be done by an act of Congress, not by a delegation by Commissioners. This has been done by an act of Congress in the case of the National Labor Relations Board where the Board had removed from it the authority to bring complaints. A General Counsel—by the authority of the Congress, not delegated by the Board—does this. He is somewhat separated from the Board.

Perhaps the time has come when, in order to avoid all of this criticism that is directed at the Commission, that the Congress consider this sort of a problem. Perhaps we need a trade court which will do nothing but decide, and have a Trade Commission to do everything else. I do not know. But it is something worthy of consideration by the Congress. Delegating the power of filing complaints and prosecuting cases to the staff would not be a satisfactory solution. Commissioners who are nominated by the President and confirmed by the Congress are the ones who ought to be held responsible. I would oppose, therefore, my responsibility being delegated to someone else over whom I would have no control. I think that Congress ought to do the delegating.

I thank you.

Senator Moss. Thank you, Commissioner MacIntyre. That was a very vigorous and well thought-out statement on your part. We appreciate it very much. You have helped us in making our record.

I am going to apply the same sort of restraint on myself and not ask you verbal questions at this time, but I will ask that, if I send them down in writing, if you would respond? There are some that I obviously will have.

Do you have any questions, Senator Pearson?

Senator PEARSON. I have just one comment. I am constrained to make some observation about Commissioner MacIntyre's comment about the differences of policy among the Commissioners. I think that is why we have five on the Commission. As a matter of fact, I could get things done a lot better if Senator Moss would agree with me all the time. But he will not do it.

I do not mean to make light of it, seriously. But we are all going to live in an atmosphere of criticism. No one who is an activist, who seeks to achieve or do things is going to ever live in any sort of climate other than one of controversy, and that will be the role of the Congress and the individuals and the Commission as long as it is here, I suggest. And the way to operate is to learn how to live with it, I suspect, to understand it, and to manage it.

But that is enough of a sermon for today. I just wanted to make that comment.

I am sure that difference of opinion is precisely why we have not only commissions with several members, but commissions of odd numbers—so we get a decision.

MR. MACINTYRE. I thoroughly agree, Senator. That was not what I had in mind. If I may explain my comment, I think it will be a little bit more understandable.

I was talking about not decisions in cases, but the question as to whether or not the policy of the law as determined by the Congress should be followed by the Commission. Let me give you an example of what I mean by that.

Members of the Federal Trade Commission have on occasions, for example, said that they did not think it was in the public interest for the Commission to pursue its enforcement of certain laws of the Congress to the extent it had been enforcing them.

For example, the Wool Labeling Act, the Fur Labeling Act, the Textile Fabric Identification Act—those are three. And some public statements have been made to the effect that the enforcement of these laws is no more than “trivia.”

Apparently some of those Commissioners repeated those same remarks to the members of the ABA commission to study the Federal Trade Commission, because on page 48 of that report which was issued September 15 of this year, there appears this statement:

Time and again the FTC has defended itself against charges of inadequate consumer protection programs on the ground that a sufficient allocation to support these programs had not been made available. Keeping in mind that money saved by cutting the allocation to the Bureau of Textiles and Furs could be used for serious consumer protection work, we conclude that the present efforts of the Bureau of Textiles and Furs to inspect—

And they go on and talk about what percentage—

Are out of proportion to the contribution that such an ambitious program can make to consumer protection. We believe a carefully devised sampling program—

Now listen to this—

cutting present expenditures on wool, textile and fur acts by one-half to two-thirds would be entirely adequate.

That means cutting out more than two-thirds of the inspection service that the Commission had been giving. Now what does that mean? We have 49 inspectors, one less than one for each State. If you cut two-thirds of those out, you would have less than one-third of a man per State doing inspection work.

This is a matter of very vital policy and not a decision in a case that I am talking about, Senator. And apparently this is all the President of the United States had to go on when he had to make his views known about what he viewed the Commission should be and should not be doing. And this particular statement of the ABA in turn was based on statements by one or more Commissioners—made orally to 16 members of the American Bar Association.

It is that sort of thing I am talking about, Senator.

Senator PEARSON. I thank you very much. I think I have that report here.

Senator MOSS. Thank you, Commissioner. We appreciate it very much.

(The material referred to earlier follows:)

FEDERAL TRADE COMMISSION,
Washington, D.C., July 1, 1969.

MILES W. KIRKPATRICK, Esq.,
Chairman, American Bar Association, Commission on the Federal Trade Commission, Madison Hotel, Washington, D.C.

DEAR MILES: In accordance with my commitment to your Panel when I met with you at the Madison Hotel yesterday, I am enclosing herewith the original record of the answers I presented yesterday to the questionnaire you transmitted to me under date of June 20, 1969. This is for the record of your Commission.

Simultaneously, I am arranging to have delivered to you under separate covers photo copies of this original (without appendices). Each of these copies is in an envelope addressed to each of the individual members of your Commission. They are, however, delivered to you for distribution to such members.

Allow me to use this opportunity to thank you for your courtesies extended by you and your Panel during the course of my meetings with you yesterday.

With best wishes, I am

Sincerely,

A. EVERETTE MACINTYRE.

STATEMENT OF EVERETTE MACINTYRE, FEDERAL TRADE COMMISSIONER

ANSWERS TO AMERICAN BAR ASSOCIATION QUESTIONNAIRE

Ladies and gentlemen, my appearance before you at this time is in response to the invitation and request made by your Chairman, Mr. Miles Kirkpatrick, by telephone June 20, 1969 and which was confirmed by him in a letter of that date to discuss with you matters under your consideration.

First, let me say that I do not think it would behoove any member of the Federal Trade Commission to undertake to suggest the composition of the membership of your Panel. It was for that reason that I opposed suggestions in the direction of who should or should not be selected to be members of your Panel. Also, I do not think it would be appropriate for a member of the Federal Trade Commission or anyone else connected with the Agency to attempt to tell you what to conclude or recommend in your report to the President.

In view of the thoughts I have expressed, I shall undertake to limit, for the most part, my remarks to the answers I make to the list of questions enclosed with the letter to me from Mr. Kirkpatrick under date of June 20, 1969. However, I realize that in those responses I may be providing statements of my views about matters relevant to the conclusions and recommendations you may make in your report.

By way of explanation, I should state that where my answers are made summarily and without reference to underlying evidentiary facts or supporting ultimate facts, that the judgment expressed is grounded upon my experience of almost four decades of work in the field of antitrust and trade regulation.

RESPONSE TO AMERICAN BAR ASSOCIATION QUESTIONNAIRE

Question No. 1.—Selection of cases, enforcement procedures and policy planning.

The Bureaus and Divisions have their own procedures for determining priorities and to select those cases which deserve Commission attention. The primary problem seems to be that the Bureaus and Divisions are split along functional lines (for example, "Restraint of Trade" and "Deceptive Practices") and each Bureau, of necessity, makes its determinations within the area of its own responsibilities. Within those limitations this arrangement has worked reasonably well and I have no criticism of the manner in which the Bureaus have fulfilled these responsibilities.

The real problem seems to be that the Commission at this juncture does not have effective staff assistance standing outside the operating Bureaus and looking at the Commission's responsibilities as a whole. As a result, the Commission's review of its mission, goals, priorities, procedures and structure has generally been on an *ad hoc* basis as problems have become apparent.

Significant improvement could be effected in this area by making effective the Office of Program Review Director. This Office, when it was established, was expected to take active steps to facilitate policy planning at the Commission on an agency-wide level. The Program Review Officer, however, has not had the

impact originally contemplated. The Office, consisting of the Program Review Director and one economist, simply did not have the resources to do the job expected. The Commission, in setting up the Office, recognized the necessity for continuous review of its policy, functions and organizational structure. This recognition is inherent in the task entrusted to the Program Review Officer. These may be summarized as follows: It is the mission of this Office to help the Commission weigh priorities and determine annual programs. The Program Review Officer, who reports directly to the Commission, is also charged with identifying, principally in cooperation with the Bureau of Economics, significant "trouble spots" in the economy in making recommendations for enforcement programs. He should be responsible for identifying and articulating appropriate criteria for initiating and evaluating the Commission's actions. Further, he should evaluate the utilization of the Commission's resources according to major programs and purposes.

The concept is sound. The principal problem is to make it work, namely, to make the Office of Program Review effective. A number of things should be done to achieve that objective. First, the position of Program Review Officer, which is now vacant, should be filled with an individual skilled both in management techniques and having an adequate legal and economic background to evaluate the Commission's objectives in the context of the resources available. In addition, the Office should be expanded by ensuring that the Program Review Officer will have an adequate staff. At present this Office has only one economist. If this Office is to work adequately it is prerequisite that the Program Review Officer have sufficient personnel to analyze the necessary data independent of the operating Bureaus, although he should, of course, work in cooperation with them. This is necessary to overcome the built-in resistance to change which may exist in any organization. Making the Office of the Program Review Officer effective so that it will actually fulfill the functions contemplated will stimulate the necessary review of the Commission's policy planning and structure. Improving the Commission's policy planning necessarily will lead to a more intelligent selection of cases and choice among possible enforcement measures.

Question No. 2.—Commingling.

The flexibility inherent in the administrative process outweighs the possible disadvantages of commingling the prosecutorial, adjudicative and policymaking functions. The Administrative Procedure Act ensures that such commingling will not deprive those involved in Commission proceedings of due process.

The basic function of the Commission under Section 5 of the Federal Trade Commission Act is to define and remedy "unfair" trade practices if possible in their incipency. To effectively fulfill these responsibilities under such a broad mandate the Commission must exercise the policy function. This in turn requires that the Commission effectively control the choice of remedy in the areas under consideration. Stripped of either the prosecutorial or adjudicative function the Commission's effective control over enforcement measures is of necessity diluted. Such discretion is vital if this agency is to deal effectively with unfair trade practices in their incipency. The "conventional judicial processes [are] not well suited to such a task" and it is "better . . . performed within the framework of the administrative process."¹ Stripping the Commission of either the adjudicative or prosecutorial functions would deprive this agency of its unique characteristics as an administrative agency, which, of course, is its reason for being.

For the same reason I would not favor delegating to the staff the function of filing complaints or the determination of whether to seek injunctions in the courts. Basically, these functions were entrusted to the Commission in order to pinpoint responsibility for public policy. Delegation of these activities would dilute agency control over policy and make it more difficult to evaluate the reasons for success or failure of the Commission's operations. Moreover, the delegation of such functions would present practical problems in view of current policy splits at the Commission level. Under these circumstances it would be difficult for the staff to pursue a coherent policy if it were charged with such duties.

Question No. 3.—Coordination with and allocation of responsibilities between the Federal Trade Commission and other agencies.

In general, the existing arrangements for coordination and the allocation of responsibilities between this agency and the Department of Justice have worked

¹ Trade Reg. Rule for the Prevention of Unfair or Deceptive Advertising and Labeling of Cigarettes in Relation to the Health Hazards of Smoking and Accompanying Statement of Basis and Purpose 130 (1964).

satisfactorily. I feel, however, that in some instances there has been undue delay in processing the Commission's requests for civil penalty proceedings in cases where cease and desist orders have been violated. I am hopeful that recent discussions with responsible officials of the Department will iron out these difficulties. In the case of other governmental units, such as the FDA and the Department of Agriculture and other governmental agencies responsible for consumer protection, the liaison arrangements have, in the main, been satisfactory. The Commission should explore, however, the question of whether new arrangements need to be instituted or existing liaison arrangements strengthened with newly instituted governmental agencies with consumer responsibilities, such as the Department of Transportation and the Department of Housing and Urban Development.

Question No. 4.—Consumer fraud and deception.

Within the limits of available resources I believe the FTC has devoted sufficient resources in recent years to consumer fraud and deception cases. In this connection there are obviously many areas which are essentially local problems and best left to the states or municipalities if they have the machinery available to deal with it.

However, it is difficult to generalize whether particular forms of deception are, as a general rule, local. For example, in the case of bait-and-switch advertising, when practiced by retail stores this is usually a local matter. On the other hand, in the case of many home improvement rackets bait-and-switch practices are an integral part of the operations of substantial interstate businesses which require federal intervention. Similarly, in the case of the holder-in-due-course defense, when the problem arises with respect to retail stores it is generally a matter of local concern. On the other hand, when the holder-in-due-course defense is used to defraud consumers in the case of deceptive sales schemes in commerce, involving, for example, aluminum siding, and where the business is, in effect, underwritten by a number of finance companies with knowledge of the fraudulent practices in question, then federal intervention on the part of the Federal Trade Commission is called for.

Question No. 5.—State and local enforcement agencies.

The question of whether the resources of state and local enforcement agencies are adequate to cope with consumer fraud and deception is a difficult one to answer with precision. Undoubtedly, the quality of state and local enforcement agencies in the consumer area varies considerably. However, it is important to note that the Commission's staff responsible for liaison with state and local consumer units is convinced that local governments are constantly improving their capabilities. Undoubtedly, officials on the state and local level are faced with the same question as the Commission, namely, an almost unlimited demand for consumer protection opposed to limited resources for dealing with the problem. The real problem in this area is to convince the state and local legislative bodies of the necessity for providing adequate financing for consumer protection activities in the face of many other demands for funds.

The Federal Trade Commission has made considerable efforts to assist local units in the area of consumer protection. In this connection efforts have been made to encourage the states to enact little FTC Acts and to assist local authorities in enforcing existing legislation. Further, the Commission's expertise, developed over the years in dealing with these problems, has been made available to local authorities, both in the area of drafting legislation and in advising as to the legal theories which might be helpful in attacking the problems within their jurisdiction. Apparently liaison between the Commission and local authorities is effective, for requests for advice and assistance from the states and referral of cases to them has markedly increased in recent years. I believe that at present the Commission's efforts in this area are well planned and thought out; the primary need is for the addition of more personnel to expand federal-state liaison activities already in effect. Here, the addition of only one or two lawyers may be expected to bring large returns.

Question No. 6.—Expansion of FTC efforts in protecting consumers against fraud and deception.

If additional funds were provided for consumer protection, I would, in applying such resources, emphasize additional enforcement proceedings against national advertisers and emphasize consumer education, as well as cooperation with and training of local authorities. Particular stress should be laid on consumer education. In enacting laws such as the Fair Packaging and Labeling Act and the Truth-In-Lending Act, the Congress emphasized providing information to

enable the consumer to make his purchases more intelligently. The fact remains that this legislation will not have the effect intended if the consumer does not actively take advantage of the information provided. In order to ensure that the Congressional intent in enacting this legislation is not frustrated, considerable effort will be required at the local level to ensure that consumers are aware of this legislation and the fact that it may help them to purchase more advantageously.

In general, consumer education may be one of the most efficient vehicles for alleviating the lot of the poor. It may be far less expensive to help a family save a given amount of money through intelligent purchasing than to achieve an equal increase in income. Many people not within the scope of current programs designed to increase incomes could be helped by consumer education programs. Moreover, even where higher income is achieved, such benefits may be dissipated by poor spending habits.

At this time, as far as the FTC is concerned, I do not believe that additional legislation is necessary to carry forward a satisfactory program. The chief problem is to marshal the resources necessary to adequately carry out existing laws. For example, in the case of the Fair Packaging and Labeling Act and the Truth-in-Lending Act, it may be difficult to finance aggressive and equitable enforcement in the light of budgetary limitations.

Question No. 7.—The D.C. consumer protection program.

The primary goal of this program, in my view, was to gather information about the problems of the inner-city consumer in a typical metropolitan area. On the basis of the information developed the Commission received invaluable insights into the problems of the economically handicapped. The pay-off will be in the Commission's efforts in the consumer education area as well as in liaison activities with local authorities concerned with consumer protection.

Question No. 8.—F.T.C. Difficulties Re national media advertising and monitoring.

The Federal Trade Commission's major problems in policing fraudulent and deceptive advertising in the national media lie in the area of evaluating product claims. The difficulty arises from the fact that the Commission does not have a staff which can conduct scientific and technical tests pre-requisite to Commission enforcement activity in many areas. On the other hand, advertisers in the national media as a general rule do have the funds to retain adequate scientific and technical staffs or consultants to work up data allegedly supporting the claims under study. To name only one example, this is clearly one of the principal problems facing the Commission in evaluating claims with respect to dentifrices represented as making teeth whiter and brighter but which may also be overly abrasive. Here the only solution is additional funds to employ the technical and scientific manpower necessary to analyze claims of this nature. Another solution might be to afford the Commission additional funds whereunder it would secure technical help on a more consistent basis than in the past from agencies such as the Department of Health, Education and Welfare and the Bureau of Standards. The primary remedy here in my view is simply additional funds. However, additional legislation might be helpful if it were to authorize the Commission to utilize the scientific manpower available in other agencies.

The Commission's monitoring program at this time is not adequate. At present the only monitoring of national media done on a systematic basis is that of the national television networks' submissions to the Commission, which are reviewed by an attorney in the Food and Drug Advertising Division and by scientific personnel in the Division of Scientific Opinions. The monitoring of printed advertising, radio and local or regional television does not appear to be adequate at this time. By 1971, the Bureau of Deceptive Practices plans to put monitoring on a systematic basis with a staff of six. As I understand it, the plan is to utilize non-lawyers, by developing a non-professional staff to operate under the general supervision of a middle grade attorney. This projected program I believe will be a step in the direction of the in depth monitoring which is required to police unfair and deceptive advertising. Hopefully it can be brought into being before 1971, budget limitations permitting.

Again, in my view, the need here is not so much for additional legislation, but for the resources to adequately carry out the duties already entrusted to the Commission.

Question No. 9.—Motivational or subliminal advertising.

It is my understanding that the question of motivational or subliminal advertising is now under staff study. My conclusions on whether expanded activities

in this area by the Commission would be desirable will be based on information provided by the staff.

Question No. 10.—The Bureau of Textiles and Furs.

In my view, the Federal Trade Commission's commitment of money and manpower to the Bureau of Textiles and Furs is worthwhile in terms of the results achieved. The Wool Products Labeling Act, the Fur Products Labeling Act, the Flammable Fabrics Act, and the Textile Fiber Products Identification Act are all "consumer" statutes. They provide the information facilitating value comparisons which consumers need to make informed and rational choices between competing products free of fraud and deception. Enforcement of these acts fosters the intelligent purchasing upon which a healthy competitive market economy necessarily depends. The Flammable Fabrics Act which of course is intended to protect the health and safety of the public is of necessity a statute which deserves aggressive enforcement. In my view, this Bureau consistently and efficiently has achieved the objectives set for it. Radical changes in the Bureau's organization and resultant disorientation of the staff would set back rather than further the cause of law enforcement.

Question No. 11.—Concurrent enforcement.

I

The advantages of concurrent enforcement of antitrust outweighs the alleged disadvantages. The special contribution which both the Department of Justice and the Federal Trade Commission can bring to the antitrust area justifies continued antitrust enforcement activity by each. Effective antitrust enforcement rather than symmetry of organizational charts should be the goal.

The Commission as an administrative agency can bring a flexible approach to complex economic problems in this area which the Department whose enforcement is limited to the courts cannot match. Moreover, as the Supreme Court decision in *F.T.C. v. Brown Shoe Co.*, 384 U.S. 316 (1966) illustrates, the Commission as an administrative agency with the power under Section 5 of the Federal Trade Commission Act to define "unfair" trade practices and to prohibit them in their incipency has a unique function to fulfill. Were the Federal Trade Commission eliminated from the field, a vacuum in antitrust enforcement would become readily apparent. There would be no agency in existence with the tools to deal with unfair trade practices before they reached Sherman Act or monopoly proportions.

Further, it is valuable to have two agencies in this field, each with its point of view of antitrust objectives. This ensures that the avenues to antitrust enforcement will be broadly explored. In short, a little competition in the field of antitrust enforcement is good for the public just as it is desirable in the market place. Consider for example the Commission's pioneering concern with conglomerate mergers—both the *Consolidated Foods* and *Procter and Gamble* cases were initiated in the late fifties. Without the stimulus of two agencies in the field, it is obvious that many desirable approaches fostering a competitive economy might simply not be developed or not develop quickly enough at a time when a dynamically changing and complex economy requires quick reaction and flexibility by the governmental agencies responsible for antitrust enforcement.

II

I do not feel quite as strongly about the necessity for continuing concurrent regulation of drug advertising by the Federal Trade Commission while the Federal Drug Administration administers labeling requirements. Nevertheless, the unique experience of the Federal Trade Commission with respect to policing of advertising justifies its continued activity in this area. Certainly in the case of FTC regulation of drug advertising, FDA expertise is not lost because of the close liaison between the agencies.

The division of enforcement of the Fair Packaging and Labeling Act as to food, drugs and cosmetics by the FDA and as to other consumer commodities by the Federal Trade Commission is logical and should continue. Clearly, Congress was motivated by the desire to cause minimal disruption to the lines of authority developed by each agency in its area of responsibility and the desire to take advantage of the expertise each had developed in its own field.² These considerations are still valid today.

² See generally "Truth-In-Packaging" Report of the Subcommittee on Antitrust and Monopoly of the Committee on the Judiciary, U.S. Senate, Committee Print 3, 88th Cong., 2d sess. (1964).

Question No. 12.—Voluntary compliance techniques and compliance with cease and desist orders.

Initially I felt that the Commission's increased reliance on voluntary procedures was a success in that it enabled the Commission to dispose of a considerable volume of proceedings with respect to unfair or deceptive acts or practices cheaply and inexpensively. I feel, however, that the reliance on this procedure may have gone too far. At this point the Commission should increase the number of formal enforcement proceedings in order to preserve the credibility of the informal procedures. Moreover, it is my view that in many cases the Commission, in granting informal disposition, did not, as required by its own rules, take into consideration the gravity of the offense or the history of the offender. Too many assurances have been accepted in the case of respondents with long records of prior offenses, in many instances covered by cease and desist orders or prior assurances of discontinuances. Equally disturbing is the fact that in a number of instances assurances have been taken after the case has been fully litigated. In my view, once substantial government funds have been expended, the public is entitled to the maximum protection afforded—namely, an order to cease and desist rather than a promise which is patently unenforceable.

For your convenience I have attached a copy of the order of dismissal in *Marlo Furniture Company*, Docket No. 8745, issued January 16, 1969, and my accompanying dissent.³ That was a proceeding unjustifiably terminated after litigation on an informal basis. I incorporate the expression of views in that dissent by reference in this response.

In general, I'm satisfied that the staff is doing a thorough job in following up compliance with cease and desist orders. I have been disappointed, however, in a number of instances where the Department of Justice has either delayed on a Commission request for a civil penalty suit or disagreed with our position that a penalty proceeding should be brought.

Question No. 13.—Revision of the Robinson-Patman Act.

I do not agree with the Neal Task Force Report, the Nixon Task Force Report or with the Johnson Council of Economic Advisory Report that it is time for legislative changes in the Robinson-Patman Act. In my view, these criticisms of the Act and its enforcement gave little indication that the report writers in question brought their own experience or original research to bear on this issue. Rather, the impression is that primary reliance was given to secondary sources, which, in the main, were undisclosed. These criticisms of the Act constitute a classic example of the *dictum* that "[t]he antitrust field is, perhaps, of all areas of disclosures the one in which practitioners live best by taking in each other's washing."⁴ On the other hand, the recent Seventh Circuit decision in *Federal Trade Commission v. National Dairies*,⁵ affirming the Commission's decision in that matter gives convincing and concrete support for the position that a competitive economy requires consistent and intelligent enforcement of the Act as it is now written.

Question No. 14.—Access to data underlying administrative actions by the Federal Trade Commission.

In my view, recent action by the Commission in relaxing the requirements which must be met before confidential data is made available went too far. I do not think they should be relaxed further. On this point I would like to make my position clear. The public is entitled to know what actions the Commission has taken, the position of the individual Commissioners voting on such actions and the rationale for their decision. However, the Commission's most recent policy which may be described as one of "maximum disclosure" glosses over the fact that the Commission, as an investigative agency, is the custodian of much confidential information from the business community and others. The investigative function is one of the most important duties lodged in the Commission, and it is of considerable breadth. As the Supreme Court stated:

"[The Federal Trade Commission] has a power of inquisition, if one chooses to call it that, which is not derived from the judicial function. It is more analogous to the Grand Jury, which does not depend on a case or controversy for power to get evidence but can investigate merely on suspicion that the law is being violated, or even just because it wants assurance that it is not * * *."⁶

³ See Appendix.

⁴ Mason, *Economic Concentration and Monopoly Problem*, 389 *Atheneum* (1964).

⁵ Attached hereto as an Appendix.

⁶ *United States v. Morton Salt Co.*, 338 U.S. 632, 642-643 (1950).

With so broad an investigative mandate the Commission obviously has a duty of keeping confidential the information received in the course of its investigations unless they are utilized in a public proceeding. This is required simply as a matter of equity since most informants giving information to the Commission do so on the understanding that this information is required for official government use by the Federal Trade Commission and that it will be held confidential. There are also practical reasons for respecting the confidence of those furnishing the Commission with information. If the Commission does not do so, inevitably sources of information will dry up and most, if not all, investigations will have to be conducted by way of litigation and compulsory process, with inevitable large-scale delay.

In this connection, it is interesting to note a recent example which I find disquieting, to say the least. In this connection, a respondent in the Midwest had been investigated by one of the Commission's field offices. Subsequently two reports from the Commission's investigative files were turned over to the Post Office. That respondent is involved in litigation with the Post Office in district court. The respondent demanded by way of discovery the complete files of the Commission, including all inter-office memoranda, interview reports with third parties and any other documents in the Commission's files relating to it. Such wholesale disclosure, now likely under the new procedures in effect, is likely to hamstring the Commission's investigations in the future as those approached in investigations lose confidence in the security of the Commission's files.

To recapitulate, I want to make it clear that I think there should be maximum disclosure about the Commission's administrative actions and the votes of the individual Commissioners and their positions. On the other hand, if the Commission is to continue the investigative function envisaged by Congress, a clear stand will have to be taken to protect the security of the Commission's investigational files.

Question No. 15.—FTC rules of procedure.

I have no specific changes to recommend. I feel, however, it would be valuable if a general study of administrative procedure could be undertaken both by the private bar concerned government attorneys and administrators with the object of simplifying administrative litigation which in my view over the years has become overly judicialized. I think we have lost sight of the fact that informality is the life blood of the administrative process. I would like to emphasize however that the study should be broadly based. Tinkering with the rules on an agency by agency basis is unlikely to have the far reaching results needed.

Question No. 16.—Personnel recruitment and policies.

On the basis of my contacts with the younger professional staff, both lawyers and economists, I have in the main been impressed with their caliber. If the personnel procedures of the Federal Trade Commission are to be tested by the results achieved the Commission's recruiting policies have been reasonably satisfactory.

The Commission, for a number of years, has had a program of direct contact with some of the two hundred top law schools in the Country. I understand that changes were made to further improve recruitment of the younger members of the professional staff. In the scheduling of interviews the emphasis has been shifted from interviews conducted by the top officials of the Commission such as the Executive Director to having this function performed by younger attorneys of intermediate grade which would be better able to establish rapport with the applicants. In addition, the younger attorneys have also been given responsibility for taking part in the rating of applicants. Younger staff members have also been sent to interview prospective employees to discuss with them the problems and opportunities of employment at the Commission. Again, this is a function better performed by our newer employees who are able to understand the transitional problems of recent law school graduates. To my knowledge, such interviews have not concerned themselves with questions of race, religion, or politics, but solely with the applicants' ability to do the job.

I further understand that plans are now being implemented to cut down the turnover of the younger professional staff. In this connection, apparently a more thorough and intensive orientation program is now in effect and a real effort is being made to put new employees to work on substantive problems immediately. I understand that in the past the delay in putting new employees to work on questions of significance has been a real source of dissatisfaction. I trust that this deficiency is now being remedied.

In this connection, I might add a personal note. As a Commissioner who at one time was also a "young lawyer" at the Commission, I am convinced that one measure to increase enthusiasm and morale among younger lawyers would be to step up rate of litigation in significant areas of antitrust and consumer protection. This, I believe, would at one and the same time, raise employee morale and serve the public interest. It is my understanding in this connection that many of the younger professional staff have been disappointed by the fact that the opportunities for participation in litigation have been far less than they expected before coming to this agency.

Finally, I would like to note that while I am of course interested in the Commission's personnel practices and recruitment this is primarily a managerial matter within the jurisdiction of the Chairman. It is not an area where as a general rule other Commissioners should interfere. Should the other four Commissioners regard themselves as "Co-Chairmen" in this and other areas involving primarily managerial responsibilities, administrative chaos would be bound to ensue.

Question No. 17.—Organization of Commission staff and allocation of staff responsibilities.

In my view, the present organization of the staff could be improved in the operating Bureaus by eliminating rigid functional lines. It is a mistake to freeze attorneys and particularly the younger attorneys into rigid categories such as "mergers", "price discrimination", or "general trade restraints". I believe that the operations of the trial bureaus could be made more efficient by eliminating such rigid stratifications and by assigning attorneys to cases on the basis of need. Furthermore, freezing an attorney's assignments merely to the area of one law is I believe stultifying. Giving attorneys a wider range of responsibilities would I believe be distinctly beneficial to their professional development. In addition, if such rigid categories were eliminated then the bureau chiefs of either the Bureau of Deceptive Practices or the Bureau of Restraint of Trade would be far more flexible in transferring attorneys to those areas which have greater priority and where the greatest need for manpower exists.

Question No. 18.—The contribution of the hearing examiners.

The primary function of the hearing examiners is to preside at adjudicative hearings. It may be that they are at this time under-employed because of a drop-off in the Commission's litigated cases. The temptation therefore might be to utilize them for purposes such as reviewing consent agreements prior to formal complaints if issued. While on its face the use of the hearing examiners for such additional duties might be helpful, I would be inclined to oppose use of the hearing examiners for purposes extraneous to their central function. In order to preserve their independence in my view the hearing examiners should confine their activities to adjudicative proceedings even though participation in other functions of the Commission might not violate the letter of the Administrative Procedure Act.

Question No. 19.—Industrywide cooperation.

The answer to this question is obvious. Certainly industrywide cooperation can facilitate the Commission's work in proper cases. The real issue is what is the proper case for such proceedings. It is difficult to generalize on that question. Nevertheless, I can think of one example, namely, the Truth-In-Lending Act. Obviously here industry associations could do a great deal to implement practical compliance with the Act.

In other instances, industrywide cooperation has to be approached cautiously both on the part of the industry and on the part of governmental enforcement agencies involved. For example, while industry self-policing to ensure ethical practices in an industry is a laudable objective it may conflict with antitrust objectives. Consider for example a concentrated market where industry leaders set up product standards with a tendency to raise new barriers to competition. In short, the desirability of such procedures is one which has to be determined on the facts of each case.

STATEMENT BY A. EVERETTE MACINTYRE, MEMBER, FEDERAL TRADE COMMISSION

The regulatory agencies, including the Federal Trade Commission at this time are again the subject of intensive scrutiny and criticism from without and within. That criticism has increased to the point where serious suggestions are being made for the abolition of the independent administrative agencies and a redistribution of their functions among the legislative, judicial and executive branches.¹

¹ See, e.g., Kohlmeier, "The Regulators", Harper & Row (1969).

Clearly, the time for self-evaluation by the agencies is at hand. I trust, however, that this statement will not be my valedictory to an agency which by and large in the words of Learned Hand has helped "to discover and make explicit those unexpressed standards of fair dealing which the conscience of the community may progressively develop."²

The assessment of the F.T.C.'s performance must of necessity begin with an analysis of the law enforcement goals entrusted to the Commission. The efficient achievement of those objectives is the only reason for being of an independent administrative agency such as the F.T.C.

The Commission's law enforcement activities may be roughly classified in two categories. The first involves this agency's responsibilities to implement the national policy of relying on competition to regulate the economy and the second, its task under various statutes providing for consumer protection from deception, for information to facilitate the public's purchasing decisions, and for shielding the public from certain hazardous merchandise. The Commission's fact finding function is of course one of its most important responsibilities and should not be overlooked.

In the antitrust area, the Federal Trade Commission Act declares it to be the public policy that there shall be free and fair competition in the market place proscribing those acts which tend to hinder competition, tend to create a monopoly or which are fraudulent or oppressive. The Clayton Act likewise sets for the Commission the objective of maintaining competition as a viable force in the market. In this connection, Sections 2, 3 and 7 of the Clayton Act require the Commission to proceed against activities such as price discrimination and related practices, tying and exclusive dealing arrangements and mergers with the effects on competition proscribed by the statute.

Under the Federal Trade Commission Act, the Commission is also charged with the task of protecting the consumer from unfair and deceptive acts and practices. The Wool Products Labeling Act, the Textile Fiber Products Identification Act and the Fur Products Labeling Act are all designed to protect the consumer from misbranding and false advertising as well as to provide him with the information necessary to make intelligent purchasing decisions as to the products within the scope of each law. Similarly, the purpose of the Fair Packaging and Labeling Act, as well as the Consumer Credit Protection Act, each in its own area, is to promote more informed purchasing, facilitate value comparisons and protect the public from deception. The Flammable Fabrics Act as its title implies is of course designed to protect the public from dangerously flammable fabrics.

The public policy objectives set forth in the Congressional enactments and in the judicial interpretation of these laws cannot be achieved unless there is a reasonable degree of unanimity as to those goals. There is at this time no meaningful agreement among the F.T.C.'s members as to the legislative goals, namely, the public policies which this agency is to pursue. To be sure, all of the Commission's members agree generally on the goal of preserving competition and protecting consumers from fraud and deception. Disagreement comes in the practical sphere namely the objectives of particular statutes, their importance, and finally their application in concrete instances. As a result under present circumstances, the task of a realistic self-reassessment of goals, tasks and priorities is virtually precluded.

It is not my objective here to list in detail all points of disagreement standing in the way of effective law enforcement by this agency, but merely to touch the highlights by way of illustration. For example, one of the most serious obstacles to coherent Commission antitrust activity is a basic disagreement of some members of the Commission with the public policy declared by Congress in Section 2 of the Clayton Antitrust Act, as amended by the Robinson-Patman Act.

This Law and its administration by the Commission is again under severe attack on the ground that the prevention of price discrimination is action against price competition. This misreading of history, moreover, has found its echo within the debates among the Commissioners.

"[However the] fear that uncontrolled price discrimination would destroy the small businessman is derived from a reading of history. For example prior to enactment of the Sherman and Clayton Acts, national combinations and international trusts openly used price discrimination to destroy small sellers in industry after industry of our country * * *."

² *F.T.C. v. Standard Education Society, et al.*, 86 F. 2d 692, 696 (2nd Cir. 1936), rev'd. on other grounds, 302 U.S. 112 (1937).

"Similarly, prior to the passage of the Robinson-Patman Act, volume purchasers ruthlessly, but still effectively, bargained for price concessions giving them decisive competitive advantages over small resellers in their respective industries * * *"³

The current need for aggressive enforcement of this Law is clear "large sellers still use territorial discrimination to destroy weaker competitors, and * * * volume buyers continue to bargain for unjustifiable preferences injurious to smaller purchasers."⁴

A recent primary line geographic price discrimination case, *National Dairy Products v. F.T.C.*, where the respondent subsidized its price discrimination with losses of over a million dollars and which posed a substantial threat to the survival of smaller regional competitors in the field of jellies and preserves illustrates the current relevance of the Act to today's economy. It also graphically documents the difficulty in securing Commission action in this area because of basic differences on antitrust policy. The majority of the reviewing Court with one judge dissenting held "The actual results of the program under the circumstances of this case represents a substantial competitive injury within the meaning of Section 2(a) of the Act"⁵ and that the predatory purpose of the program to injure competition had been substantiated. At the Commission level, however, the dissent characterized the F.T.C.'s decision as "turn[ing] the antitrust laws upside down."⁶ Increasingly, differences of this nature at the top level of the Commission have led to stalemate and inaction.

Moreover, the Commission's administration of the antitrust laws and the Robinson-Patman Act in particular have been derided by members of the Commission as "business protectionism" and as a misconception of law enforcement priorities. There is no glossing over the fact that that point of view has become increasingly prominent within the Commission. The fact remains that one of the legislative goals entrusted to the Commission under these laws is the maintenance of a climate economically viable for small business and the preservation of an economy where competition will be based on efficiency and service rather than sheer economic power.

Decision after decision of the Supreme Court and other Courts have instructed us that one of the central concerns of antitrust is "to hold the gradual demise of the small businessman"⁷ and to preserve "an organization of industry in small units which can effectively compete with each other."⁸ Mr. Justice Black in the case of the Robinson-Patman Act expressly noted "in enacting [the statute] Congress was especially concerned with protecting small businesses" lacking the economic power of its larger competitors.⁹ If that Congressional objective underlying the statute—if that goal—is disregarded or glossed over, rational enforcement of the Act becomes impossible and self-assessment of our enforcement activities thereunder a delusion. In my view at least the Commission should not lose sight of this goal or disregard it under the guise of reordering priorities. The Commission in this area should be guided by the declaration of the Small Business Act enacted in 1958, viz.,

It is the declared policy of the Congress that the Government should aid, counsel, assist, and protect, insofar as is possible, the interest of the small-business concerns in order to preserve free competitive enterprise * * *.¹⁰

Similarly, serious disagreement exists among the Commissioners in the consumer protection area. For example, enforcement efforts under the Fur, Wool and Textile Acts have been cited as illustrating the Commission's pre-occupation with trivia. However, public policy as expressed by Congress does require for example that used wool not be sold as new and that weasel not be mislabeled as mink.¹¹ The Commission as an independent regulatory agency and an arm of Congress is bound to enforce these laws when violations come to its attention. The Commission may not or at least it should not substitute its own notions for those of Congress by starving these laws for appropriations in order to allocate our resources

³ Van Cise, *No, Thirty Years Are Not Enough*, 30 A.B.A. Antitrust Section 28, 29 (1966).

⁴ *Ibid.*

⁵ *National Dairy Products Corp. v. F.T.C.*, (7th Cir. 1969) CCH Trade Reg. Rep. ¶78,829 at 87,053.

⁶ The dissenting Judge in the Seventh Circuit adopted the rationale of Commissioner Elman's dissent.

⁷ *U.S. v. Von's Grocery Co.*, 1966 Trade Cases, ¶71,780 at 82,598.

⁸ *U.S. v. Aluminum Co. of America et al.*, 148 F.2d 416, 429 (2nd Cir. 1945); *Brown Shoe Co. v. United States*, 370 U.S. 294, 315 (1962).

⁹ *F.T.C. v. Morton Salt Co.*, 334 U.S. 37, 49 (1948).

¹⁰ 15 U.S.C.A. § 631(a).

¹¹ Cf., Kohlmeier, "The Regulators," *supra* note 1 at 256.

elsewhere simply on a basis of the Commissioners' own predilections and value judgments. Certainly, truth in fabrics and truth in furs should not be considered out of date in light of the recent enactment of the Truth-in-Packaging and Lending Acts.

Ensuring that the consumer has adequate purchasing information in this area embracing the basic necessity of clothing is not a trivial matter. There are few areas where it is more important to pay heed to the principle that "A healthy competitive market economy depends upon consumers being able to make informed and rational choices between competing products and services free of fraud and deception."¹²

Similarly illustrative of the difficulties in achieving agreement on law enforcement priorities at the Commission level is a comment by one Commissioner to your Committee apparently criticizing the Commission for failing to allocate funds for product safety studies and performance evaluation while allocating too much "[to] performing the few and relatively routine functions assigned the Commission under the Truth-in-Lending Act."¹³ I have only one comment, Congress assigned to other agencies the primary function of product safety and evaluation. It did, however, make the Commission responsible for enforcement of the Truth-in-Lending Act. The Act has a very significant objective and I do not consider the Commission's responsibility thereunder routine. As simply a matter of good faith, it behooves the Commission to budget the funds necessary for the Act's enforcement.

It is ironic that the Commission is being criticized for failing to perform duties not specifically assigned by the Congress while at the same time it is being subjected to complaint for doing too much in the performance of those tasks for which legislation makes it expressly responsible. In any sensible ordering of priorities, the Commission must concentrate on those duties which Congress has specifically assigned. It should not denigrate its express responsibilities as routine or trivial while looking for new fields to conquer. The same considerations as I have already tried to indicate of course apply to our administration of the Fur, Wool and Textile Acts.

In the case of the Flammable Fabrics Act which directly involves the public's health and safety, more emphasis should be placed on its enforcement. One step in that direction would be to insist that all cases, where a violation is proven, be settled by cease and desist orders, rather than terminating certain of these cases by assurances of voluntary compliance which are unenforceable. I have, however, been unable to secure support for that position within the Commission. Certainly, since the hazard to the public's health and safety is the critical issue in this area, the Commission should insist on the most effective remedy available to it in each of these cases, namely, an order to cease and desist.

Finally, doubt has been expressed at the Commission level that this agency as an institution is suited to combat consumer fraud and deception.¹⁴ I do not share that view which should it become predominant among the Commissioners would nevertheless become self-fulfilling. Certainly a modicum of faith in this agency on the part of its members would appear prerequisite to its effective functioning. Where there have been failures, and I do not claim infallibility for myself, they should not be ascribed to the Commission as an institution, or to the laws passed by Congress, but to the decisions of the individual Commissioners.¹⁵ Clearly, if the Commission's law enforcement activities are to be viewed in perspective, it should be recognized that as on a number of occasions in the history of this agency, "human emotions, beliefs, aspirations or prejudices [are] at work in a situation where such non-logical elements are ignored almost as a matter of convention." They should not be overlooked.¹⁶

¹² "Report of the Joint Economic Committee, Congress of the United States on the January 1969 Economic Report of the President," 29 (91st Cong., 1st sess., 1969).

¹³ "Finally, in the consumer protection area, it is worth noting that no money is allocated for product safety studies, product performance review, or similar functions because the Commission has no qualified engineers or other skilled personnel on its staff hired to perform these functions. Nor has it attempted to hire any. But the Commission does feel it will have enough work to keep busy 190 people, with a budget of \$1,798,000, in performing the few and relatively routine functions assigned the Commission under the Truth-in-Lending Act." *Administrative Reform: The Federal Trade Commission*, memorandum submitted to Senator Edward M. Kennedy, chairman, Subcommittee on Administrative Practice and Procedure, Committee on the Judiciary, U.S. Senate, by Philip Elman, member, Federal Trade Commission, p. 41.

¹⁴ See my comments on S. 2246, attached hereto as Appendix A.

¹⁵ See, e.g., *Marlo Furniture Company, et al.*, Docket 8745, and my accompanying dissent (Appendix B).

¹⁶ Herring, *The Federal Trade Commissioners*, 8 Geo. Wash. L. Rev. 339 (1940), see also Henderson, "The Federal Trade Commission," 327 (1924). "In any problem of administration, these personal factors are in reality far more important than the questions of form and procedure"

I now come to a point which is critical to any assessment of the Commission, namely, the relation of the Commissioners to the staff of the agency. The Commission as a practical matter cannot function except before it by the staff and effective staff work is prerequisite to any sensible ordering of priorities. Certainly a rational law enforcement program cannot be grounded on the *ad hoc* enthusiasms of the individual Commissioners.

The staff does not have sufficient influence on the agency's decision making process for a number of reasons. The individual members of the Commission have become overly immersed in questions of mechanics which might well be left to the staff and this has had the tendency of blunting initiative at the staff level. More significantly, the staff has been severely hampered by policy splits among the Commission's members in a substantial number of areas. To some of these I have already alluded. In turn the agency's ability to evaluate its own performance has been drastically weakened.

In the main the deficiencies of the staff's performance, with some individual exceptions, do not stem from the weaknesses of the personnel, but rather due to the deteriorating relationship between the Commission and its staff. Much could be done to improve morale and performance by the simple expedient of ensuring that staff members do not get caught in the cross-fire when the prime difficulty stems from disagreement among the Commissioners themselves. The staff should, of course, not be immune from criticism, but the manner of that criticism at the Commission level is important. Too often criticism of the Commission's employees has been unnecessarily corrosive, with an inevitable adverse impact on morale and performance. In my view, the staff will respond affirmatively to fair criticism if couched in terms of good will, courtesy and respect.¹⁷

Moreover, the Commission has further complicated the staff's and its own problems by policy reversals and lack of adherence to precedent in a number of significant areas. The resultant confusion has made it difficult to chart a coherent course for the future or to evaluate what has gone before. In this connection, one of the striking examples is the Commission's revision of its pricing guides in January of 1964 which overturned precedent painfully built-up over a period of many years and affirmed by the courts. The modification resulted in no benefit whatsoever to the consumer. The new standards, as a matter of fact, complicated enforcement by substituting a subjective for an objective standard for determining truthfulness of such representations. As a result, the Commission's task of ensuring that the consumer would be able to intelligently evaluate the pricing representations held out to him was made much more difficult. After the promulgation of the new guides, for some time Commission activity in this area dropped off sharply. As far as I can determine, the contested cases where the issue of deceptive pricing has figured significantly have been few.¹⁸

Similarly, the Commission recently reversed policy of two years standing when it redefined its definition of a consumer commodity within the scope of the Fair Packaging and Labeling Act. The reversal in response to a challenge in the courts was accomplished by a settlement on the basis of the new and narrower definition before the courts even had a chance to pass on the merits of the suits.¹⁹ The result has been that the public has less protection and the staff's task in enforcing the law has been made immeasurably more difficult by forcing it to engage in almost metaphysical inquiry to determine whether coverage is indicated in particular cases. Even if the Commission's position had been overturned by the courts, we would nevertheless have been in a position to go to Congress asking for remedial action. Such a step, as a result of the Commission's policy reversal, has become almost impossible as a practical matter. The impact on the staff responsible for administration of this statute who for over two years with the Commission's full knowledge worked with numerous people in state and local government as well as consumer organizations on the basis of one set of assumptions and then found these premises in effect changed over night can be readily imagined.

Equally detrimental to the staff's operations have been a number of instances where the Commission for little or no discernible reason simply dismissed by pro forma orders, expensively litigated cases into which the staff had poured considerable time and effort without any findings on the legality of the practices

¹⁷ See Livingston, *Pygmalion in Management*, Harv. Bus. Rev., 81 (July-August 1969). "It is as though there were a law that caused a subordinate's performance to rise or fall to meet his manager's expectations."

¹⁸ See my dissenting statement to the Revised Pricing Guides and my dissent in *Revco D. S., Inc.*, attached hereto as Appendices C and C(1).

¹⁹ See my dissent attached hereto, F.T.C. Press Release, August 7, 1969 (Appendix D).

under consideration.²⁰ How the staff, in the future, was to respond to Commission policy in these areas where for practical purposes such policy was unknown and unknowable is difficult to comprehend.

My recommendations for improvement rest on the premise that the Congress desires the Commission to continue to fulfill the responsibilities spelled out in the legislation now in effect. There are no easy or quick solutions. Reform will have to begin with an attempt by the members of the Commission to achieve some unanimity of purpose to the goals of this agency. Unless this is achieved all other proposals for reform and improvement are essentially without meaning. Undoubtedly this will be a task of prime importance for the new Chairman to be nominated possibly this month.

My second major recommendation is that steps should be taken to improve the relationship of the Commission's members with the staff. If the Commission is to sensibly reassess its law enforcement duties it cannot do so without the assistance of the staff in pinpointing trouble spots where the Commission's enforcement activities will have maximum impact. Similarly, you have heard by this time, I am sure, considerable criticism about this agency's and its staff's pre-occupation with trivia. The basic problem lies in the fact that the Commission simply has not set up the staff machinery to enable the agency's officials to objectively review the Commission's performance and objectives on an overall basis. Theoretically, the Office of Program Review was designed to perform that job, but it has never been given adequate resources to accomplish this task. Staffing this office or a similar unit with sufficient personnel competent to make such an appraisal on a continuing basis will be of considerable help to the Commission in its function of setting general policy. In addition, once the Commission has set up an adequate staff to facilitate its responsibilities in the policy making area, its directives to the staff should be characterized by greater clarity and the Commission's goals in various areas more readily apparent. Performance would be improved all along the line.

While I endorse such reforms, the real search for improvement must commence with the five members of the Commission. The words of Senator Norris some forty-three years ago are relevant to this agency's problems today.

* * * [I]f the Commission is to function, if it is to continue to perform the work that the law designed it to perform, its personnel must be of men who believe in that kind of law. For the purpose of the discussion, we must assume that that kind of a law is right. I am not quarreling with any man who disagrees with me in that assumption, but he must agree, even though he does not agree in the law, that if we have a law at all, and if we are honest about it, it is based on the assumption that the law is good and that that kind of a Commission can do some good for our people.²¹

It is reassuring that the Commission was able to surmount its early crises. It should be able to overcome its present problems with good will and dedication.

APPENDIX A

SEPARATE STATEMENT OF COMMISSIONER MACINTYRE

(Re S. 2246, 91st Congress, 1st Session Deceptive Sales Act of 1969)

I concur in endorsing the Commission's support of the objectives and provisions of S. 2246 designed to protect the consumer from fraud and deception.

I have been prompted to take this position in part because of my belief that enactment of this legislation will promptly enhance consumer protection from deception and fraud. I would not wish to see the approval of this law delayed until Congress concludes its consideration some years in the future on the proposals for the establishment of a Federal Department of Consumer Affairs. Nor would it be in the public interest upon the conclusion of such deliberations for the Federal Trade Commission to be dismembered.

I do not agree that the Federal Trade Commission "has failed, and failed miserably," in protecting consumers from what has lately come to be known as "hard core frauds." I would add that this agency has proven to be the spearhead of the attack on false and misleading advertising which would "bilk the con-

²⁰ See my dissent to the dismissal of the order in *Pure Oil Company*, Docket 6640; *The Texas Company*, Docket 6898; *Standard Oil Company (Indiana)*, Docket 7567; *Shell Oil Company*, Docket 8537, issued December 28, 1964, attached hereto as appendix E, and cases cited therein.

²¹ 67 Congressional Record 5962 (Mar. 20, 1926).

sumer." For example, since 1966 the Federal Trade Commission has instituted more than 42 formal proceedings regarding activities of this kind in the District of Columbia. Practically all of those proceedings have been concluded with orders providing injunctive relief from the practices involved. In one of those cases, *In the Matter of Marlo Furniture Co.*,¹ a four member majority did fail, over my strenuous objections, to enter an order for injunctive relief in a case verging on hard core fraud. Clearly, as this instance illustrates, our failures in the consumer area should not be ascribed to this agency as an institution but rather to the individual decisions of the Commissioners.

It is significant that the Federal Trade Commission has taken action in these 40 or more cases in the District of Columbia, despite the applicable provisions of the D.C. criminal code. This makes it a crime "for any person, firm, association, corporation, or advertising agency, either directly or indirectly, to display or exhibit to the public in any manner whatever * * *; or to insert or cause to be inserted in any newspaper * * * any false, untrue, or misleading statement, representation, or advertisement with intent to sell, barter, or exchange any goods, wares, or merchandise or anything of value * * *".² That law provides for penalties up to 60 days imprisonment or a \$500 fine or both. In many of the D.C. consumer protection cases the Commission found that the persons charged had engaged in false or misleading advertising in the sale of goods in the District of Columbia. These circumstances lead to the inquiry, "Why weren't the guilty proceeded against under the criminal law?" The probable answer is that the evidence, although sufficient for a civil case before the Federal Trade Commission, would not support a proceeding against these "hard core frauds" in a criminal suit. Clearly abolition of this agency is not the answer to combatting consumer fraud or deception.

In citing such instances, I, of course, do not take the position that the Federal Trade Commission has always acted with complete effectiveness. The existing deficiencies, however, do not result from the administrative scheme envisaged or the laws enacted by Congress. Rather such failures as this agency has experienced, and I do not claim a perfect record, are attributable to the failures and predilections of those appointed to membership on the Federal Trade Commission.

To sum up, if the Commission's law enforcement activities are to be viewed in perspective it should be recognized that as on a number of occasions in the history of this agency, "human emotions, beliefs, aspirations or prejudices [are] at work in a situation where such non-logical elements are ignored almost as a matter of convention."³ These factors should not be overlooked.

The current policy split at the Commission level on issues involving not only matters directly affecting consumers but also other concerns embracing the public interest, operates as the principal deterrent to the Commission's fulfillment of its mission. This has made it difficult indeed for the staff of the Federal Trade Commission to pursue a coherent and effective policy in making recommendations for Commission action. The voting patterns of individual Commissioners on these matters speak more eloquently than the words of any of us. Consequently, for those who have an interest in such questions, I invite a *full examination* of the Commissioners' votes for the past eight years on the issuance of complaints and orders. The complete record is a subject worthy of Presidential and Congressional inquiry.

APPENDIX B

UNITED STATES OF AMERICA—BEFORE FEDERAL TRADE COMMISSION

(Docket No. 8745)

IN THE MATTER OF MARLO FURNITURE COMPANY, A CORPORATION, TRADING AS MARLO'S FURNITURE WORLD, AND LOUIS GLICKFIELD, INDIVIDUALLY AND AS AN OFFICER OF SAID CORPORATION

Commissioners: Paul Rand Dixon, chairman; Philip Elman; Everette MacIntyre; Mary Gardiner Jones; James M. Nicholson.

¹ Docket No. 8745 (Jan. 16, 1969), attached hereto as Appendix A.

² 22 District of Columbia Code, § 1411 (1961).

³ Herring, "The Federal Trade Commissioner," 8 Geo. Wash. L. Rev. 339 (1940); see also Henderson, "The Federal Trade Commission," 327 (1924); "In any problem of administration, these personal factors are in reality far more important than the questions of form and procedure * * *".

ORDER TERMINATING PROCEEDING

The hearing examiner filed his initial decision in this matter on July 5, 1968, and, on October 30, 1968, the Commission heard oral argument on the cross-appeals of respondents and counsel supporting the complaint.

Subsequent to the oral argument, counsel for respondents forwarded a letter to each of the Commissioners in which he referred to the fact that during the course of this proceeding he had tendered an assurance of voluntary compliance. He again requested that this proceeding be terminated on the basis of such assurance.

On January 3, 1969, respondents submitted the assurance of voluntary compliance contained in the appendix of this order. Therein, respondents assure the Commission that in the future they will cease and desist from engaging in all of the practices alleged in the complaint. Also, respondents agree to submit compliance reports every six months for three years, and guarantee access to the records of respondent corporation during that period.

In view of these circumstances, the Commission does not believe it to be necessary to proceed further in this matter. The proceeding will be reopened, however, if and when it should appear that respondents are not in full compliance with the assurance of voluntary compliance.

Accordingly, it is ordered that this proceeding be, and it hereby is, terminated.

By the Commission. Commissioner MacIntyre dissented and filed a statement.

[SEAL]

JOSEPH W. SHEA, *Secretary*.

Issued: January 16, 1969.

IN THE MATTER OF MARLO FURNITURE CO., ET AL. (DOCKET NO. 8745 AND—ORDER TERMINATING PROCEEDING)

Commissioner MacIntyre, dissenting:

I dissent from the Commission's action terminating this proceeding without an order to cease and desist. The nature of the practices involved should have convinced the majority that it should do no less than issue an order surely preventing their resumption in the future. The hearing examiner in his initial decision filed herein on July 5, 1968, concluded that there should be an order to cease and desist covering at least some of the practices alleged illegal by the complaint. One of these was respondent's deceptive advertising of furniture as special offers by unfortunate individuals in the classified section of Washington, D.C. newspapers as follows:

FURN.—moved to Calif. Single girl has a modern apt. full of furniture. Cost \$627, sacrifice for \$268 if responsible party is interested in entire apt. I take back 2-year note. Call Mrs. Dillon, 638-4049.
and

FURNITURE—I have 3 Rooms of Quality Used Furniture . . . orig. cost over \$500. Will take \$120 for everything. To make arrangements, call Miss Coleman, 638-5042 until 6:00 P.M. (See Initial Decision, Finding Eleven.)

The hearing examiner not only found that this advertising was typical and illustrative of other statements made by respondents in the course and conduct of their business, but also noted that his findings were based on admissions of respondents to that effect. This is undisputed by the majority.

The examiner's decision to enter an order including provisions specifically aimed at these practices which can only be described as willfully misleading and indeed verging on fraud, was inescapable in the light of this record. Nevertheless, the Commission has elected to terminate this case on the basis of an assurance of voluntary compliance. This constitutes a misuse of the Commission's informal procedures. Section 2.21 of the Commission's Rules of Practice specifically states that a proceeding is to be terminated on this basis only on a determination that the public interest will be fully safeguarded through such informal administrative action after consideration of the nature and gravity of the alleged violation as well as the prior record and good faith of the parties. Clearly here the Commission has failed to abide by the rule. Had it given proper weight to the nature and gravity of the offenses documented by this record, in my view it would not have agreed to a termination of this proceeding on an informal basis. Ironically, this action is contemporaneous with this agency's Consumer Protection Hearings. Indeed, I consider this action a sad commentary on those Consumer Hearings.

More disturbing, however, are the long range implications of this dismissal in the context of other actions taken by the Commission in the past few years. Informal procedures, to be sure, have their place among the law enforcement measures open to the Commission. They may appropriately be utilized when the violation is neither serious nor willful and before the Commission has expended substantial funds in investigating the matter and subsequent trial of the case. Once substantial Government funds have been expended, the public is entitled to the maximum of protection afforded—namely, an order to cease and desist rather than a promise which is patently unenforceable. Moreover, the Federal Trade Commission Act, the Commission's basic statute, provides that when a violation of the law has been documented on an adjudicative record, a cease and desist order is to be entered. The failure to employ the enforcement procedures specified by the statute in cases of this nature and in other instances is symptomatic of a trend indicating a steady erosion of the Commission's adjudicative processes provided by Congress.

JANUARY 16, 1969.

APPENDIX C

UNITED STATES OF AMERICA—BEFORE FEDERAL TRADE COMMISSION

(Docket No. 8576)

IN THE MATTER OF REVCO, D.S., INC., A CORPORATION, ET AL.

Commissioners: Paul Rand Dixon, Chairman; Philip Elman; Everette MacIntyre; John R. Reilly; Mary Gardiner Jones.

Commissioner MacIntyre, dissenting:

I regret that I cannot join the Majority's lengthy explanation of what the Revised Pricing Guides really mean. I fear that it is more apt to engender confusion than enlightenment. This is unfortunate; such a sincere expenditure of effort deserves a more positive result. However, the fact remains that the Guides are beset by a number of internal inconsistencies which cannot be dispelled by any amount of exposition.

At the outset I must state my disagreement with the Majority's contention that the Revised Guides made no change in the application of the substantive law applicable to the advertising of price comparisons by retailers but merely attempt to explain and elaborate the standards summarily stated in the old Guides.¹ The Majority's contention does not square with the facts. Objective judgment will prevail on this point. As I pointed out when they were first promulgated, the Revised Guides postulated new tests on the legality of pricing advertising which have demanded definition since their issuance on January 8, 1964.

Before turning to the specifics of my objection to the rule enunciated by the majority, however, it may be helpful to state the factual situation underlying respondents' comparative price advertising in the Cleveland area as I understand it from a reading of the majority's opinion.

Revco is a discount drug store operation with thirty-one stores in the Cleveland market, and the advertising which is here in dispute was formulated in an attempt to establish its image as a discount regularly selling drugs and other commodities at lower prices than its competitors. The challenged representations consisted of comparing prices under the designation "retail", "retail list", "value" and "other", with prices under the heading "Revco's everyday low prices". The prescription drugs were advertised by comparing the so-called chart prices with Revco's lower prices. The examiner and the majority found that this advertising constituted a representation that Revco's retail prices were lower than the regular retail prices prevailing in the Cleveland area.

¹ The substitution of the concept of substantial sales for the standard of usual and customary price has had a crucial impact on the Commission's law enforcement efforts in this field. As one comment has stated, "the 1964 Guides do more than restate existing law", noting further that the most far-reaching changes pertain to Guide III dealing with the advertising of non-retail distributors. Note *FTC Revised Guides Against Deceptive Pricing Limit Manufacturer Liability*, 39 N.Y.U. L. Rev. 884, 885 (1964). In short, while the Commission cannot change the law itself, it certainly can and has changed its application of the law to the area of deceptive pricing.

As the majority notes, there are some 600 drug stores in the greater Cleveland area. There are three drug chains in the area, including Revco (thirty-one stores), The Marshall Drug Company (twenty-nine stores) and The Gray Drug Stores, Inc. (twenty-two stores). Complaint counsel introduced testimony from nine of Revco's competitors accounting for some seventy stores that they were charging prices comparable to those charged by Revco and substantially below those advertised by respondents as the regular retail prices of these items. The majority finds that at least Revco's chain competitors were regularly charging prices comparable to those of respondents.

The majority in effect rejects the testimony of the seven non-chain retailers on the question of their credibility, *i.e.*, inadequate records and recollection.² The examiner, however, found that in the case of Sherwood Drug Stores its questionnaire was supported by a "wholly unassailable price list for the period involved" and with respect to the other witnesses he found their testimony credible because:

... As heretofore noted, the Commission drug store operator witnesses are highly competitive to each other and to Revco. Under these circumstances, their prices both with respect to prescription and non-prescription items cannot be too far out of line with each other, as is evidenced by the fact that the prices shown on the questionnaires of those witnesses who were unable to supply supporting data for their questionnaires closely parallel the prices of Sherwood Drug Stores whose questionnaire was supported by a *wholly unassailable* price list for the period involved in the questionnaire. . . . (Italic supplied.) (I.D., p. 25.)

The examiner further notes that he invited respondents to subpoena a minimum of 2,500 original prescriptions from these witnesses for use in cross-examination but that the offer was declined. (I.D., p. 25.)

The examiner concludes:

... the prices charged by the nine drug store operator Commission witnesses, representing not fewer than sixty drug stores in the greater Cleveland area, charged prices on the involved ten prescription drug items and twenty non-prescription items during the period in question comparable to those charged by Revco on the same items during the same period under Revco's advertised 'everyday prices' and that *none* of these Commission witnesses charged the Revco advertised higher comparative prices on the same items under such designations as "other" and "chart" or "retail," "retail list", and "value". It is also found that these Commission . . . witnesses are in more or less direct competition with each other and with Revco drug stores in the greater Cleveland area . . . and are under the necessity to keep their prices comparable or lose trade. (Italic supplied.) (I.D., p. 26.)

The majority's reasons—contained in a highly speculative footnote—for reversing these detailed findings³ are flimsy and unpersuasive, particularly when as a practical matter the examiner's findings involve a question of credibility. He should have been affirmed on this point. Under the circumstances, it is ironic that one of the Commissioners in the majority has stated that a general rule he would accord greater deference to the findings of hearing examiners on disputed issues of fact whose resolution depends on an evaluation of the evidence. (Remarks of Commissioner Elman, "Agency Decision-Making: Adjudication by the Federal Trade Commission", on September 11, 1964, before the Federal Bar Association, p. 7.)

Nevertheless, the majority finds that in a market "seemingly dominated by the independents" it is questionable whether the prices of the chains are likely to be representative. The majority states further in this connection that there is little or no basis for inferring from the prices of Gray and Marshall alone that a "*preponderant or substantial* segment" (emphasis supplied) of the Cleveland retailing community did not charge the comparative prices advertised by the respondents.

The nine Commission witnesses represented seventy-some stores constituting better than 10 percent of the drug outlets in the Cleveland area. In my view, in the light of the examiner's findings, the Commission should have held that Revco's advertised higher price appreciably exceeds "the price at which sub-

² The hearing examiner, on the other hand, assigned "complete probity to the testimony given in this proceeding by the vice president of Sherwood Drug on the prices charged by that firm in its five drug stores on prescription drugs during the involved five-month period." (I.D., p. 12.)

³ Majority opinion, p. 10.

stantial sales of the article[s] are being made in the area" (Guide II, Revised Guides). Certainly this sample, including the other two chain outlets which should be among the high volume outlets in the area, is presumably a representative one. Furthermore, in my opinion the chain stores with fifty outlets would alone constitute a "substantial" segment of the Cleveland drug market. If the majority is in effect holding here that the two chain stores Marshall and Gray are a typical or unrepresentative, that would be an astonishing idea at a time when discount selling is accounting for an annually increasing share of the market.⁴

However, the significance of the Commission decision in this instance lies not so much in the fact that the fictitious pricing charges will be dismissed. The impact of this decision will be far wider. It is another indication that since the rescission of the Pricing Guides of 1958 the Commission simply has not had a workable or understandable rule under which it can proceed to enforce the law in the area of price advertising. This decision makes it clear that the Guides are so loosely worded that it will take an unprecedented number of cases until both the Commission staff and the business community know what the guidelines for truthful price advertising are. In this instance, the confusion inherent in the Guides is compounded because much of the decision seems to be at variance with the apparent meaning of the text of the Revised Guides.

For example, the majority opinion states that the law applies an objective test to retail price comparisons. Perhaps the law does but I cannot reconcile this statement with the dictum of the Guides that:

... [The retailer] should be *reasonably certain* that the higher price he advertises does not appreciably exceed the price at which *substantial* sales of the article are being made in the area— . . ." (Italic supplied.) (Revised Guides, p. 2.)

This is a subjective test, and the test will always remain subjective until the criteria for defining substantial and significant sales in a trade area have been spelled out. This is precisely what the majority has refused to do in this instance, holding that no "exact quantitative measure of substantiality, applicable to all products and markets, is possible." (Majority opinion, p. 8.) At least under the usual and customary price concept of the 1958 Guides, which meant the majority of sales in a particular trade area, both the Commission and the business community had a rule of thumb to govern their decisions. No such criteria are available now. Admonishing the retailer that he must obtain "the facts" about his competitors' prices cannot make the test under the Guides objective when he is not told under what set of facts a particular pricing claim would be prohibited or permitted.

The decision is also confusing in that it seems to merge the concepts of "usual and customary price" with the concept of "substantial sales". It was my impression that the Revised Guides had been formulated precisely to eliminate the former concept. In this connection, it is interesting to note that the majority decision states that Guide III is also relevant to the advertising of retail price comparisons. Guide III, with respect to the criterion of substantiality, states in relevant part that:

... if the list price is significantly in excess of the *highest* price at which *substantial* sales in the trade area are made, there is a clear and serious danger of the consumer being misled by an advertised reduction from this price. (Italic supplied.) (Revised Guides, p. 4.)⁵

I, at least, have some difficulty in reconciling this rule enunciated in the Guides with the holding in the majority's opinion here that:

... Unless and until discount selling in a particular area has become so prevalent as to produce a breakdown in the retail price structure, and what were formerly the regular prices are adhered to by only a few isolated, atypical sellers and are no longer representative of the general price level in the area, retail price comparisons cannot be presumed to be deceptive. . . . (Majority opinion, p. 14.)

It is conceivable that the "list price" might at one and the same time represent substantial sales of the products in question and, conversely, appreciably

⁴ "From 1960 through 1964 discount-store sales have grown an average of 40 percent annually, while total retail volume has gained 19 percent and department store sales gained 15 percent." The New York Times, Sunday, June 13, 1965, p. E7.

⁵ Illustrative of the problems inherent in construing the Guides is the seeming conflict with the immediately preceding sentence:

... [A list price] will not be deemed fictitious if it is the price at which *substantial* (that is, not isolated or insignificant) sales are made in the advertiser's trade area (the area in which he does business). . . . (Revised Guides, p. 4.)

exceed the price at which substantial sales are made. Should such a situation occur (for example, 20 percent of sales are made at list price in the trade area while 80 percent of the sales in the market were appreciably below the higher comparative price), then the question of enforcement could conceivably hinge on the particular sentence in the Guides on which reliance is placed.

Does the majority here mean that a price cannot be fictitious unless an overwhelming majority of the sales in the trade area in question are below the higher comparative price? Perhaps the majority here is equating "substantial" with "overwhelming" or, conceivably, it is simply eliminating the concept of substantiality which was introduced in the Revised Pricing Guides. If this sentence signifies what it seems to mean, then in effect the word "substantial" has been read out of the Guides, for, as a practical matter, a finding of fictitious pricing is precluded unless none, or only a minuscule percentage, of the sales in a particular area are at a higher comparative price. That is a stringent standard, indeed.

There is no need to belabor the point. The Guides themselves are ambiguous and this decision, which in certain respects is in seeming conflict with the Guides, has not clarified the situation. There is a real question concerning the utility of Guides or Rules which are not clear on their face. The ambiguous Rule or Guide which can only be construed with certainty after numerous adjudicative decisions interpreting its meaning does not serve the cause of law enforcement. In short, when a Rule or Guide requires as much interpretation or exposition as the Revised Pricing Guides evidently require, then the Commission might profitably consider its revision.⁶

Hearings Relating to the Marketing of Automobile Tires (1965), Record, p. 769.

[For Release on Wednesday, Jan. 8, 1964.]

The Federal Trade Commission today announced the adoption of revised Guides Against Deceptive Pricing.

The new Guides, which supersede those adopted October 2, 1958, are intended to serve as practical aids to the honest businessman who seeks to conform his conduct to the requirements of fair and legitimate merchandising. They are not to be considered as precise statements of law or as fixed rules of "do's" and "don'ts."

The Guides highlight certain problems in the field of price advertising which experience has demonstrated to be especially troublesome to businessmen. They point out that one of the most commonly used forms of bargain advertising is to offer a reduction from the advertiser's own former price for an article. If the former price is the actual price at which the article was offered to the public in good faith on a regular basis for a reasonably substantial period of time, a legitimate basis for the advertising of a price comparison is provided. This would be true even though no sales were made at the former price. However, when the advertised former price is not genuine but is an artificial, inflated price established for the purpose of enabling the subsequent offer of a reduction, the so-called "bargain" is a false one.

Another commonly used form of bargain advertising is to offer goods at prices lower than those being charged by others for the same merchandise in the area in which the advertiser does business. In doing this the advertiser should be reasonably certain that the higher price he advertises does not appreciably exceed the price at which substantial sales of the article are being made in the area. If the offer concerns comparable merchandise the advertiser should be reasonably certain that the price advertised does not exceed the price at which such merchandise is being offered by representative retail outlets in the area.

The Guides also afford guidance as to the proper use of manufacturers' suggested retail or list prices. A national or regional advertiser will not be expected to investigate in detail the prevailing prices of his products throughout his large trade area. If he makes use of a suggested retail price as an honest estimate of the actual retail value, and his suggested price does not appreciably exceed the

⁶ In this connection, it is interesting to note that the National Association of Better Business Bureaus, by letter of January 7, 1965, advised the Commission:

We believe that some of the problems which arise with respect to pricing designations and guarantees are due, in part, to the current FTC position on use of the term "List Price." We further believe that these problems would be minimized if the Commission reverted to its original position on "List Price" as set forth in its Pricing Guides dated October 2, 1958. (Italic supplied.)

highest price at which substantial sales are made in his trade area, he will not be chargeable under the Guides with having engaged in a deceptive practice. A retailer competing in a local area, however, is chargeable with at least a general knowledge of the prices being charged in his area. Before advertising a manufacturer's list price as a basis for comparison with his own lower price he should ascertain whether the list price is in fact the price regularly charged by principal outlets in his area. In other words, a retailer who advertises a manufacturer's or distributor's suggested retail price should be careful to avoid creating a false impression that he is offering a reduction from the price at which the product is generally sold in his trade area. The Guides stress the essential requisite that the manufacturer, distributor or retailer must in every case act honestly and in good faith in advertising a list price and not with the intention of establishing a basis for a deceptive comparison.

In a preliminary statement the Commission said: "The basic objective of these Guides is to enable the businessman to advertise his goods honestly, and to avoid offering the consumer non-existent bargains or bargains that will be misunderstood. Price advertising is particularly effective because of the universal hope of consumers to find bargains. Truthful price advertising, offering real bargains, is a benefit to all. But the advertiser must shun sales 'gimmicks' which lure consumers into a mistaken belief that they are getting more for their money than is the fact."

Commissioner Everette MacIntyre made a separate statement regarding the revised Guides. His statement is as follows:

STATEMENT ON THE NEW PRICING GUIDES

By MacIntyre, Commissioner: I am wholly in accord with the professed aim of the Commission to clarify some of the more troublesome problems in the deceptive pricing area. I too believe that we should take a reasonable approach in these matters and that the businessman should know where he stands. However, I fear that these Guides, albeit unintentionally, on balance have raised a number of new and troublesome issues which outweigh any solutions to older dilemmas which they may suggest.

The nub of the problem as I see it is that these Guides are not, as they purport, restatements of the law; the changes introduced here are too sweeping for that. It is fair to say that the Guides in many respects are sharply at variance with the body of law on this subject painfully built up by the Commission and courts over a number of decades. The result may well be the opposite of that intended—uncertainty for consumers, the businessman and the Commission's staff alike. Under the circumstances, there is a serious question that we can sustain the necessary vigour of enforcement even with the best of intentions.

I do not intend at this point to outline my disagreement with the Guides in every detail. If necessary, that can be done as specific problems arise. Suffice it to say for the present, the Guides apparently present us with a new vocabulary in the context of fictitious pricing which will require definition. That process may well be difficult and time consuming. I need only cite one example to make my point. In connection with bargain advertising of retail price comparisons, i.e., the offer of goods at prices purportedly lower than those being charged by others in the same trade area, the Guides state:

... Whenever an advertiser represents that he is selling below the prices being charged in his area for a particular article, he should be *reasonably certain* that the higher price he advertises does not *appreciably exceed* the price at which *substantial* sales of the article are being made in the area—that is, a sufficient number of sales so that a consumer would consider a reduction from the price to represent a genuine bargain or saving. . . . (Italic supplied.)

The requirement that a retailer should be "reasonably certain" that the higher price does not "appreciably exceed the price at which substantial sales of the article are being made in the area" is open to numerous interpretations. The phrase "reasonably certain" substitutes a subjective for what has hitherto been an objective test. How a businessman is to document the state of his mind in this respect is not pointed out. Possibly the ingenuity of counsel over a period of time may supply some answer to this and other questions. The problem remains, however, whether there is any real advantage in abandoning tested precepts which are now understood by business, the courts and the Commission's staff.

To continue, hitherto the standard applied in these cases has been the "usual and customary" retail price in a given area, a term given content and meaning by numerous previous decisions. The proper interpretation of the requirement that the advertised higher price may not "... appreciably exceed the price at which *substantial* sales of the article are being made in the area ..." is at best conjectural. A considerable number of cases will have to be brought and considered by the courts and the Commission before either our staff or the business community can be expected to operate with any confidence under the new standard.

A very important reversal of policy is, of course, contained in Guide III, which deals with advertising of retail prices suggested or established by manufacturers or other nonretail distributors. In effect, manufacturers or other nonretailers are invited to suggest list prices or pretacket their items with only the vaguest standards to determine their responsibility for taking such measures. Whether the Commission will, in the future, be able to take effective steps against fictitious pricing on a regional or national scale under the new dispensation remains to be seen.

The new Guides are effective immediately. Copies may be obtained from the Bureau of Industry Guidance, Federal Trade Commission, Washington, D.C. 20580.

APPENDIX D

FTC ISSUES A REVISED INTERPRETATION OF DEFINITION OF "CONSUMER COMMODITY"

The Federal Trade Commission revised its interpretation of the definition of "consumer commodity" contained in Section 10(a) of the Fair Packaging and Labeling Act. The Commission stated that the revision was made in light of the express language and legislative history of Section 10(a) and of the entire Act and was based upon a memorandum of the General Counsel which contained a digest of the pertinent legislative history. These materials are available to the public upon request to the Commission.

In fulfilling its enforcement duties under the Fair Packaging and Labeling Act, and in preparing its regulations, the Commission has been continuously reviewing the law and its legislative history. The latest review by the General Counsel coincided with pending litigation which threatened to postpone implementation of the statute indefinitely. The Commission's decision to revise the consumer commodity definition, while permitting the immediate termination of these lawsuits, will facilitate the expeditious implementation of the Fair Packaging and Labeling Act as to all those commodities which Congress clearly intended to be covered. The Commission has chosen this course rather than prolong the already protracted period of indecision and delay in putting the statute into effect.

In its policy statement, the Commission said that its prior policy statements and actions granting exceptions were superseded by the new statement. The Commission pointed out that further questions as to the coverage of specific products will be publicly ruled upon by the Commission and that such interpretive rulings will further contribute to the development of a clearer delineation of the scope of the term "consumer commodity."

The new interpretation, the Commission stated, expressly sets forth a list of products which Congress intended to place outside the scope of the term "consumer commodity" and sets forth an interpretive definition of several key statutory phrases. Thus, it was noted, the new policy statement recognizes that Congress intended exclude such products as durable articles and commodities, textiles and items of apparel and paint and kindred products. Secondly, the statement defines such phrases as "consumption by individuals," "personal care," and "consumed or expended" in a manner that is fully consistent with both the language of the Act and its legislative history.

Contrary to the impression that may be created by Commissioner MacIntyre's statement on this matter, the Commission has taken no action with respect to the inclusion or exclusion of commodities such as household tacks.

In concluding its statement, the Commission stated that the foregoing interpretation serves to amplify the definition of "consumer commodity" supplied by Congress in Section 10(a) of the Act. The agency further observed that in making its determination as to whether specific products are within the definition it will also consider the Congressional policy that packages and their labels should enable consumers to obtain accurate information as to the quantity of

contents and should facilitate value comparisons. The Commission concluded its statement by stating that as to those products determined to be "consumer commodities" the agency would consider requests for exceptions from the Act and its pertinent regulations and publicly announce its decisions upon such requests.

Commissioner MacIntyre did not concur. His statement follows:

I do not concur with this re-definition of the term "consumer commodities." In my view this re-definition excludes some commodities which should be included in any definition of the term "consumer commodities" within the meaning of the Fair Packaging and Labeling Act. The new definition treats the concept of durability too broadly and the concept of consumption too narrowly. The new approach necessarily excludes from coverage packaged durable articles, such as packages of household tacks. The Commission's earlier definition provided that in case of a wide variance in the amount of the packaged contents from the quantity specified on the label, this would be considered a violation of the law and regulations amounting to slack filling. Now, under the re-definition of consumer commodities applying to such situations involving numerous products, the consumer will no longer be getting the protection which appeared to be the purpose of the Fair Packaging and Labeling Act.

The question of whether the Commission has or has not previously or with this action excluded in so many words from the scope of the statute products such as household tacks is beside the point. The new definition by expanding the concept of durability while at the same time narrowing the concept of consumption accomplishes that result in the absence of any other specific pronouncement on the part of the majority.

APPENDIX E

UNITED STATES OF AMERICA—BEFORE FEDERAL TRADE COMMISSION

Commissioners: Paul Rand Dixon, chairman; Philip Elman; Everette MacIntyre; John R. Reilly; Mary Gardiner Jones.

(Docket No. 6640)

In the Matter of PURE OIL COMPANY, *a corporation*

(Docket No. 6898)

In the Matter of THE TEXAS COMPANY, *a corporation*

(Docket No. 7567)

In the Matter of STANDARD OIL COMPANY (INDIANA), *a corporation*

(Docket No. 8537)

In the Matter of SHELL OIL COMPANY, *a corporation*

FINAL ORDER

In the exercise of the Commission's administrative discretion, and without rendering decisions adjudicating any issues of law or fact involved,

IT IS ORDERED that the initial decisions in the above-captioned proceedings be, and they hereby are, set aside, and that the complaints be, and they hereby are, dismissed, for the following reasons:

(1) In three of these cases, there is no quorum of the Commission at the present time for rendering adjudicative decisions on the merits and issuing any orders to cease and desist based upon findings of violation of law. Adjudication of these cases would require re-argument of the appeals. The specific practices challenged in these cases occurred almost a decade ago, in the mid-1950's, and competitive conditions in this dynamic and rapidly changing industry appear to have altered significantly since then.

(2) The Commission has this date announced the initiation of a broad inquiry into the problems of competition in the marketing of gasoline. Orders to cease and desist entered against a few oil companies—orders which would probably not become final, if at all, until completion of lengthy review proceedings in the Federal Courts of Appeals and the Supreme Court—could not provide

complete or effective solution to the competitive problems of the gasoline industry. It would appear to be more desirable, from the standpoint of effective administration of the law, that the Commission concentrate its necessarily limited resources on a comprehensive industry-wide approach to the problems of competition in the marketing of gasoline.

By the Commission, with Commissioner Dixon not participating and with Commissioner MacIntyre dissenting for the reasons stated by him in the accompanying dissenting opinion.

[SEAL]

Issued: December 28, 1964.

JOSEPH W. SHEA, *Secretary*.

UNITED STATES OF AMERICA—BEFORE FEDERAL TRADE COMMISSION

(Docket No. 6640)

In the Matter of PURE OIL COMPANY a corporation

(Docket No. 6898)

In the Matter of THE TEXAS COMPANY, a corporation

(Docket No. 7567)

In the Matter of STANDARD OIL COMPANY (INDIANA), a corporation

(Docket No. 8537)

In the Matter of SHELL OIL COMPANY, a corporation

Commissioners: Paul Rand Dixon, Chairman; Philip Elman; Everette MacIntyre; John R. Reilly; Mary Gardiner Jones.

Commissioner MacIntyre, dissenting:

These cases are of vital importance, not only to the public but to the businessmen engaged in the petroleum industry.

Likewise, it is of importance that the vital issues involved in these adjudicative cases be resolved. This the Commission has decided to avoid. In its order the Commission states that the cases are being dismissed "without rendering decisions adjudicating any issues of law or fact involved." This is error. The "aggrieved" are entitled to a resolution of the issues involved here. This is demanded by not only the equities involved but also as a matter of moral right and by at least the spirit of the Administrative Procedure Act.

The Majority excuses its action by stating that these adjudicative matters are being dismissed "In the exercise of the Commission's administrative discretion" and "without rendering decisions adjudicating any issues of law or fact involved." I respectfully submit that the portion of the Administrative Procedure Act commencing with Section 5 under the heading of "Adjudication" contemplates no such treatment. Moreover, the further excuse is advanced through the indication that if remedial measures should be required regarding any practice, it would be attempted following the initiation of a broad inquiry into the problems of competition in the marketing of gasoline. In that connection, it is stated that orders to cease and desist, if entered in these cases, would not provide a complete or effective solution to the competitive problems of the oil industry. Let it be understood my dissent here is not directed against the absence of cease and desist orders in these cases; rather, I am dissenting to action by the Majority which avoids adjudication of the vital issues involved. The Majority has not fulfilled its responsibility for making findings of fact and stating its conclusions thereon regarding the practices involved. Thus, it is advising no one concerning the existence or the significance of any of the practices involved.

I am mindful of a statement in the Commission's "Final Order" to the effect that "there is no quorum of the Commission at the present time for rendering adjudicative decisions on the merits." With that assertion I emphatically disagree. The Commission has mustered a quorum sufficient to act and with which it is acting on these cases. I agree that if the members of the Commission, who are acting to dismiss these cases without an adjudication of the issues, should undertake to adjudicate the issues involved, it would be appropriate for them to hear re-arguments on the appeals.

It is the position of the Majority that it would be inappropriate to hear re-arguments on the appeals. Reference is made to the limited resources available to the Commission. Re-arguments in these cases would not unduly draw upon

the limited resources of the Commission. No convincing proof has been advanced which would show the need of any substantial additional allocation of funds or personnel to provide for re-argument of these cases. The work is done and the funds allocated to the cases have been spent. In passing, it should be noted that the Commission's records disclose that the tax payers contributed substantially to those funds. For example, the records show that the government has spent between \$125,000 and \$200,000 in covering the costs of the litigation in these cases. Undoubtedly the respondents spent much larger sums on the cases in the course of litigation. The result we get is the disposition of the issues without deciding the appeals on the merits.

The opinion of the Majority points to an intent to try the use of industry-wide methods for dealing with the problems and practices said to exist in the petroleum industry and for advising businessmen about their responsibilities concerning such problems and practices. On its face, this expression of intent is admirable. I hope, however, that I may be pardoned, under the circumstances, for finding this formula less than reassuring. The two most obvious avenues to an understanding of gasoline marketing problems are either making findings in the pending adjudicative cases or in the rule making fact finding proceeding requested by important segments of the industry. The proposed "broad inquiry" does not expressly provide for the Commission to make findings of fact on the data submitted as it is obliged to do in adjudicative cases or in a trade regulation rule proceeding.

Unfortunately, I am unable to discern an interest here to find the facts and act on them in grappling with these challenging problems. Indeed, our present inability to act seems part and parcel of a more extensive malady. A recent line of Commission decisions evince a regrettable trend toward disposing of adjudicatory matters on procedural grounds, thus avoiding difficult legal and policy problems.¹ Undoubtedly this is a convenient formula, at least in the short run, for those of us responsible for administering these statutes. On final analysis, however, it plainly constitutes an abdication of the Commission's functions, which is charged with advising businessmen of their obligations under the law.

As a member of the Commission who participated with other members of the Commission in hearing appeals in these cases, I am convinced from what I have learned in hearing and considering these cases that undoubtedly in some of the cases the Commission on some issues would have found complaints not sustained. Findings on those issues in those cases undoubtedly would have been differentiated from findings on other issues in other cases. I repeat, here we avoid dealing with those troublesome problems in cases where records on facts have been made. Indeed, we are here confessing bankruptcy in our efforts to find the facts and make judgments on these problems. Certainly, this is true to this date, insofar as the marketing problems of the oil industry are concerned. Although I am unable to accept as justifiable this bankruptcy at this point in time, I do find some consolation in the promise of the Commission that after a "broad inquiry" in the future the Commission will undertake to make some determination whether competitive problems really exist in the petroleum industry in the marketing of gasoline.

Senator Moss. Next we have Commissioner Nicholson—Commissioner Jones.

I was going to let the lady have the last word.

¹ E.g., *S. Klein*, 60 F.T.C. 388, 419 (1962). A case involving a most important commerce question was dismissed without reason for that action. In *General Electric Company*, Docket 8487, — F.T.C. — (February 28, 1964), a case involving very significant questions under Section 2(d) of the Robinson-Patman Act, as well as issues of price fixing under Section 5 of the Federal Trade Commission Act, was dismissed on February 28, 1964, "without adjudicating any issue of fact or law contested on this appeal." In *The Papercraft Corporation*, Docket 8489, — F.T.C. — (December 24, 1963), a charge of fictitious pricing was dismissed, although the issue had been fully tried because "... in the particular circumstances of this case, the public interest required that the initial decision be vacated, and the complaint and complaint counsel's appeal dismissed, without determination of the merits of the charge." Further, the Commission refused to initiate a trade regulation rule proceeding, although requested to do so by representatives of the Gift Wrappings Industry, who contended such practices were rife in the industry. The Commission, in *Papercraft*, therefore while abandoning the "case by case" basis, at the same time failed to act on an industry-wide basis in response to an industry-wide problem.

STATEMENT OF HON. MARY GARDINER JONES, COMMISSIONER,
FEDERAL TRADE COMMISSION, WASHINGTON, D.C.

Miss JONES. Thank you, Senator. If you would prefer that order--- I did not mean to jump up before you called.

Senator Moss. We are delighted to have you.

Miss JONES. I do not intend to read my full statement, Senator. I am going to try and summarize it briefly.

Senator Moss. Thank you. The full statement will be in the record.

Miss JONES. Thank you very much.

In your letter inviting us to testify here this morning you asked that we direct our comments to the question of S. 3201 as a vehicle for action by the Federal Trade Commission on a broad range of consumer problems facing the Nation.

I thought, therefore, it would be useful first to consider just what are the major consumer problems that are confronting us and consumers in the Nation. We can categorize them briefly into four categories.

No. 1, I think that consumers are urgently concerned today with what one might refer to as the quality of life in this Nation. They are concerned with the technological fallout of business decisions. They are concerned not only with the functions of the competitive system but with the question of what is the impact of business decisions on our environment, on our genetic development, on all of the aspects of life now that come under this rubric of quality of life.

I think the second concern of consumers is more directly related to the marketplace in the area of product information on the kinds of products that are coming out on the retail shelves today. Consumers no longer can trust their judgment and their general experience to make the kinds of decisions and selections they have to between values and to try and understand comparative quality of products. So they need product information. Along with this they need performance standards so they can in fact, make the type of informed judgments in the marketplace on which we rely for our competitive system to work.

Third, of course, are the frauds and deceptions which have been talked about this morning. Consumers do need substantial protection from these practices in the marketplace.

And fourth, and as an overall area of need, consumers need educational and informational programs to help them participate in a meaningful way in the marketplace.

Now against that background of four consumer concerns as I see them, let me apply S. 3201.

S. 3201 first tries to broaden the geographic scope of the Commission's jurisdiction. This is to update it, really, since the Commission's statute of jurisdiction was written in terms of "in commerce" and the more modern version is "affecting commerce." I think this would be a useful amendment to the Commission's jurisdiction but I do not think that we should look at this as removing any major obstacle to the kind of thing that has made the Commission less effective than it might be.

So I think while it is a useful thing, I do not think it goes to the guts of the problem of consumer protection that we have in this country.

I would like to see S. 3201 amend the substantive jurisdiction of the

FTC. I would like to see it amend the Commission's statute so that we would have the authority to consider, investigate, and make recommendations on the broader social and environmental implications of business decisions.

Now, note I am not asking for any adjudicative, any prohibitory jurisdiction in this area. This is much too new and ambiguous an area. But I think there should be an agency with investigatory powers to be able to study what are the social implications of some of the business decisions that are affecting us and to be able to make reports. We need a factfinding forum for this kind of problem, and I think the Commission is well experienced to do this type of thing.

Second, I would like to see the Commission's rulemaking authority be made explicit so that we have the express right to issue regulations requiring the disclosure of product information not just to eliminate deceptions, but also to enable consumers to compare values, analyze quality, and generally to issue those regulations which would promote the effective functioning of the competitive system.

I think we already probably have this type of rulemaking authority, but rather than go through the litigation necessary to establish it, I think an expression from Congress that we have it would be very effective for use to handle the kind of product information problems that consumers have today.

The second major objective, I guess, of S. 3201 is to create a new authority in the Department of Justice to proceed against frauds and deceptions. I am heartily in favor of as many resources as possible in the consumer protection field. Therefore, I think that to bring the Department of Justice into this will add to those resources; and in principle I am in favor of it.

However, my problem is that the listing of the practices which the Department of Justice would be authorized to proceed against are not those practices which in fact it should be authorized to proceed against. You have heard Commissioner Elman this morning and other people have talked about the hard-core frauds as one of the problems confronting consumers.

Now, nowhere in S. 3201 do I see any description of any practices that I would regard as falling into the hard core fraud area. Indeed, S. 3201 expressly eliminates credit transactions. It is in the credit field that we have had the most brutal and most poignant deceptions and frauds against consumers. The passing off of the retail installment contract as an order or a receipt; the execution of these contracts in blank and filling them in later; the kind of confession-of-judgment clauses that you see boilerplated in the contract. These are the things that have in fact robbed the low-income consumer of hard earned savings. Nowhere are these mentioned in S. 3201.

I will not go through the other omissions, but I have listed them in my statement, the kind of hard core frauds that are nowhere in S. 3201 and yet are the very ones that—if the Department of Justice receives this authorization, together with the FBI and their greater expertise in the criminal area—are the ones they ought to be going after. The only things they are authorized to go after are the kinds of ordinary civil administrative deceptions which the Federal Trade Commission is well equipped and has the experience to proceed against.

In the area of class actions, again, I think it is a useful tool to add to the consumer's arsenal, to have a class action. But I do not myself put any great reliance on the class action as being any great panacea for the consumer's problems in the marketplace.

The ordinary consumer is fearful of litigation. The ordinary consumer transaction is much too small to warrant litigation. And the class action is an effort to pool those together. But from the individual consumer's point of view, are they going to go through the time and the energy and the nervousness, if you will, of participating in a lawsuit?

So, although I think a class action is a good thing and that Congress should pass such a provision, I do not think we should think we have done a tremendous amount after we have done it. It is just one more tool that is necessary.

But I certainly agree with Senator Tydings that to put the class action in the context of simply following up on a government suit is a very useless device, and I think it is almost a put-on on the consumer. Unless the consumer can sue independently of government, I think we have done very little.

The Government can in fact collect some of these funds and create funds and direct respondents to notify consumers of fraud. We can do this within our own powers. The real value of the class action suit is to enable the consumers to proceed against those frauds that bother them, whether the Government agencies have thought those were in the public interest or not. So that I would hope that S. 3201's class action provision will be amended to enable the consumer to bring that independent of any Government action.

Now coming to the consumer remedies in terms of self-help, the class action is fine for those types of consumer frauds where the consumer will in fact go through the problem of litigation. But I think consumers need something that will be more useful to them, and that is some type of informal grievance mechanism, something that does not have all the trappings of the law.

I think in Europe you find complaint boards which are created with industry and consumer members, where a consumer can simply go before it and bring the fur coat that was ruined in the dry cleaning, or whatever the problem is, in a rather informal proceeding, and have their grievance resolved without any kind of legal panoply.

It is difficult to get industry to appreciate the need for this. I have made a lot of speeches along this line.

But I have a feeling that the Congress could perhaps create an incentive for industry to create these boards if, when you draft your class action bill, you make it a prerequisite for a consumer to have exhausted its rights before such a complaint board if it exists. This I think would create an incentive for industry to establish these boards as a means of trying to avoid the class action suit in the areas where the industry could well say, "Gentlemen, if they had told us, we would have resolved it."

I think a lot of industry people will testify that so many grievances will be brought to them via litigation which they would have solved on their own. We have to create an incentive for industry to do this, and I think something like the exhaustion of administrative remedies—if you build this into the class action, you might well create the kind of boards I think the consumers need.

In addition to that kind of grievance board, I think that we should consider and provide for some kind of mediation services. This is something that has troubled me as a Commissioner. I would get a letter from a consumer saying, "My refrigerator door fell off." I am tempted to write the Westinghouse—if that happens to be the company—president saying, "Look, the Commission has no jurisdiction but I am sure you would want to know about the complaint," an effort to sort of get the complaint to the horse's mouth. I have held off because I think as a Commissioner it is probably improper. No matter how much I would disclaim it, it would be taken as some kind of bringing of police power of the Commission behind that lady's grievance, so I have not done it. But I am troubled that consumers need somebody to intervene on their behalf. Louis Lefkowitz does it in New York. He has sort of a mediation service.

So I have been thinking that it would be possible for the Congress to authorize the Commission to set up a mediation service quite separate from the investigation, prosecutory staff, which would be attached to our field offices which would in a sense be an ombudsman, if you will, somebody who will call the business up and say, "We have this complaint. What is your side of it?" It would function somewhat like the Federal Mediation Service does in labor disputes.

So I throw that out. I have not yet been able to pursue it in my own thinking any further than this, but I throw it out as another thing I think consumers need today.

Now coming to the sanction part of S. 3201, here they authorize the Commission to have injunctive power. Again, I think injunctive power for all deceptions would be a useful tool for the Commission; but again I do not entertain any notion that this is going to resolve the Commission's problems in trying to get effective protection for consumers.

Why? Because although I agree with Commissioner Elman and Mrs. Knauer that people are beginning now to look at business practice deceptions as crime in certain areas, the ordinary court just does not look at the businessman's activity as criminal.

By the same token, if the Commission walks in and asks for the court to enjoin what on its face is an ordinary business practice, on the Commission's say-so that they are going to prove it was deceptive and that deception does not show on its face, I am very doubtful any court is going to give us that injunction. So I do not think the injunctive tool is going to solve all our problems, although I want to make it clear I think it is a useful tool to have in the arsenal. But I do not think we are going to use it very often or that it will be granted very often.

I do think that what we need are stronger sanctions. A cease-and-desist order is not enough to create the kind of deterrent that one needs so that in fact business will police itself, because no agency, State or Federal, can police violations of law. What you depend on is for the community to police itself. But in order for a community to police itself, you have to have effective sanctions.

I think we ought to have money damages. We ought to be able to levy money fines for initial violations of the law as well as for violations of orders. I do not believe on the order violation that we should

have to go—as we do now—to the Department of Justice to bring our civil penalty actions. I think this is unnecessary. It makes two groups of lawyers having to look at the same kind of situation and facts. I think that we ought to be empowered to either ourselves levy money damages or, if that has some problems because of our administrative character, that we should have the authority to recommend and seek money fines in a court. We should hold the hearing; we should make the necessary findings of violations; we should issue cease and desist orders; and if we wanted to add a money fine, we could make a recommendation on that and go into court and get it levied. So you would solve any problems you might have because of our administrative nature.

On the things that S. 3201 does not do—and I will run through them quickly because I have developed them in my statement—the area of performance standards. I do not think the Commission is equipped, has the expertise, or should have any standards-making authority. I think the Department of Commerce is the logical body to have that.

But I think that in a general consumer bill that you are considering, I think you should consider including provisions for standards-making authority, and I would like to run down the essentials that I see for that kind of authorization.

First I think that the Department of Commerce should have the authority to initiate the proceedings. Now, whether they ask industry to formulate voluntary standards in the first instance or do it themselves, I think they should have both authorities.

But I think that the role of consumers in standards-making is very important. Up to now, consumers really, although they have had representatives in standards proceedings, they really have not had a meaningful opportunity to participate. Consumers ought to have the right to petition for a particular standard to be adopted.

I think the Federal Trade Commission would be the body that could handle that petition, investigate the need, make findings as to whether there is a need for standards for the consumer interest or not.

Second, I think that the standards-making body—and I think it probably would in most instances be the industry group—consumers ought to be able to participate in those proceedings and they should have a right of appeal from them on the ground that the standard does not sufficiently protect the consumer interest.

This has not been had before. We have had consumer participation but no right of the consumer to petition that “this really does not help me at all.”

My own feeling is, again, that the Federal Trade Commission could handle that appeal; but it could be you do not want to build too many agencies in it and you would like it to go to the Department of Commerce. But there should be a provision of this sort.

The third aspect of any standards authority I think should be a provision for a fund to be created and a panel of consumer experts to be established. One of the major problems when one deals in the consumer field is the constant question, “Who is the consumer?”

Certainly a housewife does not know anything about standards making; but there are consumer experts in the country and I think that the Department of Commerce in its standards-making activities should create panels of consumer representatives and a fund to finance

their attendance at these standards proceedings, and a fund to finance any kind of petitions and appeals that consumers would want to file.

Again, we have to realize that if you get one or two consumers who are interested, or consumer groups, they are not funded by anybody. They have no ready source of funds; and yet filing papers and travel expenses are costly to them. But in the overall it is not very costly. So I think we have to think in terms of the financing of this if we really care about making consumer participation meaningful.

Last, I see nothing in S. 3201 which talks about consumer educational and informational programs. Again, I think what is basic to consumer education and information programs is the congressional creation of a research fund to fund research projects by law schools, by other institutions, into whole areas of consumer problems that an agency like the Commission and even the HEW really has no expertise to get into.

We need studies. We need studies of what are the credit eligibility programs? What is the creditor-debtor experience of low-income consumers? What kinds of motivational and behavioral patterns do consumers have, so that we know what the impact of deceptions are on them?

The moment the Commissioners, five of us, sit there and try and decide whether a consumer is more bugged by bait-and-switch than they are by an offer of free goods, this is our off-the-top-of-the-head reactions, or prejudices, if you will. Now, certainly today, with the state of the art, we have gotten to the point that we can make much more scientific studies of what really does exercise consumers, so that all of the policy agencies concerned with consumer affairs can have a much more informed guess—and I put it quite deliberately in that sense—of what is of most importance for them to put their meager resources into.

Second, I think in the consumer education and information program we need funds to create materials. When I say "materials," I am not thinking in terms of the ordinary pamphlet, although that is expensive. But obviously today the media of communication is TV. No Federal agency, and no State agency, has either the expertise or the money to create the kind of effective TV program which I think we have to create in order to get across to consumers the kinds of information they need. They need it about the marketing system. They need it about the free enterprise systems, if you will. They need it specifically on particular products. They need it in terms of the kind of consumer frauds and deceptions they may encounter in the marketplace. They need it so that they know where to go for advice.

I think we ought to create what they call in England "citizens' advice centers." I notice the model cities programs and HUD are providing for some of these consumer service centers but they are obviously not going to be in every city, and I think there should be some provision made for the creation of these boards in communities where they do not otherwise exist, so consumers can be told where to go for information on what their rights are.

I notice that we have a very serious problem which maybe only Congress can take care of. One of the big law firms in Baltimore decided to open a law firm in the ghetto in Baltimore to try and provide legal services to the poor. Well, one of the major things you have to do if

you want to provide legal service to the poor is to go and tell the poor what their legal rights are. This law firm is now before the grievance committee of the bar association for advertising.

Now, had they used paraprofessionals and not lawyers, I am perfectly convinced that those paraprofessionals would have been before the bar association for practicing law without a license.

We have got a real hiatus here, and when I think about it, I think perhaps only a government of some kind, local or Federal, can do the kind of job that is necessary to educate the poor as to what their legal rights are because it is an essential part of providing them with legal services.

So I would like to see a comprehensive consumer bill which would encompass this problem as well.

That is it.

Senator Moss. That is a very thoughtful paper, and it has a great deal in it. It will be helpful to us.

Your discussion there at the end made me hark back to the bill we do have in this Committee about establishing independent consumer councils, as we call them, all around the country that would be available for people, not only for the educational purpose, but also to render advice and tell them where to go and in fact, be sort of an ombudsman for the consumer, and particularly the poor who have no recourse otherwise.

Miss JONES. It provided for this mediation, I notice, and this may be the best way to do it, this kind of sort of a separate TVA corporation. This may be the most palatable.

I am perfectly willing for the Commission to take it on since I am on the Commission, but I understand it might be a better way of doing it.

Senator Moss. It is a very provocative paper, and I would like to ask if we may send you some questions.

I have some questions about the environmental issues in the first part which I would like to send down to have you expand your ideas, perhaps, on them, after I have read your statement again more carefully. I have just skimmed over it as you have been talking.

Do you have any questions?

Senator PEARSON. No. Thank you.

(The prepared statement follows:)

STATEMENT OF MARY GARDINER JONES, COMMISSIONER, FEDERAL TRADE COMMISSION

Your letter of December 8, 1969, asked for comments on S. 3201 as a vehicle for action by the Federal Trade Commission on a broad range of consumer problems facing the nation.

In my judgment S. 3201 is an inadequate vehicle for the Federal Trade Commission to enable it to respond more effectively to current consumer problems.

Let me outline briefly what I believe are the major concerns of consumers today in the marketplace:

1. Consumers are increasingly concerned with the technological fallout and environmental impact of many business decisions respecting the production, distribution and sale of goods and services.

Consumers are concerned, for example, with the environmental and personal health hazards which may result from the use of an increasing number of products and services. Consumers are concerned with such problems as privacy and conglomerate power as these are emerging in the growing information and communications industries.

Consumers are concerned with the social and cultural spillover of current TV advertising.

These quality-of-life concerns of consumers must be heeded and inquiry made as to the adequacy of current regulatory authority to deal with them.

2. Consumers have very specific and immediate needs for product information and for definitional and performance standards if they are to be able to make rational decisions in the marketplace and protect themselves from fraud and deception. No incentive to maintain prices at reasonable levels or to compete on the basis of price or quality, can exist unless consumers are able to compare values and to recognize quality differences.

3. Consumers have very real needs for increased protection against fraud and deception. There are some 25 states without any civil consumer protection legislation or administrative machinery to deal with consumer deceptions in the marketplace. Many states having some consumer protection legislation or administrative authority are poorly funded and inadequately staffed.

There is a substantial need to strengthen and expand all consumer protection programs on both the federal, state and local levels. But consumers must continue to look to the federal government and to themselves for a substantial part of the protection which they need against the frauds, deceptions and misrepresentations practiced against them in the marketplace.

4. Consumers have a deep and urgent need for educational and informational programs so that:

(a) Consumers can learn to use and interpret and recognize the value of the product information which is available to them;

(b) they can protect themselves from frauds, deceptions and misrepresentations;

(c) they know what they can do to register complaints or obtain redress for their grievances and what business and community services exist to service their complaints, inquiries, etc.

It is against the background of these four major areas of consumers' concerns and needs today that we must analyze the provisions of S. 3201.

1. EXPANSION OF COMMISSION'S JURISDICTION

S. 3201 would enlarge slightly the *geographic scope* of the Commission's jurisdiction to bring it into accord with the more modern case law defining the interstate commerce jurisdiction of the federal government.

While I am in favor of updating the FTC Act in this manner, I do not believe that the present slightly narrower definition of the Commission's jurisdiction has created any substantial obstacles to the exercise by the Commission of its consumer protection responsibilities.

I do believe that Congress should consider the advisability of amending the substantive scope of the Commission's jurisdiction in two respects:

(a) to expand the Commission's administrative jurisdiction to study and investigate and make reports with respect to the broader social and environmental implications of business decisions in the market place which are of increasing consumer and national concern.

(b) to provide expressly that the Commission shall have the authority to promulgate rules to require the disclosure of product information to enable consumers to compare values, analyze quality and generally to promote competition as well as to eliminate deception.

While I believe that the Commission's statute confers this rule-making authority on the Commission, a Congressional declaration or specific amendment to this effect could stimulate and facilitate Commission action in this area.

2. EXPANSION OF EXISTING CONSUMER PROTECTION AUTHORITY

S. 3201 authorizes the Federal District Courts upon application of the Attorney General to enjoin a series of enumerated deceptive acts or practices.

I favor the creation of as many resources in the federal government as possible to proceed against frauds and deceptions perpetrated against consumers. I am therefore in favor of this provision of S. 3201.

However, I believe that the way in which this grant of power is effectuated by S. 3201 is inadequate and illadvised.

A. Substantive provisions of section 201

One of the principal reasons for authorizing the Department of Justice to supplement the FTC's consumer protection jurisdiction arose out of a concern

that the administrative cease and desist sanction of the FTC Act was inadequate to deal with hard-core frauds which in essence are no different from more traditional forms of stealing but which appear in different clothes and for which the existing sanctions under the FTC Act are not sufficient deterrents.

The most serious hard core frauds have arisen in the field of credit transactions. Yet, S. 3201 expressly exempts credits transactions from its scope. Moreover, none of the acts and practices enumerated in Section 201 encompasses the hard core frauds perpetrated on consumers. Finally, Section 201 creates standards of proof which appear to be much stricter than those accepted by the courts for the identical practices found to violate the Federal Trade Commission Act.

Illustrative of the types of deceptions which S. 3201 excludes would be the following:¹

(a) Scarce tactics to lead the consumer to believe that because of some defect in his home the lives of his family and himself are in danger if the product or services are not purchased.

(b) "Spiking the job"—where, within hours after signing, the home improvement racketeer initiates a minimum, token performance and then badgers the purchaser into believing that there is partial performance which makes the contract non-cancelable. It is frequently weeks and may be months before the job is completed at the convenience of the gyp operator.

(c) Affirmative misrepresentations in connection with loan transactions—sales of home improvement products are made on the representation of "buy now and pay later" coupled with an offer to consolidate all outstanding bills of the prospective purchaser.

(d) Other deceptive practices of this nature include actual misrepresentations as to the interest rates and finance charges; signatures obtained upon blank completion certificates before the work is completed and on blank contracts which are later loaded with unauthorized charges; and enticing home owners into executing first or second mortgages without their knowledge, or by subterfuge or misstatement.

(e) Excessive and false scare tactics in connection with collection of bills, waiver of service and jurisdiction clauses, etc.

In my view S. 3201 should be amended so as to prohibit specifically misrepresentations of contract terms, misrepresentation of the instrument being signed, failures to perform under contracts, use of confession of judgment clauses and other onerous provisions in retail installment contracts. It should specifically outlaw unconscionable contracts, high pressure sales tactics, harsh collection practices and threats of bodily harm. Most important it should provide for stiff money fines, powers to require restitution of property, refunds of monies and power to enjoin private suits brought against consumers based on any transaction as to which a cause of action may lie under the federal bill.

b. Consumers' class actions

I believe that Sec. 204 of S. 3201 is far too narrowly conceived. The purpose of giving consumers standing to sue for consumer deception is to *add* to the arsenal of weapons available to protect consumers. If consumers have to wait until the government acts, they are not much better off than they were before and indeed are not as well off as treble damage plaintiffs who can bring their own action independently of the government. Moreover, the obstacle in the way of consumer suits has not resulted from their need for a new cause of action to be created. Rather, it exists in the fact that the financial impact for a consumer flowing from a deception while relatively large for that consumer will in the ordinary case not be sufficient to warrant his incurring the litigation expenses and time involved in bringing suit. The present bill does not tackle this aspect of the problem at all. The bill should give consumers a right to proceed as a class independently of any government action.

One of the principal problems confronting consumers today is to get their complaints heard and considered by the store or manufacturer involved. Many of these complaints may not involve violations of law. Yet they are of great significance to the consumer—perhaps even of greater monetary significance than many acts or practices constituting law violations. Because of the high cost of legal service today, recourse to a lawyer is almost prohibitive.

¹ Many of these examples are drawn at random from the Commission's reports on ghetto deceptions and home improvement frauds.

I believe that the most effective remedy which consumers require in order to deal with the great bulk of their problems in the marketplace is some form of informal grievance machinery to handle their complaints. Such a mechanism could be a single individual or a board. Its primary function would be to elicit both sides of the story and to recommend a solution. It should have the authority to handle and make recommendations on the disposition of all consumer complaints which were not resolved by the seller or manufacturer to the consumer's satisfaction. Such boards could be created by a single company, by an industry, by a Better Business Bureau or local Chamber of Commerce or even by a consumer protection office. No set procedures should be established. Its function would be primarily to recommend resolutions of consumer complaints.

In the absence of such grievance boards, consumers could be substantially helped in their dealings with business, if they could have access to some type of mediation service such as is provided by New York State to consumers.

I recommend that S. 3201 be amended as follows:

A. In order to stimulate industry to create informal boards a consumer should be required before joining a class suit to have submitted their complaint to such a board if one has been established with authority to consider the complaint lodged against the particular respondent.

B. To authorize the Commission to establish a mediation field service to be staffed by persons totally separate and independent from the Commission's investigatory and prosecutory staff whose sole responsibility would be to mediate consumer disputes with their sellers.

Finally, I can see no reason for the provision in Sec. 204 for authorizing courts to inquire into the reasonableness of fees agreed upon between consumers and their attorneys and to revise such fees irrespective of whether or not the attorney's fee is assessed against the defendant. If S. 3201 is sincerely intended to aid consumers in obtaining redress for illegal practices perpetrated on them, this provision of Sec. 204 will nullify whatever benefits the bill otherwise confers on consumers.

Most attorneys willing to handle consumer class action suits will do so primarily out of a sense of their public concern for consumer interests. Consumers can afford only minimal fees and the time, trouble and expense of the class action will continue to remain serious obstacles to any attorney undertaking such suits. To place in the path of an attorney the risk that whatever fee may be agreed upon by him might be regarded as unreasonable and revised accordingly is an intolerable invasion of his professional rights and also an unacceptable burden on such an attorney which might prevent him from accepting any case which would be brought under S. 3201. This provision should be deleted.

I also believe that the 1-year statute of limitations is unrealistic for consumer class actions and should be amended to provide for a 3-year statute.

C. SANCTIONS FOR CONSUMER PROTECTION ACTION

S. 3201 attempts to strengthen the existing sanctions of the Federal Trade Commission Act by giving the Commission injunctive power with respect to all unfair and deceptive acts and practices prohibited by the Act. The Commission consumer protection work has been hampered by its lack of adequate sanctions and I agree that its powers require expansion in this area.

I do not believe that the injunctive provision of S. 3201, while useful, adequately deals with the real deficiencies in the Commission's existing sanctions. Courts have always been reluctant to grant injunctions to law enforcement agencies particularly as respects ordinary business practices which may not on their face appear to be illegal. Sec. 102 of S. 3201 does not, as now written, create the additional deterrent power which the Commission requires.

S. 3201 should be amended to empower the Commission:

(a) to seek from a court money penalties for violation of the Federal Trade Commission Act as well as for violation of Commission orders. Thus armed, the Commission would be able to discharge its responsibilities effectively;

(b) to direct respondents in appropriate cases to give notice to consumers of orders entered against them and to offer to rescind their contracts or transactions affected by the deceptive practices and to provide refunds or replacements.

3. S. 3201 FAILS TO PROVIDE OTHER ESSENTIAL CONSUMER PROTECTION REMEDIES

A. Standards Authority

S. 3201. contains no provisions respecting the development of product or performance standards necessary to enable consumers to participate more effectively in the marketplace. I do not believe that the Commission has the expertise to undertake to initiate or formulate standards. It does have the authority and expertise to make findings as to the need for standards. I believe it also has the expertise to resolve disputes as to whether a standard unreasonably restrains trade or is being abused to this end.

S. 3201 should be amended so as to provide the requisite standards making authority and machinery as follows:

1. The Department of Commerce should be authorized to designate products for which definitional or performance standards should be formulated, to request industry to initiate standards proceedings or to do so itself, and to promulgate such standards as it approves;

2. The role of consumers in this standards making procedure should be carefully spelled out as follows:

(a) Consumers to have the right, either directly or through an Office of Consumer Affairs if one is established, to petition for particular standards to be developed and the Federal Trade Commission to have express authority to investigate and make findings as to the necessity of particular types of standards;

(b) Consumers to have the right to be represented in the standards formulation stage whether conducted by industry or government—and to appeal to the Federal Trade Commission from any industry standards-making decision on the ground of the inadequacy of the standard to protect consumers' interests;

(c) Consumers to have the right to petition the Department of Commerce for an amendment or modification of any standard ultimately promulgated on the ground of its inadequacy to protect consumers' interests;

3. In order to make consumer participation in standards making realistic and practicable, the Department of Commerce should be authorized to establish panels of consumer standards-making experts upon nomination of consumers and to establish funds to finance (a) the participation of consumer representatives in standards making proceedings and (b) the preparation by consumers of petitions and appeals papers.

B. Consumer Educational, Informational and Research Programs

S. 3201 should be amended to provide for the establishment of a research fund to be administered by the FTC or HEW or by an office of Consumer Affairs if one is established to be used for the following purposes:

(a) to finance consumer research projects by law schools or other institutions respecting such matters as consumer law, consumer behavioral and motivational patterns and attitudes towards various deceptions, and marketplace satisfactions, credit eligibility standards employed by business and credit experience of low income debtors, the need for legislative solutions for consumer problems such as the feasibility of a government guarantee for installment credit extensions, and the like.

(b) to provide training and materials for consumer protection and educational specialists as part of a community service consumer project, local legal aid group or state or local consumer protection office;

(c) to provide educational and informational programs and materials (for all media) to appraise consumers of their rights, of local community sources of available consumer aid and of other types of marketing information, consumer economic data and information about frauds and deceptions.

(d) to devise methods to measure the specific areas of deception of greatest concern to consumers and the effectiveness of various types of government actions and programs designed to protect consumers from frauds and deceptions (information v. enforcement, industrywide v. case by case approach, etc.).

2. In order to respond to consumers' needs for education and information, S. 3201 should be amended to provide for the creation by the Commission of Citizen Advice Centers in localities where no comparable federal or state facility exists in order to service consumers' needs in these areas and to give consumers information on their rights and available remedies.

Senator Moss. All right, Commissioner Nicholson, we have you as the "tail-end Charlie" now, and we are very happy to have you. We do not want you to cut yourself down any more than need be, because we are sure it is important; but if you can summarize to some degree, we will be grateful.

STATEMENT OF HON. JAMES M. NICHOLSON, FORMER COMMISSIONER, FEDERAL TRADE COMMISSION, WASHINGTON, D.C.

Mr. NICHOLSON. Mr. Chairman, Senator Pearson, I am honored and pleased to be here today.

I would remind you, however, that for the last 16 days I have been "Mister," so apparently I am the citizen witness of these hearings.

I have been here and listened to the seven witnesses and read the statements that they have prepared, and I have thought to myself about the other bills pending before the Congress, both on the House side and here in the Senate, relating to consumers and their problems, and the solution of those problems.

I think there is a tell-tag bill that Congressman Rosenthal has, the class action proposals outlined by Senator Tydings—which I think you are cosponsor of, Senator Moss—the proposals for the creation of a Department of Consumer Affairs, amendments to the Truth in Packaging Act, creation of a statutory office of consumer affairs out of Mrs. Knauer's present office, the warantee-guarantee bill that I think is also one of yours, Senator; the independent consumer council bill, which of course is yours, Senator, and Senator Hart's; the funding bill for State agencies Senator Prouty referred to yesterday—that I think he and Senator Javits are supporting—all of these bills deal with the problems of the consumer, and then with the structures of the solution of those problems.

These hearings today are focusing upon S. 3201, which is one of the structural bills, and you have heard the conflicting points of view with respect to this legislation, the amendment of the Federal Trade Commission Act with respect to our jurisdiction, whether it ought to be "in commerce" as it is now, or amended to expand into "affecting commerce"—I have my own views on that. You have heard differing views from the Commissioners and from the other witnesses.

I think one thing that I would feel rather strongly about at this point is that the Federal Trade Commission is not, and I do not think could ever be suited to be the consumer agency on the main streets of this country. I do not think any Federal agency can do that adequately.

And if it is the intent of this bill, by changing it to "affecting commerce" to increase the pressure and the activity of the Commission in that area, then I think it does a disservice to the public interest.

I think, however, what the President had in mind with respect to this—and I am not privy, frankly, we are on opposite sides of the aisle—but I think what he may have had in mind in this is enabling the Commission to conduct the sorts of pilot or demonstration projects that were suggested in the ABA commission examination of the Federal Trade Commission. They recommended we ought to set up in a number of different cities in this country demonstration-pilot type projects that might well become vehicles for effective local and State action; and with that amendment we would be more readily able to set up that kind of pilot project, and I think in that respect and with that purpose in mind, that is a good provision of this bill.

The preliminary injunction phase you have heard some different remarks on. I thought the suggestion of Commissioner Elman—with respect to the creation of the independent General Counsel of the Commission who could make these sorts of prosecutorial decisions and not involve the Commission in problems of prejudgment in the seeking of preliminary injunctions—was a very thoughtful suggestion.

The schedule of frauds Mr. McLaren testified represented 85 percent of the volume of cases of the Commission. I would say that if this is true of the historical volume of cases, that might not be the best selection, and I think that the evidence was pretty strong and the testimony was pretty strong that that is not what ought to be done.

I concur with what I think most others do, that the creation of a consumer division within the Department of Justice has a useful purpose. Private action, of course, of some kind has got to come sooner or later to relieve Government and the bureaucracy which, at whatever level, is somewhat removed and insensitive to the immediate needs of people.

One of the most creative provisions of this bill and one I would like to take off on just a little bit—with some further suggestions I would like to make—is the provision for an annual report to Congress. So far as I am aware, in any of the pending consumer legislation that has been adopted, there has been no such provision.

I think, and I strongly urge, that before we get into extensive structural changes of consumer enforcement programs, this committee or this committee in combination with the Federal Trade Commission or the House committee or Mrs. Knauer's office, or whatever might best suit the purpose, ought to do a quick and expeditious study of the enforcement of existing legislation to see what the cost-benefit ratios are, where is it effective and where is it weak. Where do we get the results that the bills have promised to the citizens and the consumers of this country? And where is it failing to get them?

I think from this kind of a study the committee could deal with this bill in a way that would assure a greater likelihood of success in whatever structural systems this committee might adopt.

The goal of consumer protection is to provide for a free, fair and safe market in which the consumer can intelligently choose products and evaluate their costs. And it seems to me that all of the existing legislation ought to be examined from that point of view, and new legislation in the consumer protection area ought to be evaluated from that point of view.

I think the suggestion of Commissioner Jones here this morning with respect to the mediation service is a very thoughtful one. I am more inclined to think that something like the Independent Consumer Council is perhaps going to be more effective. But it seems to me that, except in areas like the warranty-guarantee bill, where the problem is clearly recognized and something has got to be done about it, when this committee begins to examine what ought to be done structurally with the consumer protection program and what additional problems ought to be solved, we can look and learn a great deal from the existing laws on the books.

We can also learn quite a bit, in my opinion, about the problems from the testimony given before this committee, before House committees, and the 9 days of hearings which the Federal Trade Commission conducted, and which are available now in print, some 350 pages. In addition to that, there are 109 written submissions by a broad spectrum of people: business, labor, consumers, those who purport to speak for consumers and those who do speak for consumers, Congressmen, Senators. There is a vast volume of valuable and thoughtful information.

I am not saying—you know, the answer always is to create a commission—"Let's study this problem for a couple of years." I do not think they can wait that long. I think we must have more prompt action.

But it seems to me that any action that is taken ought to be thoughtfully enacted in view of past experience and, therefore, I think that it would serve the public interest well if this sort of study could be made in an expeditious way so that the legislation that does come out of this committee will have a higher degree of likelihood of success than we might have had with less thoughtfully considered bills.

Thank you, sir.

Senator Moss. Thank you very much, Mr. Nicholson, for your testimony here and your comments on the bills.

As you counted off, there are many consumer bills now being introduced, and perhaps this underlines what was said by one of the earlier witnesses—I think it was Commissioner Elman—we have done this piecemeal, and it is time that we viewed the overall structure and tried to decide how we could fit the whole thing together now.

But your counsel is we have a great deal on the books and we ought to see how that has worked and is working?

Mr. NICHOLSON. And where it can be helped, too, Senator.

Senator Moss. And where it can be improved and utilized fully. So I appreciate your comments. Your experience on the Commission gives us information that we are trying to get before the committee, and so you have been very helpful, too.

Do you have any questions?

Senator PEARSON. I have no questions. Thank you very much.

Senator Moss. Thank you.

I do appreciate all of the witnesses this morning. You have cooperated with us very well, and we have made our deadline, or very close to it, so I will be able to get over there in time for the vote when the bell rings.

I think what has come out here is what we are all so conscious of—that there is a very great need now in the consumer field.

I guess Mrs. Knauer's quote is going to be classical. She used such eloquent language; saying "Now is the time; the time for rhetoric is past and the time for action is here."

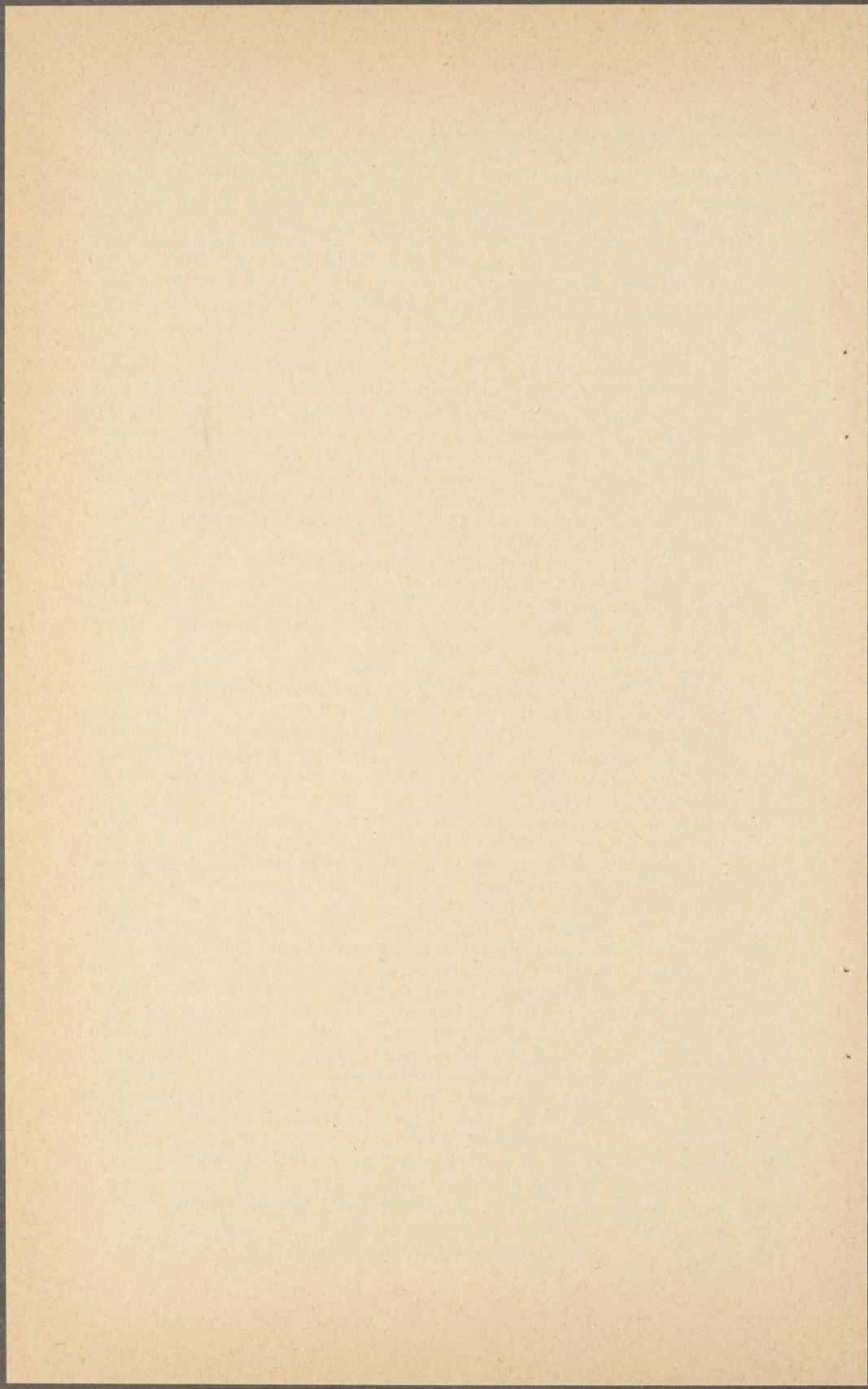
You have been very helpful. You have brought us comment and suggestion and criticism on the language of the bills before us.

I believe that the administration program is unclear on some points, as you have pointed out. It may be inadequate in the protection that it offers to consumers. It is, however, a first step and we will work in the committee in the next month-and-a-half to see what we can do to fashion a bill that grants adequate protection and an adequate means of administering consumer protection laws.

We are going to reconvene this subcommittee on the 3d, 4th, and 5th of February, when we will go in depth into some of these issues that you have helped us now to get into perspective. We hope that some of you will come back and join with us, perhaps, when we reconvene.

We are now in recess.

(Whereupon, at 12:10 p.m., the hearing was adjourned, subject to the call of the Chair.)



CONSUMER PROTECTION

TUESDAY, FEBRUARY 3, 1970

U.S. SENATE,
CONSUMER SUBCOMMITTEE,
Washington, D.C.

The subcommittee met at 9:30 a.m. in room 5110, New Senate Office Building, Hon. Frank E. Moss (chairman of the subcommittee) presiding.

Present: Senators Pastore, Moss, Cotton, and Pearson.

OPENING STATEMENT BY THE CHAIRMAN

Senator Moss. The hearing will now come to order.

Today the Subcommittee for Consumers of the Senate Commerce Committee begins a second series of hearings on bills designed to protect the consumer from fraudulent and deceptive practices in the marketplace.

The legislation before us attempts to achieve this consumer protection in two ways: First, it attempts to strengthen the Government's hand when dealing with fraudulent and deceptive practices, and, second, it attempts to give the consumer some clout so that he can protect himself when victimized by deceptive or unfair practices.

It is important to note that the bills before us are limited to the subject of consumer protection; they do not treat the many problems that face the American consumer; they do not provide a vehicle for fostering the consumer's right to be heard; they do not bring order to the chaotic area of warranty and guarantee; they do not facilitate product safety and they do not encourage the dissemination of objective product information. These consumer needs are the subject of separate legislation.

Let us focus clearly on the subject at hand, recognizing that we are engaged in the important task of fashioning protection. But let us be clear that consumer protection is not a panacea for all consumer problems.

Allow me to turn to the consumer protection bills before us. The President hailed his consumer message as containing the most far-reaching recommendations in history. In explaining S. 3201 to this committee, Mrs. Knauer called it "landmark legislation" and vividly described it as a necessity to halt the "insidious economic cancer" of consumer fraud that is eating at the very vitals of our society.

The aims of the administration are laudable and we support them. However, our task is to determine whether S. 3201 meets the administration's aims—and the needs of the American consumer. Our hearings in December suggest that perhaps it does not.

I would like to raise a number of ideas in the hope that we may develop adequate and effective legislation by examining them:

1. Should a consumer office be established in the FTC to prepare individual consumer cases for Commission decision?
2. Should the sanctions of the Commission be expanded from cease-and-desist orders to civil penalties and orders of restitution?
3. Should the Department of Justice be empowered to seek criminal penalties for intentional fraud?
4. Should the Department of Justice have civil powers analogous to those of the FTC for dealing with intentional fraud?
5. Should consumers be given unrestricted right to institute class actions as would be given by S. 3092?

Following our hearings held in December I prepared a letter which I sent to a number of people detailing the provisions of the three bills that we are considering this morning and asking them, the receivers of the letter, to respond as to whether or not these powers and remedies that I have been talking about should be given.

In order to make the record complete I will put this letter in at this point:

(The letter follows:)

U.S. SENATE,
Washington, D.C., January 28, 1970.

As chairman of the hearings on the consumer protection bills, S. 2246, S. 3092, and S. 3201, I have given the subject of these bills considerable thought and attention. Along with other members of the Committee, I do not believe that the bills before us provide the American consumer with the degree of protection to which he is entitled.

The primary inadequacy lies in S. 3201 which our initial hearings showed to have seriously limited provision for enforcement and consumer remedy. On the basis of thoughtful comments and suggestions received at those hearings, several of us have come to believe that measures of the following nature should be added to S. 3201 in order to create an effective piece of consumer legislation. I would appreciate receiving your views on these measures, either in testimony or by written statement submitted to the Committee.

1. The Federal Trade Commission should be given additional powers and facilities to prevent persons from engaging in unfair and deceptive acts or practices.

(a) An Office of Consumer Protection, headed by a Consumer Counsel, should be created within the Commission to undertake all enforcement functions with regard to individual consumer cases. The Consumer Counsel appointed by the Commission and subject to its policy guidance, would relieve the Commission of the time-consuming duties of initiating investigations and complaints, seeking preliminary injunctions in court, and enforcing compliance with Commission Orders, thereby freeing the Commission for policy and adjudicatory decision-making.

(b) The Commission should have greatly expanded enforcement powers in order to prevent fraud and deception and to remedy injuries caused by such practices. Its powers should include the power to impose monetary civil penalties for knowing and willful violations, the power to issue consumer regulations with the effect of law, and the power to remedy the damage to injured consumers, by ordering rescission, restitution, or payment of damages.

2. The Department of Justice should be given tools with which to prevent and remedy instances of hard-core fraud.

(a) The Department should be able to seek substantial criminal fines and jail sentences for persons who intentionally engage in fraudulent practices.

(b) The Department should be able to seek substantial civil penalties for violation of specific and clearly defined laws. It should also be able to seek court-ordered reparation to consumers injured by reprehensible practices, including rescission, restitution, award of damages, and notification

of the public of its findings and others. The courts should be empowered to appoint receivers, if necessary, to insure that injured consumers receive money due them from defendants.

3. Consumers should have the right to join together in class actions in federal court to recover for violation of their rights.

(a) The concept of S. 3092, introduced by Senator Tydings and which I have cosponsored, more nearly provides consumers this right and should be incorporated into a comprehensive consumer protection bill.

(b) Decisions of the court in consumer actions brought by the Department of Justice and orders of the FTC should be accorded the weight of prima facie evidence in class actions against the same defendants on the basis of the same practices by consumers who did not receive remedy in the government-prosecuted case.

(c) There should be no requirement of prior government action, or "triggering", before consumers can go into court.

I would appreciate having your comments on these ideas and would be pleased to consider any suggestions you might have for statutory language embodying them.

Other members and I believe that the above measures are necessary to provide adequate consumer protection. I urge the Administration to join us in the development of legislation that matches the need of the American Consumer and the promises of the President's consumer message.

Kindest regards.

Sincerely,

FRANK E. MOSS,
U.S. Senator.

Senator Moss. It will appear from this letter that these questions I posed generally should receive an affirmative answer because I feel the time has come to fashion comprehensive and effective legislation protecting consumers from fraud and deception.

I am interested to hear what our witnesses will have to say. So we will now turn to the witnesses.

First, I will ask Senator Pearson if he has an opening statement.

Senator PEARSON. I have no statement.

Senator Moss. I will ask Mr. Walker Sandbach, the executive director of the Consumers Union, and I understand he will be accompanied by Mr. David Swankin, to be our first witnesses.

We are pleased to have you with us this morning and look forward to your testimony.

STATEMENT OF WALKER SANDBACH, EXECUTIVE DIRECTOR, CONSUMERS UNION; ACCOMPANIED BY DAVID SWANKIN, WASHINGTON REPRESENTATIVE

Mr. SANDBACH. Thank you, Mr. Chairman and members of the committee.

My name is Walker Sandbach. I am the executive director of Consumers Union of the United States, Inc. I am accompanied today by David Swankin, who is the Washington representative of Consumers Union.

In my testimony this morning I would like to just touch on the high spots of the written testimony which I have already filed with the committee.

Before doing that I would just like to say a word about the organization I represent, Consumers Union. For 34 years we have been involved in this job of trying to provide information and help to the consumer. For most of that 34 years we have felt like a voice in the wilderness,

trying to get consumers organized, trying to get Members of the Congress interested in the problems of the consumer.

But all of a sudden, about 5 years ago, this whole atmosphere changed, as you gentlemen know—we probably would not be here today if that had not happened—but 5 years ago consumers did begin to organize, did begin to express themselves, and now our problem is how to find the resources and the manpower to respond to the many requests we get from individual consumers and from consumers who have organized saying that they want help to do a better job in trying to protect themselves in the marketplace.

Today we have three bills before us. But essentially, I would like to concentrate and spend my time discussing the more important question facing this subcommittee, and that is the consideration of the relative merits of Senator Tydings' amended class action bill, S. 3092, and the administration's Consumer Protection Act of 1969, S. 3201.

But beyond that it seems to me that the subcommittee needs to constantly keep in mind that tools other than the class suit legislation will become necessary if the Federal Government is to be adequately equipped to protect the consumer interest.

I think the committee is aware, as the chairman indicated in his opening remarks, that this by itself is not going to be enough.

In our view the Tydings bill is superior to the administration bill in a number of ways, but two aspects are most significant.

First and foremost, the Tydings bill allows consumers to pursue a court action without waiting for successful Government action, either by the FTC or the Department of Justice.

We think it is good law to provide that when the Government does successfully close an action, then consumers, individually or as a class, would be able to bring a private action based upon the public action and further, that a prima facie case would be the citing of the successful Government action. However, we would urge the subcommittee to expand this, to report out legislation so that the concept would be enlarged by establishing a prima facie case when FTC as well as Justice successfully concludes a case.

But beyond that, a meaningful private remedy must be created to act as a strong deterrent to marketplace fraud. A strong deterrent in our view will be one that allows consumers to bring private suits to drive fraud and misrepresentation out of the marketplace without waiting for the Government to act first.

Fraud and misrepresentation exist in marketplaces all over the country. As you have already been told by previous witnesses, the FTC alone has 9,000 complaints a year, and I suspect that that is only the exposed tip of the iceberg.

No community is exempt. Federal Government actions can do a lot to drive out the worst practices—but to expect the Federal Government to do the whole job is unrealistic.

Give consumers the right to take private action by themselves, and we will finally have the opportunity to develop a quality marketplace that is free of many of the frauds and deceptions that today plague consumers and just as important, and having been a businessman myself, the honest businessmen will also be helped if this is done.

The second reason the Tydings bill is superior to the administration bill is in its broader scope and coverage. Commissioners Dixon and

Jones, in their December testimony, cited numerous examples of the kinds of fraud and misrepresentation that fall outside the scope of the 11 categories specified in S. 3201. I will not repeat them here, as I am sure the subcommittee is aware of them. But in addition to these examples, there are others which have come to our attention from the thousands of letters that we receive every year from consumers, and we are disturbed that the following types of frauds and deceptions also lie outside the scope of the administration's 11 categories. These include referral sales schemes, dunning letters that look like summonses or other official court papers, charity pitches in door-to-door magazine selling, phony market research surveys, "missing heir" scandals, and excessively priced credit life insurance contracts.

We do not share Mr. McLaren's view that it is necessary to restrict the scope of the bill to these 11 categories in order to give the business community a sense of certainty in knowing what is and what is not legal. On the contrary, we think Congress would do well to leave open a gray area, so that the dictum in the business community would become "when in doubt, don't do it." We have great faith in the businessman's ability to identify what is an honest practice and what is not. And should he be in doubt, he is well equipped, either himself or through his trade association, to retain legal counsel that can advise him on what is and is not legal under the vast body of law that has been developed in the FTC, and in the States over the years.

Now, if Congress is convinced that the concept of a private remedy to wage war on fraud is a good concept, then why either encumber it with conditions, or limit it to only certain kinds of fraud?

This brings me back to what I stated earlier, namely, that the three bills before you today need to be viewed as part of a total package of legislative reforms that consumers need and deserve. In our view there are three important legislative reforms needed to aid the consumer and two of them lie outside the scope of the legislation pending before the subcommittee today.

First, the consumer needs a strong, independent voice in the Federal establishment, authorized and equipped—with money and talent—to represent the consumer interest in policymaking decisions, authorized and equipped to intervene on behalf of the consumer interest before regulatory agencies, courts, boards, commissions, and other departments whenever a decision is being made that affects the consumer interest.

We have already testified before the House on this subject and hope to be invited to express our views to the Senate when further hearings are held on consumer representation.

Second, we believe that the Congress needs to establish a workable mechanism for the negotiation and settlement of individual consumer complaints along the lines of the Independent Consumer Council sponsored by Senators Hart and Moss.

I note in this morning's paper, for example, that the FTC is establishing a consumer complaint center in 11 cities across the country as a pilot project to see how this kind of thing can be done, and this is an action that we certainly encourage.

While we hope that the class action legislation will act as an effective deterrent to marketplace deceptions, we realize that there will always be individual complaints, many of them having nothing to do with

fraud or deliberate deceptions, just misunderstandings, misreadings of the warranties, et cetera, and these need to be handled.

While we have some specific problems with Senator Hart's and Moss' bill as it is now written, we have no problem at all with the concept behind it. We agree that the vast majority of specific consumer problems in the marketplace can best be handled case by case through a network of local consumer complaint centers where a consumer can bring his complaint, and where it will be settled quickly, fairly and finally.

Third, the consumer needs to be given the right to use the court system to help police the marketplace, and to help see to it that the rules and regulations governing the marketplace are lived up to. That is the Tydings bill which we are testifying in favor of today.

When the consumer is given these three institutional arrangements, we will be well on our way toward an equitable marketplace. The consumer will then have a real voice in the establishment of the rules and regulations by which the marketplace is to be guided; at the other end of the scale, he will have an inexpensive, quick and fair institution that will offer him justice in resolving day-to-day marketplace problems—problems that will always be there given the size and impersonality of the marketplace.

In between, giving the consumer the right to use the courts, and procedurally making it possible for him to do so, will add a policing mechanism that will make fraud and misrepresentation too expensive for any business enterprise to engage in.

When consumers have all three of these rights and institutional arrangements, we will stand on the threshold of the consumer oriented economy so many have talked about for so long.

Now, Mr. Chairman, on January 27 you addressed a letter to the Consumers Union, and with regard to those specific questions at this time I would like to ask Mr. Swankin to respond to those questions, so we will also have that testimony before you.

Senator Moss. We will be happy to have that.

MR. SWANKIN. Mr. Chairman, Senator Pearson, in the testimony I think we have covered pretty well the last three of your questions, the ones that go toward the class action bill in our support of the Tydings approach as against the administration approach, and I don't think there is much more to be added with regard to your questions A, B, and C.

With regard to the two questions that you asked us under 1, A and B, you asked us two things. First of all, whether we believe that the Federal Trade Commission should establish an Office of Consumer Protection headed by a consumer counsel who would be appointed by the Commission and who would relieve the Commission of time-consuming duties of initiating investigations and complaints, et cetera, with the idea of leaving the Commission free to make policy.

I do not think we want to get into the detailed specifics of the exact way the Federal Trade Commission should be organized, but speaking generally to the concept we support it, we think it is a good idea. We think that there is plenty of work for the Federal Trade Commissioners to do not to be tied up in the day-to-day operations in making the Federal Trade Commission an efficient organization.

The one thing we might have a problem with would be to have a general counsel appointed separate and apart and not appointed by the Federal Trade Commissioners themselves.

There are other commissions where that has happened, and that oftentimes creates a climate for political football. The general counsel will have one philosophy and the Commission will have another philosophy.

I think the way you phrased the question that would not occur here because the general counsel would be responsible to the commissioners specifically and that should solve the problem of having two different philosophies at work in the Commission and nevertheless make the Commission able to work more efficiently, so we do support that.

Your second question went to—I will not read it—but what you asked us, if I may summarize or rephrase your question, should the Commission have a broader array of powers than it now has in order to deal with the problems that come before it, and we give a resounding yes to that.

Having been a Government official myself, I think that one of the worst situations you can be in is to have a single remedy, especially when the remedy is not particularly useful in attacking the kinds of problems that come before the Commission.

The Commission today can do two things: It can agree to a consent order or it can seek a cease and desist order, period, and many times the old cliché, the punishment ought to be able to fit the crime, should apply.

I would much rather see the Commission with a broad array of powers, the power to assess damage, the power to rescind the contract, whatever is appropriate in a particular case. In that way I think the Commission would be more effective.

Mr. Sandbach did not read that part of our written testimony which we filed for the record, in which we supported the provision in a separate bill and also in the administration's bill that in addition to these powers the Commission be authorized to seek temporary restraining orders or injunctions in the courts. We would support that, too, all under the concept of giving the Commission the broadest array of powers so that they could match the penalty and the remedy to the case.

The second two questions went to what the Department of Justice ought to be doing and what tools the Department of Justice ought to have. We support both of the questions or both of the statements that you raise in your letter.

I would like to say one thing. In our testimony that Mr. Sandbach made reference to in the House, when we were testifying on an independent consumer agency, the question came up as to whether or not the Department of Justice could not become this agency, why do we need another agency?

In supporting the concept that the Department of Justice ought to be given new tools, it ought to actually create a new division, we want it clear that we still believe in an Independent Consumer Council insofar as carrying on the overall function of intervention and representing the consumer any place and anywhere where the consumer interest ought to be asserted. We do not agree that the Department of Justice ought to become the consumer agency, but having said that we do think that the Department of Justice has a larger role to play in driving fraud and misrepresentation out of the marketplace.

We think the Department of Justice ought to have a division of consumer fields or whatever it ought to be called. We think it ought to

be at as high a level as the Antitrust Division. We think it ought to be able to seek both criminal and civil sanctions against those businessmen that engage in fraudulent practice.

We think to the extent, as Mr. Sandbach said, that the Justice Department is successful in prosecuting a case, that the consumer ought to have a *prima facie* case in the courts in a class suit action.

As I say, we support both your ideas that you laid out in your letters, that the Department be empowered to go into the courts to seek civil and criminal penalties as their role in driving out fraud.

The only question I possibly would raise, is it a bad thing to split up? If we are going to create a strong Federal Trade Commission, why do we need a strong Department of Justice? Or if we are going to create a strong Department of Justice, why should we give the Federal Trade Commission new tools? I do not see that as a problem.

I think the consumer interest could well afford to be represented in both places, and I think the two agencies could work out an arrangement. My own feeling is the Department of Justice ought to limit itself or ought to have as its top priority to clear up fraudulent practices, and the Federal Trade Commission ought to be primarily concerned with those practices that are maybe a shade below what the courts had developed and had stated was clearly a fraudulent practice.

Fraud carries with it a whole connotation of criminal activity, and yet there are so many practices that we would call misrepresentative or deceptive that may or may not be outright fraud.

So we do not see a problem in having two strong departments working together to handle this aspect of consumer interest.

Senator Moss. I take it the line that you think should be drawn between the cases with which Justice and the Trade Commission should concern themselves is one of deliberate, criminal, type of fraud, because the Justice Department deals primarily in enforcing the criminal law, whereas practices that may be deceptive or unacceptable and should be rectified by some kind of a civil order—an order of restitution or something of the sort—should be left on the Federal Trade side?

Mr. SWANKIN. That would clearly be the first division. I don't think you are ever going to draw it quite so neatly that there won't be cases that both could potentially handle. I think that could be worked out.

Basically, the answer to your question is, "Yes."

Senator Moss. I appreciate your comments, and I of course noted that Mr. Sandbach excerpted from his statement. The whole text will go in the record so we will have the whole thing before us after we have questioned you.

Mr. Sandbach, one of the industry's prime concerns is the fear that floodgates of harassing legislation would be opened by class actions and that they would be flooded by them.

Do you think industry's fear is justified in this regard, and do you think there ought to be restrictions on the right of consumers to bring class action?

Mr. SANDBACH. We have indicated in our testimony that we do not think that this is likely to happen. As I have indicated to you, over the years the problem has been to get the consumers organized and willing to take action on behalf of themselves.

I also have considerably more confidence in the business community than many of the businessmen seem to have in their ability to handle

anything like this that comes along. I think that business is going to respond when this deterrent is available, and a lot more of these things are going to be settled before they get to this situation.

So there is much less likelihood of these becoming so crucial.

What we are faced with, as I am sure you know, is a crisis of confidence in the marketplace. Consumers are really very much upset. A recent survey that I saw done by the opinion research center indicated that over half the consumers felt there was need for more government legislation to protect them.

Businessmen will deny that this is needed, but the consumers themselves obviously feel this need.

So we are indicating today in our testimony some of the actions that should be taken.

Senator Moss. Of course, you have indicated you thought these informal complaint settlements—of the type that the independent consumers council would handle—would be a good thing. Do you think it would be reasonable to require a consumer to have submitted his complaint to informal settlement before he could bring a class action?

Mr. SANDBACH. I don't think it would be wise to require this. Some places where these will be set up they are going to be ineffective. Other places they will not be set up. I think we have to give the consumer as much encouragement as possible to take this action when it is required. That is why we want to remove these restrictions. We want to encourage the consumer to become active in making a better marketplace. Otherwise, we are just not going to get it done.

Senator Moss. Your notion that Congress ought to leave sort of a gray area by refusing to define consumer fraud too narrowly is an interesting one. Do I understand your concept to be that the burden should be upon business to make sure that its practices are legal and honest?

Mr. SANDBACH. As you know, the traditional statement has been, let the consumer beware. It seems to me we are certainly moving into the area where the businessman has to be more certain that he is acting in a fair and honest way, that his guarantees and warranties are understandable, that they are meaningful, that the consumer can get action, because if we destroy the confidence of the consumer in the business community, we are really in a terrible state in this country, and we are approaching that right now.

That is why the necessity for this legislation.

Mr. SWANKIN. I think it is misleading to think that the world is just beginning today and there is no idea in the business community of what has been determined to be a fraudulent practice.

Our problem with restricting it to the 11 categories, it just seems to freeze in those 11 categories of fraud to be in a class separate and apart from all other types of activity that might very well be fraudulent.

There is a body of law that has been developed in the States, and there is no reason as we see it—it is not so much of shifting the burden, in a sense it shifts the burden, but it isn't that he doesn't have guidelines. He has plenty of guidelines. He has all the decisions that have been handed down in the State courts. And he has all the activity of the body of law created by the Federal Trade Commission above on these 11 specific categories.

Surely it will create for him a decision over and above a legal decision, and that is the point that our testimony was getting to when we talked about the gray area.

We would like to see the business community, over and above what the law says, err on the side of being a little bit more cautious and less deceptive.

But insofar as the Congress would be and will be engaged in writing a law, to the extent that the businessman ought to—take away from whatever the Congress passes a sense of certainty, we would agree with that, but we think that that sense of certainty is not lost by expanding beyond these 11 categories.

Senator Moss. Do you think the procedural requirements of bringing a suit are so onerous that there would be deterrent to consumers bringing class suits?

Mr. SANDBACH. I don't think the courts are going to be flooded. I think we are going to need action on the part of consumer organizations to encourage consumers to bring these suits, to help them get organized. That is one reason we wanted as few restrictions as possible so they can be encouraged to do so.

Senator Moss. But you believe that most consumers would probably choose this complaint center and the easier procedure?

Mr. SANDBACH. If it is readily available and it gets a reputation for being effective, I think that would eliminate a great many of the complaints we have today.

Senator Moss. It is almost certain to be a much swifter type of remedy than going through a court procedure which involves time.

Mr. SANDBACH. They are going to take it if it is there and if they know it is there because that gives a chance of quick and immediate action, and this is what we would like.

But then if the action is not effective, it seems to me they have got to have an additional resource of getting together with other consumers in like difficulty and taking court action.

Senator Moss. On these complaint centers that we are talking about, do you think the burden ought to be primarily on industry to get them set up rather than have the Government involved in getting them set up, these independent consumer centers?

Mr. SANDBACH. I don't think it is going to happen really, unless the Government does get involved. I wish industry would.

I speak a lot to trade associations and industry meetings, and I keep saying to them the opportunity is there, you can take action now and you can do a lot of these things, and then the Government won't have to take action.

But industry keeps complaining about the Government taking action when they don't do things that would stop this action, and I think that is the problem. We have got to encourage industry to take as much action as they will, but when they don't move, then, the Government has got to move and some enlightened business leaders are seeing this, as you know.

Senator Moss. How successful have the better business organizations been where they have been set up?

Mr. SANDBACH. It is a mixed picture. For example, I was president of the High Park Business & Professional Association in Chicago. We had a committee that acted as sort of a better business bureau. We were

not big enough to have a better business bureau itself. But the attitude of many of the businessmen when I was present, was that they expected to get a whitewash by this committee.

I said that is not right. That is not going to satisfy the consumer complaints.

In many communities this is exactly what you have, a whitewash by the better business bureau. In some other communities that is not true. St. Louis is a prime example of an outstanding better business bureau that really does an aggressive job in making sure that frauds are exposed and fraudulent businessmen actually put out of business.

Senator Moss. Thank you.

Senator Pearson?

Senator PEARSON. Let me just say to both of you, first, thank you for your excellent contribution. If we are going to enlarge the jurisdiction of both the Justice Department and the Federal Trade Commission, I think we are going to have to be a little more precise than that which you have outlined in your testimony.

You speak of a broad range of remedies within the Federal Trade Commission and as an example cite the warranty of damages and the canceling of contracts.

This goes back to the old administrative law criticism that I heard two decades ago in law school, which I think has largely been dissipated now, but the shade below that you spoke of in the Federal Trade Commission is going to be rather hard to define.

I am not bothered by both agencies having a hand in this. They have a hand in this now.

But in any way that you could be more precise where we draw the line, might be very helpful to us.

I am a little concerned about awarding damages in administrative procedures, although I know it is done in some instances.

Mr. SWANKIN. Really I think there are two questions or two thoughts in your question.

Insofar as the protection the Federal Trade Commission would offer if it were given a widened and broadened array of powers, I envision it working by the trade regulation route, and there is plenty of protection in the processing and the developing of trade regulation or trade rules that would protect everybody's interest and the requirements to challenge the rule as being unreasonable, et cetera.

I am not particularly troubled by allowing the Federal Trade Commission to deal in this area—to think about affirmative disclosures. As we see it over the years, we think there ought to be more affirmative disclosure. We would like to see it come about voluntarily. If it doesn't, it is probably and likely a role of the Federal Trade Commission to frame their rules and regulations to require it.

Senator PEARSON. I don't disagree with you, but we have to reduce it to language, and it is a great deal more difficult to take that concept and reduce it here.

What I really was seeking was something more definitive.

Mr. SWANKIN. We would be glad to work on language and submit it for your judgment.

Senator PEARSON. There is one other question I wanted to ask you.

You made reference to your consumer protection service, not only in reference to commodities but services. In the flood of literature and

writing now on the inflationary pressures, the consumer demands these days have gone way up on services in relation to commodities and goods that are being bought. Aren't there some very special and different kinds of considerations in consumer protection on services as distinguished from the purchase of goods that are packaged and represented and have a warranty, and so forth?

Are we not going to have a very different set of problems in this particular field?

Mr. SANDBACH. I suspect we are, and this legislation really doesn't address itself primarily to that. We have problems with lawyers, we have specific problems with doctors, we have all of these service areas, some of which are related to products.

Your warranty testimony, of course, will get very heavily into the service area with regard to products, and I think this is an important area where very definite action has to be taken, and I think this committee is aware of it.

Senator PEARSON. I thank you both.

Senator MOSS. Senator Pastore?

Senator PASTORE. I am sorry, sir; that I wasn't here at the beginning of your testimony, and I have been running through your presentation here rather hurriedly, and I was going to ask you the question in order to dramatize—because you are a specialist in this area—to dramatize certain instances and examples of fraud whether or not you could give some examples, but I look at your statement and you talk here about dunning letters that look like summonses and other official court papers, charity pitches in door-to-door magazine selling, phony market research surveys, “missing heir” scandals, excessively priced credit life insurance contracts.

Can you go beyond that and give us some specific examples of the fraud that you have met that we should guard against?

Mr. SWANKIN. In the earlier testimony in December, Commissioners Jones and Dixon had cited a series of things that were outside the 11 categories. Rather than repeat them, we agree with theirs. I would be glad to summarize some of them.

Senator PASTORE. Of course, I come from a jewelry State. I guess sometimes even a deceptive practice can be detected by the consumer only because of the character of the thing that he buys. But there are many, many thing that, unless there is honesty and integrity in the sale, there is no way for the consumer to know that he is being deceived—for instance, we had instance after instance where certain articles of jewelry were marked 14 karat and they were nothing but brass.

You take the ordinary individual, or a woman who goes out to buy a pair of earrings that is marked 14 karat on the card, she has no way of knowing whether it is gold or whether it is just brass.

It strikes me that that is even beyond deceptive. That is being a common cheat. When I was a prosecutor in Rhode Island, I prosecuted some of those cases.

But this really has gotten out of hand, hasn't it, this idea that in order to promote sales, all kinds of gimmicks are invented and all kinds of falsifications are made?

Mr. SANDBACH. This is one of the major problems we have. We have created a crisis in the confidence in the marketplace so that the consumers do not have confidence in what they buy.

Senator PASTORE. Here you specify in your statement, you are speaking now about the Tydings bill, and you want to give the consumer the right to sue for fraud that is perpetrated.

How does the individual consumer do this? You take the ordinary housewife who goes out and is deceived by one of these sales, how can she hire a lawyer and bring suit?

Mr. SWANKIN. The answer today is, she can't, or she won't. For all practical purposes, she is really cut off, because even if she knew how to do it, it wouldn't be worth her time and the money it would cost her in almost every case.

The idea of the class suit—this really goes back to the question that Senator Moss was asking Mr. Sandbach, do we think that the consumers, even with the class suit, will begin to flood the courts. I think you have put the finger on why they really won't.

Everybody, the day they feel they have been defrauded, even if Congress should make it easy to join in a class and bring a class suit in a Federal court, isn't going to go out and spend the time at the lawyer's office. First of all, they are not always going to know that remedy is available, they may not know they have been defrauded. Even if they know it, they might say the hell with it, it just isn't worth all that time to get back my 50 cents, my \$5 or \$50.

So we do not envision a flood of the courts.

Senator PASTORE. I am not worrying about flooding the courts as much as I am concerned that the individual have some recourse and that the expense not be too much that they would become discouraged in pursuing their right.

In that bill that I talked to you about that we authorized, where the Government did not take action—and this bill was opposed by the Justice Department at the time—we authorized a regionally chartered organization of the jewelry manufacturers to bring a suit in the name of the individuals, because they would be in the position to do it, and that in itself acts as a deterrent. These fellows are pretty clever, they are very deceptive, and they know that if they perpetrate this on housewives, even though they may be aggrieved and might call up the Better Business Bureau or something, it then dies on the vine. Sometimes we hull ourselves into a sense of satisfaction by saying we give the consumer the right to sue, but we realize the consumer isn't big enough on an individual basis to do it.

Mr. SWANKIN. We also said earlier to make this effective the consumers would have to be organized.

Senator PASTORE. Is there anything in this bill that takes care of that?

Mr. SWANKIN. Not in this bill. Hopefully in the bill that isn't before this committee, the Independent Consumer Council that would encourage the organization of consumers, there would be these organizations.

Senator PASTORE. But you think we ought to give that some consideration?

Mr. SWANKIN. Very definitely.

Senator Moss. It is before this committee, but not being heard here this morning.

Senator PASTORE. I think you have got to do something like that, because unless you get some kind of a nonprofit organization that is interested in the consumer interest to intervene on behalf of that con-

sumer, I am afraid that much of this, while it might sound good, won't have the effectiveness to cure the abuse.

Mr. SWANKIN. We couldn't agree with you more.

Senator MOSS. Senator COTTON?

Senator COTTON. No, thank you.

(The full statement follows:)

STATEMENT BY WALKER SANDBACH, EXECUTIVE DIRECTOR, CONSUMERS UNION

My name is Walker Sandbach. I am the Executive Director of Consumers Union of the U.S., Inc., a non-profit membership organization chartered in 1936 under the laws of the State of New York to provide information and counsel to consumers about the management of family expenditures. I am accompanied today by David A. Swankin, the Washington Representative of Consumers Union.

A word more about Consumers Union for the record. We are the publishers of the monthly magazine, Consumer Reports. Our financial support comes from the sale of Consumer Reports to more than one and three-quarter million subscription and newsstand buyers, and from the sale of other publications. We accept no support from any commercial organization. Consumer Reports carries no advertising. Besides testing products and reporting the results in Consumer Reports, we publish general information for consumers on service problems, on health and medicine, on economics of the marketplace and on the legislative, judicial and regulatory actions of government affecting consumer welfare.

We have long been advocates of stronger consumer protection laws at the Federal level. Now in our 34th year, we have observed first hand the inequities in the marketplace, and have deep convictions that the inequities will not disappear by themselves. Only economic pressure on sellers, asserted through the pressure of the law will give us the quality marketplace that will make a better America and bring about the consumer-oriented economy which we have talked about for so long. Of all the major economic interests, only the consumer interest is improperly and inadequately represented today. Until it is equally represented with all economic interests in the business of government, the public interest will suffer.

The reasons for consumer under-representation are multiple, but two stand out. First, the consumer interest is diverse and all-encompassing, thereby making it difficult to organize a single government agency to represent so broad an interest. Second, and probably more important, the consumer is by-and-large unorganized, and thus has been unable to bring pressure to bear on government to create an institution to represent him, or to bring pressure to bear on existing agencies to represent his interest more effectively.

Today, you have three bills before you:

S. 2246, to amend the Federal Trade Commission Act so as to allow the FTC to seek temporary injunctions or restraining orders in the courts;

S. 3092, Senator Tydings' amended class action bill;

S. 3201, the Administration's Consumer Protection Act of 1969.

We endorse wholeheartedly the first of these bills, S. 2246. Certainly the perpetrators of unfair and deceptive practices should not be free to continue to victimize consumers during the one, two, or even ten years it takes for the FTC to take effective action against such practices. While certainly no panacea, the ability to seek an injunction in the courts will give the FTC a necessary tool to better fulfill its responsibilities to consumers, and so we urge enactment of S. 2246.

The more important question facing this Subcommittee is its consideration of the relative merits of S. 3201 and S. 3092. Beyond that the Subcommittee needs to constantly keep in mind the tools other than class suit legislation that will be necessary if the Federal government is to be adequately equipped to protect the consumer interest. While today's hearing concentrates primarily on class action legislation, I would like to say a word at the end of this testimony about Consumers Union's views on the larger picture of consumer protection.

We have reviewed with great care the December 16-17 hearings on these bills, and believe that the Subcommittee has had presented to it the cogent arguments as to why Senator Tyding's bill, S. 3092, is far superior in its approach than is the Administration's bill, S. 3201.

The Tydings bill is superior in a number of ways, but two aspects are most significant:

(1) First and foremost, the Tydings bill allows consumers to pursue a court action *without* awaiting a successful government action, either by the FTC or the Department of Justice. We think it good law to provide that when the government successfully closes an action, then consumers, individually or as a class, would be able to bring a private action based upon the public action and further, that a *prima facie* case would be the citing of the successful government action. We would urge the Subcommittee to report out legislation that would expand this concept by establishing a *prima facie* case when FTC as well as Justice successfully concludes a case.

But beyond that, a meaningful private remedy must be created to act as a strong deterrent to marketplace fraud. A strong deterrent will be one that allows consumers to bring private suits to drive fraud and misrepresentation out of the marketplace without waiting for the government to act first. We hope that the Justice Department and the FTC will engage in vigorous consumer protection activities, but to expect a small group of lawyers to do it all by themselves is unrealistic. Fraud and misrepresentation exist in marketplaces all over the country. No community is exempt. Federal government actions can do a lot to drive out the worst practices—but to expect the Federal government to do the whole job is unrealistic. Give consumers the right to take private action by themselves, and we will finally have the opportunity to develop a quality marketplace that is free of many of the frauds and deceptions that today plague consumers and honest businessmen alike.

(2) The second reason the Tydings bill is superior to the Administration bill is in its broader scope and coverage. Commissioners Dixon and Jones, in their December testimony, cited numerous examples of the kinds of fraud and misrepresentation that fall outside the scope of the eleven categories specified in S. 3201. I will not repeat them here, as I am sure the Subcommittee is aware of them. In addition to their examples, we are disturbed that the following types of frauds and deceptions lie outside the scope of the Administration's eleven categories:

Referral sales schemes

Dunning letters that look like summonses or other official courts papers

Charity pitches in door-to-door magazine selling

Phony market research surveys

"Missing heir" scandals

Excessively priced credit life insurance contracts

We do not share Mr. McLaren's view that it is necessary to restrict the scope of the bill to these eleven categories in order to give the business community a sense of certainty in knowing what is and what is not legal. On the contrary, we think Congress would do well to leave open a grey area, so that the dictum in the business community would become "when in doubt, don't do it!" We have great faith in the businessman's ability to identify what is an honest practice and what is not. And should he be in doubt, he is well equipped to retain legal counsel that can advise him on what is and is not legal under the vast body of law that has been developed in the FTC, and in the states, over the years. If Congress is convinced that the concept of a private remedy to wage war on fraud is a good concept, then why either encumber it with conditions, or limit it to only certain kinds of fraud?

Besides what is described as a doctrine of fairness, the Administration has attempted to justify its approach on the grounds that a bill as broad as the Tydings bill will create an unmanageable workload for the already overworked Federal courts. We disagree. We disagree because as much as we support and see the need for class action legislation as a sound deterrent, we do not foresee consumers turning to the courts in record numbers to assert and protect their rights. Just as it is true that the ability of the FTC to seek temporary injunction is not a panacea, so too we see the role of the class action suit as limited one, even if procedurally the class suit is made more feasible. Besides, if we really believe in making the court system useable to police the marketplace, isn't it more efficient to encourage class suits than to have consumers bring their suits one at a time?

This brings me back to what I stated earlier—namely, that the three bills before you today need to be viewed as part of a total package of legislative reforms that consumers need and deserve. In their December testimonies, FTC

Commissioners Elman and Jones attempted to give this Subcommittee a sense of perspective in their thoughtful presentations. We urge the Subcommittee to give those statements the most careful attention.

In our view, there are three important legislative reforms and two of them lie outside the scope of the legislation pending before the Subcommittee today.

First, the consumer needs a strong, independent voice in the Federal establishment, authorized and equipped (with money and talent) to represent the consumer interest in policy-making decisions, authorized and equipped to intervene on behalf of the consumer interest before regulatory agencies, courts, boards, commissions and other departments, whenever a decision is being made that affects the consumer interest. We have already testified in the House on this subject, and hope to be invited to express our views to the Senate when further hearings are held on consumer representation.

Second, we believe that the Congress needs to establish a workable mechanism for the negotiation and settlement of individual consumer complaints, along the lines of the Independent Consumer Council sponsored by Senators Hart and Moss. While we hope that the class action legislation will act as an effective deterrent to marketplace deceptions, we realize there will always be individual complaints that need to be handled. While we have some specific problems with that bill as it is now written, we have no problem at all with the concept behind it. We agree that the vast majority of specific consumer problems in the marketplace can best be handled case by case through a network of local consumer complaint centers, where a consumer can bring his complaint, and where it will be settled quickly, fairly and finally.

Third, the consumer needs to be given the right to use the court system to help police the marketplace, and to help see to it that the rules and regulations governing the marketplace are lived up to. That is the Tydings bill.

When the consumer is given these three institutional arrangements, we will be well on our way toward an equitable marketplace. The consumer will then have a real voice in the establishment of the rules and regulations by which the marketplace is to be guided; at the other end of the scale, he will have an inexpensive, quick and fair institution that will offer him justice in resolving day-to-day marketplace problems—problems that will always be there given the size and impersonality of the marketplace. In between, giving the consumer the right to use the courts, and procedurally making it possible for him to do so, will add a policing mechanism that will make fraud and misrepresentation too expensive for any business enterprise to engage in.

When consumers have all three of these rights and institutional arrangements, we will stand on the threshold of the consumer-oriented economy so many have talked about for so long.

Senator Moss. Our next witness is Mr. Gilbert H. Weil who is the general counsel of the Association of National Advertisers. We are pleased to have you with us, sir, and you may proceed.

STATEMENT OF GILBERT H. WEIL, GENERAL COUNSEL, ASSOCIATION OF NATIONAL ADVERTISERS

Mr. WEIL. Thank you, Mr. Chairman. I am here as general counsel, Mr. Chairman, members of the subcommittee, of the Association of National Advertisers which I will refer to from now on for short as the A.N.A. This association, in brief, represents those companies which are engaged in promoting and selling services and products to consumers and who in the course of that endeavor utilize advertising on a national or regional scale.

We represent a broad spectrum of American business in the course of that, ranging from large companies through medium companies down to relatively quite small ones, and they cover the consumer packaged products at the lower priced end of the scale, if anything is low priced these days, then consumer durables, and then services—banking, transportation, almost anything in the product or service area that goes ultimately to consumers.

Among our membership we certainly do not number foes of consumers or foes of consumerism. Certainly nobody is inclined to take issue in the abstract with the broad principles of goodness and motherhood and so on. I am sure you would be amazed if anyone came down here to speak in favor of fraud and deception, or that he was opposed to people having been affected by such nefarious activities having some effective remedial procedures open to them.

But as a practicing lawyer, I have to cope and deal with statutes after they have been passed, and when the actual application and administration of them takes place, when the governmental enforcers and policemen grab statutory language and try to run with it. I think we all can number within our experiences instances where administrative agencies and even courts and the Supreme Court have taken statutes far beyond the reach that was initially conceived for them by the Congress in enacting them; so that we have our problems not with your concepts—they're our concepts too. The healthy consumer is the guarantee of our continued good business—but with the specifics and the implementation; and it's in that sense I now turn to the particular bills that are under consideration this morning.

First, covering the temporary injunction, which is S. 2246, I can state our position very quickly on that. We are definitely in favor of the Federal Trade Commission being able to come into court in a proper case and seek a preliminary injunction. We see it as very much needed. What we are concerned about is the relaxation or the possible relaxation of the equity rules usually prevailing and governing the grant of a remedy as drastic as a preliminary injunction.

One must keep in mind, especially in dealing with the FTC area, that in many, if not most, cases the grant of the temporary injunction will be for all practical purposes the end of the case, because once the promotional practice is discontinued, especially under an aura of court condemnation, the passage of a year or two or even more until there is final determination of the matter would mean that the case is not worth fighting for the advertiser or for the business any longer, because even if he should win after considerable expense to vindicate himself, it would no longer be commercially worthwhile to resume the practice that had been enjoined before he had his full day in court.

Now, in the last session of Congress, S. 3065 was before the Senate and it had much the same background as the present S. 2246. The A.N.A. came in and made its views known and said that it would support S. 3065 if it were amended and made clear that the grant of the temporary injunction would depend upon usual equitable principles. That amendment was made. We did support it, and that bill was passed by the Senate. We simply recommend that the same thing be done with S. 2246 and if done, we would certainly endorse it.

Senator PASTORE. May I ask a question?

Senator MOSS. Yes.

Senator PASTORE. What do you mean, sir, by usual equitable principles? A temporary injunction has often been granted by an equity court. You mean not an *ex parte* granting? Is that what you mean?

Mr. WEIL. That is part of it, although the temporary restraining order might be granted *ex parte* because of the exigencies of the situation requiring it, but what I mean is a court realizing what such a remedy is will not ordinarily grant it unless there is a strong likeli-

hood that the plaintiff will ultimately prevail in the final outcome of the case and unless the court is also convinced that there will be considerably more harm done to the plaintiff by denying the interim relief than there would be done to the defendant by granting it if it should ultimately prove to have been unwarranted. It is that balancing of the equities, how much real need is there for it as against how much harm it may cause if improvidently granted, and also what are the chances that a plaintiff is going to be proven right in the final outcome.

Senator PASTORE. Aren't we writing rules for the court in that concept you have just expressed? I am not arguing with you and I am not against you. I quite agree with you there has to be justice and fairness in this, and as we deal to protect the consumer, at the same time we don't want to destroy American ingenuity, and some of these cases are borderline cases. I don't follow you too much when you say you agree with a temporary restraining order but at the same time you want a guarantee that there is a reasonable chance that the plaintiff is right. How do you find that out unless you have a hearing?

Mr. WEIL. One does have a hearing in front of the court. The hearing can be either on affidavits—

Senator PASTORE. Isn't it up to the court to decide these questions that you talk about?

Mr. WEIL. Yes. I think I understand the Senator's question.

Senator PASTORE. I hope you don't expect us to write the rules of the court or try to circumvent or in any way intervene with the jurisdiction of the court because I think then you would be doing yourself more harm than good.

Mr. WEIL. Exactly, and this is our problem with S. 2246 as it presently stands. It might be taken in its present language to be rewriting the rules of the court and changing these traditional doctrines. For this reason: it provides for the grant of a temporary injunction when the Commission has reason to believe that a violation of section 5 of the act has occurred or is going to occur.

That is the point. There have been a line of cases which have so construed that language. You see, there is similar language now in the present section 13 of the Federal Trade Commission Act dealing with foods, drugs, cosmetics and devices, and under it we have had two lines of cases develop, and it has not been resolved yet by the Supreme Court.

One line of cases says: "Well, the usual rules prevail, and it is up to the court to decide in its discretion whether there is a strong enough case here for the plaintiff to warrant a temporary injunction." But the other line of cases has said: "That discretion has been taken away from us by the language of section 13. It says 'when the Commission has reason to believe'. If the Commission has reason to believe, we lose our judicial prerogative." I see no sense in new legislation buying ambiguity. I think the new legislation should make it clear that Congress is not tampering with the well developed and understood court procedures, leaving them where they are. That is what S. 3065 would have done in the last session and that is all that we suggest be done here.

Senator PASTORE. Could you give the staff the citation of these cases?

Mr. WEIL. Yes, that is in our written statement.

Senator PASTORE. You cite the cases?

Mr. WEIL. Yes. We refer to the Congressional Record, and in the Congressional Record those cases are cited.

There was a discussion on the floor. Senator Hruska, I believe, and Senator Cotton I believe participated, and Senator Magnuson, and in the course of the discussion these cases were referred to, and the whole reasoning that I have outlined was given, and those references are in our written statement, sir. I can supplement it with the actual citations, but—*Rhodes Pharmacal* is one of the leading cases for the proposition that the discretion of the court has been diminished but the language—

Senator PASTORE. Did that go to the Supreme Court?

Mr. WEIL. No, it has not gone to the Supreme Court. Right now we don't know which rule is the right one.

Senator PASTORE. What is the latest Supreme Court case on this subject and what did it hold?

Mr. WEIL. There is none. This question has not been decided by the Supreme Court, and it would seem there is no point in new legislation of simply buying past ambiguity. Why not simply make it plain? That is our only point on that.

Coming to what has received the burden of the discussion and certainly is extremely important, the consumer class action subject: Again when we are talking about fraud and deception, when we are talking about the 14 carat brass activities, there is no dispute; but I do not share the confidence of other witnesses here in the sense of certainty that business can have as to what it is being faced with; and the reason for that, if you please, is primarily because of the inclusion of violations of section 5 of the Federal Trade Commission Act as a substantive element to support the consumer class action.

I think it will well warrant our taking a moment to review the initial concept of section 5 of the FTC Act and how it works, because it bears very directly on this thing.

Originally in the antitrust laws under the vague generality of Sherman Act section 1 particularly, and also section 2, it was felt that businessmen had no reliable guide where specific conduct might be involved as to whether ultimately it would be held to be a violation of the general language of those sections or whether it would not. Therefore, the administrative agency, the Federal Trade Commission, was empowered through its administrative process to resolve and to fill in and to give specific meaning to these statutory generalities in given fact situations one at a time, and then as an outcome to issue its final decision which, if against a practice, would be a cease and desist order so that from then on the business that had been engaging in that conduct would know that it was in a verboten area.

But, as a very important factor in that process it was provided, and deliberately and advisedly so, that the determination of the Federal Trade Commission would not be attended by any penalties or any monetary liabilities or any retroactive or ex post facto effects.

Now, this is very important because first of all you have the agency making this decision being the complainant, the prosecutor, frequently the witness, and the judge and jury. So if monetary penalties or damages could attach to their decision, there would be very serious questions raised of separation of powers for one thing, which is not exercising a judicial function, and secondly, due process, complicated by

the further fact that the Federal Trade Commission in reaching its decisions is not bound by the usual rules of evidence which apply in a court trial. So, one might find himself the recipient of an adverse decision by the Federal Trade Commission as a result of hearsay or secondhand, thirdhand or fourthhand hearsay, as the result of the disregard of many of the protective rules of evidence which prevail in court and are so important to due process, but all of this you see was justified on the ground of, "So what, he isn't being hurt; he is just being given advice for the future."

All right, fine. When he gets that advice for the future, then he can have that sense of certainty, but if along with that advice for the future he undergoes punishment for the past, where is that sense of certainty when the Commission through its rulings is constantly pushing the frontiers into new and unsuspected areas?

Senator PEARSON. Isn't there judicial review of the FTC?

Mr. WEIL. There is, but it is very limited. On the facts it is even less limited than review of a jury verdict, and on the law we have this growing concept that the administrative agency which is charged with the enforcement and administration of a statute is a very persuasive and important factor in determining the construction of that statute; that courts must bow to a great deal, to a large extent, to the interpretation which the administrative agency puts upon its own statute, which would not be so in a straight judicial case.

Senator PEARSON. Suppose the congressional history indicates one interpretation and the agency the contrary; what would a court on judicial review make reference to?

Mr. WEIL. It would still give great weight, but not conclusive weight, to the interpretation by the agency; but, of course, congressional history is not always that clear nor is it always deemed that applicable after a decade or two decades or three decades have gone by.

Let me, because sometimes illustrations help these things, take a situation. It was a very famous case when it occurred some 3 or 4 years ago, the sandpaper case, where a shaving cream company used a television commercial where it showed sandpaper being shaved after the application of the shaving cream to it. In order to produce that commercial because of certain technical production difficulties, sandpaper was not actually used. Plexiglas with sand was used. However, for the purpose of the decision on this point, it was conceded and accepted that if the consumer took regular sandpaper or watched the demonstration being done in his presence on regular sandpaper he would have seen precisely the same result. The only reason for the mockup on TV was not to misrepresent the ultimate picture, but because under the lights and everything the sand wouldn't photograph against the sandpaper and you wouldn't see what was actually going on.

There were two advertisers involved and each one had a separate case. Two Federal courts of appeal ruled—in other words, six judges—ruled against the Federal Trade Commission on that and said it was not a deceptive practice under section 5 because there was no material misrepresentation.

The Supreme Court reversed them, not on the ground necessarily that it agreed with the Commission but that it thought this was a

matter for the Commission's decision more than for the court's decision.

Now, can you tell me that an advertiser should have had a sense of certainty that that would be a violation of section 5 when in the course of being reviewed six independent circuit court judges who had no axe to grind in this matter agreed with them and when the Supreme Court disagrees not on grounds of moral dishonesty, not on grounds of fraud and deception, but on grounds of interpreting the scope of administrative agency powers?

I think to make matters of this sort the subject of *ex post facto* damage action, monetary penalties, regardless of who collects them, whether the Federal Trade Commission collects the fund or the Department of Justice as custodian collects the fund or whether the consumers themselves proceed against it in a class action, I think it is highly inequitable a disregard of the special considerations pertaining to Federal Trade Commission actions.

Senator Moss. What damages would there be flowing out of the sandpaper case? Wasn't this just a cease and desist?

Mr. WEIL. Yes, but there is an odd thing. This brings up another question that I do want to discuss. I, for the life of me, can't see any real substantial harm to consumers resulting from that practice. Yet it is a section 5 violation and consequently it could serve as the basis of a consumer class action because none of the bills that have yet been proposed that I can see in them anything by way of a criterion to distinguish insubstantial—I won't even say frauds or deceptions or misleadings—but insubstantial violations of some statute, State, Federal, FTC Act, or what have you, and those which are substantial in the sense of causing real injury.

This I say is what is seriously missing, because I think you may be asking if nobody feels he has really been damaged, why would he bother to bring the action in the first place.

Well, let me say when Congress provides an inducement of a class action which can be brought with the possibility, and a very strong one, of recovery of plaintiff's attorney's fees, consumers have nothing to be lost. All they have to do—or the members of the public—all they have to do when they are given invitation, "Do you want to join in this, it is not going to cost you anything and maybe you will get something out of it." I think we simply have to take human nature into account, and although the damage may be *de minimis*, interestingly enough some of the bills talk in terms of damage or damages, and that is fine, it is pretty well understood, but the administration bill, for example, talks in terms of "consumers adversely affected."

Well, I don't know what that means, and it could well mean something other than damage. If it only meant damage, why shouldn't it have said damage?

Perhaps some of these people who watched this sandpaper commercial and later found out what happened may have found out they were philosophically affronted in some way. As the bills presently stand, and I am glad there are expressions on the panel that I am talking about something ridiculous, because I am, my point is within the present bills this ridiculousness can be embraced. I don't believe you mean it to be, but you have not said it shall not be.

I believe the bills should have something in them—first of all I do think that section 5 should go out as a foundation for the substantive

rights for monetary penalties. Unless we are willing to completely recast Federal Trade Commission administrative adjudicative proceedings so as to allow regular rules to evidence—you would really be making them another court which is a problem in itself, but beyond that even under a Department of Justice action, which would have to be brought at the district court level in the first place, and under the list of eleven specific items, I think some distinction should be made between those instances in which there has been no real, no important, no significant injury or damage to consumers and those instances in which there has.

Where there has been real injury and where it has been the result of conduct which the company had every reason to know was wrong, should have known, we have no problem with legislation that would cover that situation. We have problems with the shotgun legislation that goes far beyond that.

May I say that in the fraudulent cases that everybody cites as their examples as though they represented everything that was involved, well, I hate to bring the old cliché of adequate remedies, certainly preventive, I can hardly think of any one of these which wouldn't violate the postal fraud laws and lead to criminal sentences if the Department of Justice were inclined to prosecute.

I know that this still does not give rights to consumers to recovery, but where they have substantial injury, certainly a verdict such as that could be used as a basis for a class action because this is based on actual intent, this is adjudicated right in the case, and we do not have any real problem with predicating the action as in the administration's bill upon a successful action in the district court by the Department of Justice where the usual judicial procedures would apply; except that we have a problem with item 11 because while items 1 through 10 are pretty specific, and again referring back to a previous witness here this morning, if more can be listed to those 10 which are specific enough and well enough established, we have no problem with that either. Our problem is with certainty versus uncertainty rather than limitation versus expansion.

Our problem with section 11 is that this language involves generalities which we think undoes all the good that was intended by the earlier, more specific bill of particulars, because it gets into generalities which are broad enough and vague enough that all section 5 of the Federal Trade Commission Act could be deemed to be reincorporated right back into the list of 11 which, of course, had not been originally intended.

I have taken a lot of time here.

Senator Moss. I was just going to interject here, and I recognize we must move along, but I wondered whether you thought that these frauds and deceptions that were listed by Mr. Sandbach would fit into those written categories that you speak of, the referral sale schemes and the dunning letters and so on?

Mr. WEIL. I think some of them would, and some of that he mentioned, as I recall, for example, magazine door-to-door subscription sales, that is not a per se unlawful practice; it is a question of what is done during the course of the face-to-face visitation, but where there is misrepresentation—look, Mr. Chairman, whenever a company makes representations that it has good reason to know that they are false

representations, we hold no brief for that, and if they bring substantial injury to those consumers, those consumers should have a remedy. But it has gone so much further. It is like shooting volleys of shots into a crowded marketplace to try to get a purse snatcher around there.

If it could be trimmed and zeroed in on what should be done and not slopped over—because you see what hurts, here again, if improper burdens, if unnecessary and undue burdens are put upon business, this is not something that exists in an economic vacuum. Those expenses eventually have to be recovered unless the business is going to be bankrupt. If they are going to stay in business, they have to come back, and where do they come back? To the consumer. There is no other place. The costs in the bill eventually for these various modes of enforcement will come back to the consumer and the question is, the consumer getting sufficient value for what it is likely to cost him to get it. This has to be weighed in the consumer's own interest.

These class actions, as I have said, we're in favor of effective remedies. But we are not all that convinced that the class action is all that effective. If it a very cumbersome and a very unwieldy procedure, and as I believe Mr. Sandbach mentioned or Mr. Swankin before, it may be that a good number of consumers still won't bother to come in because they are still going to have to come into court. Each one is going to have to prove his individual damage. If there is a claim that the injury is due to reliance upon a misrepresentation, each one of these consumers is going to have to come into court and testify that he saw that misrepresentation, he relied upon it, was that which induced him to make his purchase and then to establish his own individual damage as a result of it. So, while we don't think of anything much better at the moment and we are not opposing it on that ground alone, I must say, as the chairman said earlier, it is far from a panacea, and even in the cases where it is justified, it might ultimately be worth more in costs to the producers than benefits to the consumer himself as distinct from the attorney who represents him in the class action.

You have been very patient. I am sure I have gone way beyond my time.

Senator Moss. We appreciate having you testify, and your full written text will be in the record along with your remarks.

I wonder about the difference between the temporary restraining order and the preliminary injunction.

Are you opposed to temporary restraining orders by the FTC?

Mr. WEIL. Let me at this point not speak for the association because I do not have the association's views, but I will speak personally.

No, I am not opposed to it if, again it is subject to the usual court principles, because the courts recognize how drastic this is and they are not inclined to exercise the temporary restraining order unless they feel it is really and genuinely needed, and where it is, then, I think it should be available.

It is even more drastic than a temporary injunction, because the person who is subjected to it has no opportunity to be heard at all in his own defense. It is entirely *ex parte* and a one-sided presentation.

But the courts ordinarily when they are faced with that and they know they have to work fast, they are quite ingenious, they will get on the telephone and try to reach the other party and have him get

his attorney down in the chambers within an hour, or they will make the temporary restraining order a very short duration, perhaps at the most 24 hours.

They will take suitable measures, and I do not have any great concern over that as long as the courts realize that they are free to go ahead in their usual manner in processing them.

Senator Moss. The FTC does have this power now to seek a temporary restraining order?

Mr. WEIL. No, I am not sure that it has, Mr. Chairman. It has the temporary injunction power under section 13 for foods, drugs, cosmetics, and devices, and it may also have temporary restraining order. I simply do not recall that.

Senator Moss. It does in the Flammable Fabrics Act, I think.

Mr. WEIL. Yes.

Senator Moss. And the Fur Products Labeling Act. In several of the acts they have been granted this power. I just wondered why this new language would not be acceptable where consumers are injured by an unfair or deceptive act generally.

Mr. WEIL. Are we talking about temporary restraining order or temporary injunction or both?

Senator Moss. I think it is a temporary restraining order.

Mr. WEIL. That is the one that can be issued ex parte and right out of hand.

Again, sir, as I say, I have no problem with it as long as it is understood that there can be interposition of the usual court review and control of that drastic remedy. Granted that, I have no problem personally, not speaking for my client at the moment.

Senator Moss. Turning a little bit to a different side of this issue, I propose strengthening the FTC for action against consumer frauds, and I propose creation of an Office of Consumer Protection headed by a Consumer Counsel to handle prosecution of individual consumer cases before the Commission.

If the Consumer Counsel were authorized to seek preliminary injunctions in court, I believe the issue of a Commission prejudgment; to which you have averted, would be solved. The Commission would not be in a position of telling the court that the respondent was guilty before it heard the case; instead the Consumer Counsel would determine when to seek a preliminary injunction and would make the case before the court.

You don't object to that?

Mr. WEIL. That I think would be a salutary development in that area, Mr. Chairman.

I am a little concerned, I recognize in preparing this letter you didn't attempt to get into the specifics, but there is a conjunction there between the Consumer Counsel and your saying "subject to the Commission's policy guidance." Someone might get back to how much Commission intervention is there in the Consumer Counsel's application for any particular temporary injunction. But if there is a divorcement, if you have a Consumer Counsel's Office which is quite compartmentalized from the Commission itself, and then the Consumer Counsel comes in to ask for the temporary injunction, I agree that this does not precipitate an unduly hasty crystallization of Commission views as to the ultimate merits of the case.

Senator Moss. He would act in the situation we are talking about—going to the court rather than bringing an action for some Commission ruling on it.

Mr. WEIL. Would he, then, be taking the responsibility for issuing a Federal Trade Commission complaint?

Who would decide that?

Senator Moss. I assume it would be a Trade Commission complaint all right, but rather than seek the judgment of the Commission on it and whatever power the Commission had to restrain or do whatever else, he would bring it in the court, using the powers of the court and he would have, it seems to me, to make the traditional representation under all the safeguards the courts afford the litigant.

Mr. WEIL. I think that would be an improvement, Mr. Chairman. There could be, though, situations where the Commission itself in its administrative discretion might not wish to go for a temporary injunction, and then they would be in a rather anomolous position if their counsel did it anyway.

I have been engaged in some of these cases where the Commission recognizes it is bringing a test case on a technical question involving the application of the law. It is satisfied just to bring that test case to test out the law. It doesn't want to hurt anybody in the process.

The Consumer Counsel might go dashing off for a temporary injunction when in its administrative discretion the Commission did not really desire it.

Senator Moss. But as I conceive it, he would have the power all right to seek a remedy in the court of that sort and he would not be inhibited in that in exercising his judgment by the Commission.

Mr. WEIL. I would certainly prefer that, and I think it is less tinged by the other problem if the Commission itself made the application.

But then there would have to be very strict observance of the present provisions of the Administrative Procedure Act that there is no contact or communication between the consumer counsel and the Commission itself, that he just acts entirely on his own.

Then the question comes down to administrative responsibility of his actions.

Senator Moss. Do you agree with the suggestion here that the FTC be empowered to levy civil penalties for violation of well-established law? The worst penalty he can receive now is a cease and desist, but how about having the extra power of levying a civil penalty?

Mr. WEIL. I think, Mr. Chairman, you run into very serious constitutional questions on that because you would be converting the Federal Trade Commission into a court. See, even under the present law when there has been a violation of a cease-and-desist order, and I think this was the very reason for the separation of powers, the Commission is not enabled to assess the penalties for that violation. It must go into the district court for them through the U.S. attorney.

So you do have to pay homage to the judicial department in these actions which award damages or assess penalties.

Senator Moss. I agree it would be an administrative court that would assess a civil penalty and it would have to function as such. So, if you have a consumer counsel and he brought an appropriate action, the FTC would have the power to assess a civil penalty. Would you agree with that much broadening of the powers of the jurisdiction of the FTC?

MR. WEIL. No, I would not, Mr. Chairman, because of this very cloudy area of section 5, of there being a great deal of uncertainty over what it really means. Further, I do not think the civil penalty thing would help the consumer at all; it would put no money back in the consumer's pocket.

If you are going to convert the Commission into a board or a court for having the individual consumers come in and establish their damages as they would have to do in court in a class action, I do not know what you would accomplish beyond what you would accomplish through a properly formulated class action in the first place in the courts.

Senator Moss. I wonder under the present system do you feel that the consumers really have an opportunity to recover for losses on goods that they have purchased in a deceptive situation? Is there any practical way now for them to recover without a general granting of a class suit power that we have?

MR. WEIL. In many of the States legislation of this sort is going on apace, which presents another problem of duplication. In New York City there is a city law. There can be State laws, and then on top of that if one imposes a Federal law, would a given consumer be able to recover three times for the same thing by going into three separate courts or coming in under three separate statutes? There is a great deal of potential overlapping.

I think more and more there are remedies being provided on a local basis, and as I listened, again getting back to the beginning here, fraud, deception, and so on, as I listened to those specific ones listed, they seem to have the element of being quite local in their character, the door-to-door sales and things of that sort. They do not seem to embrace a great deal that sweeps over the Nation as a whole, one particular practice.

The localities are proceeding more and more to take up arms against these practices, and they are perhaps a great deal better equipped to administer it because these matters could come before local juries who know the locality, know the people involved, and to the extent that those do not exist I would answer your question, no, except where a retailer or a manufacturer will voluntarily take his responsibilities.

In many instances there is no practical remedy because the amount of damages is too small for the consumer to be bothered, it does not pay him to go out and retain an attorney to prosecute a case for \$50, it will cost him more than that for his lawyer, I agree.

As I say, we are not opposed to the concept of a class action as such because we think it has appropriate areas, but it should be tailored to them.

Senator Moss. Do I understand from your reply that you feel this could and should be left to the local jurisdictions and should not be incorporated into any Federal statute?

MR. WEIL. Well, certainly to the extent that we are talking about local wrongs, localized wrongs, I think they should be. If the people of a community which is particularly affected by the misdeeds do not have enough interest and if the consumers and the electorate in those communities cannot whip up enough interest in their local legislatures, I do not know why the Federal Legislature, burdened as it is with more than enough fairly extensive problems to demand its full man-hours

and brain-hours, should get into Main Street activities. Where they all link together, a national or even a widely regional practice, malpractice, then, yes, once it goes into these various areas, perhaps the need for coordination, the need for overall perspective, might dictate Federal interest.

But on most of these local things, if the local community is not that interested, I really do not see why the Federal with its own set of problems should undertake to do more for the locality than it is willing to do for itself.

Senator Moss. As you know, New York City now has a class action statute which is considered landmark, but it is confined to the jurisdictional limits of the city there. Why, if this is available there and suitable there, should not the same general right be granted under a Federal statute?

Mr. WEIL. I did not say that it should not. I think that where practices are involved which extend beyond localities so that the only governmental structure which is capable of dealing with them effectively is the Federal Government, that, then, that is a suitable cause for Federal concern. But where it is not a lack of local capability but merely a lack of local interest, I do not see why the Federal Establishment should step in.

Senator Moss. Do you agree with the concept in S. 3092 that provides that State substantive law be the basis for a class action in a Federal court?

Mr. WEIL. There again I think that is part of the past answer. If the State is not willing to provide that remedy within its own borders for its own citizens, I do not know why it should become a matter of Federal concern. Now, if on the other hand we look at it extending beyond the State borders, then you get into an interesting conflict of laws. If State A makes a certain activity unlawful and that activity is performed in States A and B but it is not unlawful in State B, what would the subcommittee's contemplation be of the reach of a class action in that case; to extend State A's laws to a citizen of State B?

Senator Moss. It depends on the jurisdiction where the fraud occurs, of course, if I heard all of your answer correctly.

Mr. WEIL. May we not talk about a fraud but a violation of a State law. To the extent that the activity is performed in State B, which has no law such as that of State A, would it be the idea to confer a Federal class action on the citizens of both States A and B for the violation of State A's laws?

Senator Moss. No, until the act was committed within State A which had the substantive law, I do not think it could be applied.

Mr. WEIL. In that case, State A ought to be able to handle it itself, and if it is not interested enough to apply class action, then I do not know why the Federal Government should be. I think it is up to State A to take care of the citizens of State A, and if it elects not to, then I do not think it is up to the Federal Establishment to come in and say, "You are not doing the proper job for your citizens, so we are just going to have to step in and do it."

Senator Moss. I think in your testimony you said that class actions are inefficient remedies for consumers. Do you not think they provide an effective means to recover?

Mr. WEIL. No, I do not, Mr. Chairman, in many instances. We are back to the same problem as with individual actions. Where the quantum of damage per capita to each individual member of the class is quite substantial, then they could be effective, but where it is not substantial I do not think they are going to do much good for the consumers because the class action is not a magic wand which one waves and then suddenly recompense flows to each individual who has been damaged or claims he has been damaged. Each individual consumer who wants to get money in hand, even in a class action, has got to come into court and prove that he was wronged and that he was injured before he may receive recompense.

Senator PEARSON. Insofar as the problem is national in its nature, would not the businessman in his necessity for certainty to do business be much better off seeking to comply with a Federal statute than he would be with some 50 separate measures and regulations?

Mr. WEIL. Possibly so, Senator Pearson. I think I will have to agree with you. But he is not going to have that anyway. What he is going to have is the Federal plus the local. He is not going to have one in place of the other.

So again maybe that adds to the responsibility of the Federal legislature to try to do what it can to eliminate unnecessary overlapping and duplication.

Senator PEARSON. There has just been so much testimony and so much emphasis on the availability of an easy and adequate remedy for consumers that, just for myself, I think if there is to be any achievement in these items of legislation that that may be secondary.

The first goal to achieve is to eliminate and prohibit and deter consumer violations, and I think that would be the role of the Government. When these violations occur in spite of the best efforts, then remedies as a second level ought to be available and to such an extent that they act as a further deterrent.

Whether or not you agree with that, if the primary purpose of this and all other regulation is not remedies but prohibition, where should that lie? In the Federal Trade Commission? In the Justice Department? Some new consumer council that the administration would set up some place? Where would you assume that should have its proper place?

Mr. WEIL. I think that should be divided. We have had up to now pretty much division on a rational basis which has been mentioned earlier this morning, that the Federal Trade Commission because its cease-and-desist orders do not involve ex post facto penalties will develop the law, and then once one is on notice as to what the new law is henceforth, then violations of that, for which there is no excuse, would be prosecuted, and if there are more hard-core violations they should be prosecuted with more hard-core enforcement proceedings, many of which exist today as I said before, Senator.

I can hardly think of any of these hard-core frauds that can be perpetrated without violating the mail fraud statute as it stands today.

Senator PEARSON. I think you are right.

Mr. WEIL. There are many other statutes in the broadcast field and so on where fraudulent acts like these are criminally punishable and people can be sent to jail. In the food, drug, cosmetic and device area you have got your criminal penalties under the food and drug law. So how much more provision for this preventive activity that you

speak of is needed, I do not know. I think there are very few chinks to be filled in on that.

Senator Moss. Is not one of the objectives of having the class action suit that you bring into play enforcement procedure in the hands of the consumer rather than depending on a Government agency enforcement which you need in the mail fraud and in the various other ways you are talking of now?

Mr. WEIL. I agree with you precisely, Mr. Chairman, if it be a properly formulated and controlled class action. We are not against class actions as such.

Senator Moss. I wonder if you could supply us with some language distinguishing between "trivial" and "serious" which you have tried to draw the line on.

Mr. WEIL. Yes.

Senator Moss. You send it in writing, and any suggestion you have along that line.

Mr. WEIL. I would be very happy to try, sir.¹

Senator Moss. Maybe each individual loses only \$5, but if a class action goes across a wide spectrum, there might be a lot of money involved.

Mr. WEIL. Would anyone be interested in having a class action if the consumer lost only a nickel?

Senator Moss. It depends on how many there are.

Mr. WEIL. Do not forget, to be effective each one of these consumers has to come in and testify that he lost a nickel. Is he going to bother?

Senator Moss. We do thank you. We apologize for having kept you so long before the committee. It has been very enlightening and helpful, and we are very glad to have had your point of view. We appreciate it very much.

Mr. WEIL. It has been my privilege, Senator. Thank you very much.

Senator PEARSON. Thank you very much.

(Mr. Weil's statement follows:)

STATEMENT OF GILBERT H. WEIL ON BEHALF OF THE ASSOCIATION OF NATIONAL ADVERTISERS

My name is Gilbert H. Weil, and I appear here as general counsel to the Association of National Advertisers, Inc. (A.N.A.). My client, and I personally, are very appreciative of the opportunity to present some observations concerning S. 2246, S. 3092, and S. 3201.

The A.N.A. is a trade association whose members are companies which use national or regional advertising to promote the sale of their products or services. The membership totals approximately 500 companies.

As you can see, it might be said of most of our members that consumers are their business and their only business. Beyond that, every individual in this nation is a consumer; and that includes people who own, who manage and who operate our member companies, as well as their wives and families. Only unreasoning prejudice and emotional fanaticism can accuse them of not being pro-consumer in principle and in essence.

I stress this, because it would be most unfortunate if their constructive, or even wholesomely motivated negative criticisms of specific measures in this field were to be maligned, and hence discounted, *ad hominem* rather than be evaluated upon their merit.

The fact that consumerism is a white horse does not mean that everyone who leaps onto its back is an expert rider, or that every direction in which it might be taken dashing off is the right one. Programs which in practical operation may result in poorer products or service for consumers, or restricted choices,

¹The information requested appears on p. 219.

or higher prices would be anti-consumer no matter how well-intended they might have been, or how appetizing they might be labeled and dressed. Realism cannot allow us to leave out of sound consumer planning the consideration that costs added to manufacturing or distributional processes, and impairments of efficiencies and economies in such functions, must ultimately backlash against the consumer himself. Dispassionate, objective and competent consumer cost-benefit ratio type of thinking is called for, unless the real reason for a proposal is to vent wrath and punishment upon those who sell to consumers.

Indeed, it may well be that this is a major innovation underlying the tidal wave of consumerism legislation and regulation that is inundating business at this time. One can hardly review the amassment of city and state, as well as federal, enacted and proposed laws on the subject without recognizing that there has to be a basic assumption that no amount of harm to consumer industries can produce any degree of harm to consumers themselves; and that any degree of chastisement of such business, however extreme, can only redound to the public benefit. If such is the actual orientation, it should be brought out into the open where the validity of its premise and the impact of its consequences upon the consuming public can be effectively and adequately explored before Congress commits itself to legislation implementing so drastic a purpose.

Hopefully, our Association can offer some contribution to analyzing the subject bills to the end that consumerism will not harm its own cause in over-reaction against particular undesired conditions, even though they may be real and not fancied or exaggerated. In that vein, then, I turn to the specific bills.

S. 2246: In the last session of Congress the A.N.A. testified in favor of legislation which would have enabled the Federal Trade Commission to seek a temporary injunction from a federal district court in any section 12 or section 5 case, provided the grant or denial of its request would be governed by traditional equity doctrines. The bill was S. 3065, and it was ultimately passed by the Senate after having been amended to incorporate that proviso (Congr. Rec. July 18, 1968, pages S 8475-S 8480, and S 8502).

Reasons for explicitly including such safeguards in the bill were included in my testimony in passages which are equally applicable to S. 2246. I stated:

"A temporary injunction is a drastic remedy. It is granted in civil cases only when the court is convinced of two essentials: that the plaintiff in the case is highly likely to be the victor after the case has run its full course, and that the plaintiff will be seriously and irreparably injured if he does not get the temporary injunction in the meanwhile. Even then, a bond is usually required of the plaintiff to indemnify the defendant for the harm occasioned by the temporary injunction if it later turns out that the plaintiff was wrong.

"In many instances, if not most, a temporary injunction at the behest of the Federal Trade Commission will mark the end of the case. Once an advertising campaign has been interrupted, it will rarely be worth reinstating a year or more later, especially if a cloud has been meanwhile cast upon its believability by the interim pronouncement of a court that it is so probably and grievously deceptive as to call for summary interdiction. Thus, the question becomes unfairly begged, for an ultimate determination of whether the temporary injunction had really been justified in the first place may never be made; and the right to make the claim (and the public's right to receive it) will have been lost to the force of circumstances, even though it might have been vindicated by a full and fair trial.

"In this very connection, it is important to note that there may be an unusually liberal predisposition in some courts to grant temporary injunctions to the Commission where it would not issue them, under the same facts, to private plaintiffs. This would be due not only to deference to the Commission as a guardian of the public. (That office is undoubtedly entitled to great respect and weight; but it should not be a substitute for proof that the proper prerequisites exist for unleashing such a potent, and potentially damaging, weapon as the temporary injunction.) It would be the consequence, also, of the wording proposed, that the temporary injunction be ordered 'Whenever the Commission has reason to believe' that there is or is about to be a violation of section 5. That might be construed to mean any case in which the Commission issues a complaint, for such 'reason to believe' is a statutory condition precedent to instituting every case under section 5(b) of the Federal Trade Commission Act. Some courts (with others disagreeing) have given almost that automatic an application to such language in the present section 13(a) of the Federal Trade Commission Act.

"Certainly it cannot be intended that there shall be a right created for the Commission to have a temporary injunction in every case it brings.

"But if it is not so intended, there should be some legislative pronouncement to inform the courts that they are required to exercise the drastic remedy only in the drastic situations.

"And there is a further evil in making temporary injunctions that easily available. The road to a temporary injunction should not be so inviting that the Commission may seek to travel it in any but relatively extreme cases where, as the Chairman has said, there is actual intent to defraud, clear violation of the Federal Trade Commission Act, and truly substantial injury to the public; for the very act of seeking the temporary injunction commits the Commission to a point of view as to the merits of the case which renders it virtually incapable thereafter of proceeding with the judicial-like freedom from bias that is so essential to a fair trial, or at least to the appearances of a fair trial which, as Congress emphasized so often during its deliberations upon the Administrative Procedure Act, is equally important in preserving public respect for the law and order of the administrative agency process.

"Mr. Justice Fortas expressed this well in his dissenting opinion in *F.T.C. v. Dean Foods Company*, 384 U.S. 597 (1966), when he wrote, at pages 617-618:

"The Commission was not intended to—it has no power to—it should not—make a judgment on the merits prior to notice and hearing. To sanction its doing so is to strike a devastating blow at the fundamental theory upon which the exercise of both prosecutorial and adjudicatory functions by an administrative agency is based. Cf. 5(c) of the Administrative Procedure Act of 1946, 5 U.S.C. 1004(c) (1964 ed.).

"The Commission, prior to taking evidence and writing a report, is supposed to make only a very limited judgment: that there is "reason to believe" the law is being violated. But to obtain a preliminary injunction, it must—without hearing the other side, and ordinarily merely on its staff's recommendation, necessarily based upon a quick exposure of the facts—file affidavits or produce evidence with the calculated purpose of demonstrating to the court of appeals that consummation of the merger will have such adverse effects that it must be halted in limine. In fact, and in all realism, it must take positions and establish, with sufficient positiveness to overcome strenuous opposition, that the merger will tend substantially to lessen competition or create danger of monopoly, that it is harmful to the economy, immediately threatening in its consequences, and that it is unlawful. There must be Commission conclusions, not merely the views of the staff. Their assertion and necessarily stout advocacy make a mockery of a subsequent quasi-judicial proceeding in which the Commission is supposed objectively to consider the same issues on the basis solely of the record."

"Notwithstanding that a bare majority of the Supreme Court did not find this reasoning sufficiently compelling as a matter of law to govern the decision in that case, its logic may well command respect, as a matter of policy, in the legislative chambers.

"This would seem especially appropriate to the fundamental character of the Commission's function, as originally conceived under the Federal Trade Commission Act; that is, to serve as an advisor to the befuddled businessman as to the specific application to particular practices of the general language of the antitrust laws (and of section 5 of the Federal Trade Commission Act itself).

"Necessarily this calls for constant clarification of what has previously been obscure;—a clarification which should be reached only after full and considered, and open-minded deliberation; and which should not then serve, *post facto*, to punish.

"The temporary injunction process is antithetic to all of that, by predisposing the Commission too prematurely to its ultimate conclusion (as Mr. Justice Fortas points out) as well as by aborting many cases short of full exploration and resolution (as we have earlier referenced), thus frustrating the primal purpose of elucidation."

Similar reasoning, and an explication of why the requirement of "a proper showing" in S. 3065 (and now in S. 2246) did not adequately meet the situation appears in the colloquy upon which the amendment of S. 3065, and then its passage, were based (Congr. Rec. July 11, 1968, pages S8478-S8480, S8502).

The President's consumer message to Congress of October 30, 1969 regarding temporary injunctions on behalf of the F.T.C. was unequivocal in stating that the usual protections for a defendant (except for a bond) should be applicable. He said, "The judicial process includes safeguards which will assure that this authority is fairly used. Courts will retain their usual discretion to grant or deny

an injunction in the light of all the consequences for both the accused and the plaintiff. Parties will, of course, retain their right to a fair hearing before any injunction is issued."

S. 3065, as amended, took care of all that. A.N.A. proposes that S. 2246 be similarly amended; and in that form A.N.A. will wholeheartedly support it.

S. 3092: A class action can be an extremely costly and harassing event for a company, even if it ultimately wins the case. Such cases impose upon courts, as well, heavy administrative burdens, to the detriment of their already overloaded dockets and strained budgets. The costs of both these drains come eventually back to consumers in prices and taxes.

Drastic remedial procedures (and the consumer class action is certainly a drastic procedure) should be reserved for serious offenses. S. 3092 would authorize them for trivial transgressions which come to be classified as illegal under section 5(a)(1) of the Federal Trade Commission Act only by the hypertechanical legal gymnastics of an administrative agency that acts at one and the same time as the complainant and prosecutor in the very case in which it sits as judge.

I present no brief for those who perpetrate clearly wrongful frauds which cause significant damage to consumers. But that is not all that section 5(a)(1) is about. The section embraces many decisions by the Commission which are so tenuous and contrived that they could result only from the fact that the Commission is empowered to act as judge and jury over the evidence its own attorneys have presented to support its own complaint in the case,—and even, in some instances, to disregard the actual evidence and substitute, instead, its own subjective opinion.

In one case, for example, a manufacturer advertised his product as a permanent hair color. What he meant and thought women would comprehend was that the dye would not wash out. F.T.C., however, complained that a substantial number of purchasers would believe that the dye would color hair not yet grown—in effect, that one application would suffice for a lifetime. At the trial the Commission's attorneys found one witness to testify, after much prodding, "that you would think 'permanent' means you would never need to bother having it dyed again"; although she herself knew better. Although the federal court of appeals reviewing the Commission's decision said, "It seems scarcely possible that any user of the preparation would be so credulous as to suppose that hair not yet grown out would be colored by an application of the preparation to the head", it was bound to affirm the Commission's power, under section 5(a)(1) to reach such an artificial conclusion. (*Gelb v. F.T.C.*, 144 F. 2d 580.)

In a more recent case, ten consumer witnesses produced by the Commission's own attorneys testified that the product involved would satisfy the purposes for which they would use it as they understood the challenged advertising. The Commission itself proceeded to reject their testimony (which, if accepted, would have required a decision in favor of the advertiser) and made its own *ipse dixit* conclusion that the advertisements should be differently construed and, that, under such interpretation, they would then become false. (*Bakers Franchise Corp. v. F.T.C.* 302 F. 2d 258.)

In *Prima Products, Inc. v. F.T.C.*, 209 F. 2d 405, Judge Medina, writing for the appellate court in a case where the Commission had found false a representation that use of the product was "easy", observed. "The directions . . . are plain and readily understood by anyone of average, or even less than average intelligence . . . A person of average intelligence would surely have no trouble following the instructions." Nonetheless, he was compelled to affirm the Commission, saying, "After all, 'easy' is a relative term and we cannot say that no one would be misled."

Beyond these aspects of section 5(a)(1), it operates in situations which involve no real damage to consumers, conduct which—as exemplified in cases such as those just discussed—seems hardly to warrant the extreme punishment of being subjected to consumer class actions.

One need only cite the *Mary Carter* case where, although it was a conceded fact that the defendant's paint offered, gallon for gallon, the same value as competitive paints selling at double the price, F.T.C. held it unlawful deception to represent that the consumer would receive one gallon free with each gallon purchased. (Mary Carter had simply preferred, for marketing reasons, to sell twice as much paint for the same price as competitive equivalent qualities rather than offer the same quantity at half the price.)

More recently the Commission ruled it an illegal misrepresentation to fail to state affirmatively in a drug advertisement that the ailment for which the product was offered could not be reliably self-diagnosed by laymen. No claim

had been made to the contrary in the advertising, and common knowledge alone would seem to dictate the reservation implicitly. Of even later vintage, the Commission has proposed trade regulation rules declaring it illegally misleading and deceptive to sell textile products without labels that give full information for their laundering, dry-cleaning, preservation and the like, with guarantee obligations for the accuracy of such declarations attaching to the persons responsible for such labeling.

It is no exaggeration to say that there is hardly any advertisement which could withstand a firm intent by F.T.C. to rule that it violates section 5(a)(1). It is precisely because F.T.C. has such vast power to extend the reach of the law to surprising and tenuous applications that monetary or other penalties have been withheld, at least until a person repeats the violatory conduct after it has been declared unlawful and enjoined by F.T.C. In that way one is spared the injustice of heavy *ex post facto* penalties in an area of the law which possesses remarkably little by way of predictability. Now, however, this bill, by setting up section 5(a)(1) of the Federal Trade Commission Act as a foundation for a consumer class action based retroactively upon the violation covered thereby, would subject the defendant to extreme expense, harassment and potential monetary liability for acts which might have been reasonably thought to be lawful when undertaken, and which have subsequently been branded otherwise only by hypertechnical and attenuated rationale; and, moreover, with perhaps no more than a philosophical kind of harm to the public (e.g., the "sandpaper" case, in which a mock-up prop was used to produce an ultimate television picture which faithfully duplicated what the viewer would have seen in a real-life demonstration using authentic materials; or the *Mary Carter* case referred to above, in which the purchaser got the full dollar's worth of paint the advertising had promised him.) Even if the consumer class could not show actual harm of a serious nature to purchasers, it could still prosecute the case to a successful conclusion (the bill sets no minimum amount damage per individual to arm the class action; presumably 1¢ per capita would be sufficient), and the plaintiffs' cost of the suit and reasonable attorneys' fees would then fall upon the defendant.

Even more shocking is the fact that a company may find itself beleaguered by a consumer class action for an activity which not only is inconsequential insofar as significant injury is concerned, and which had never been deemed to be unlawful until the F.T.C. had attenuated section 5(a)(1) to cover it, but which had been performed by the company in total good faith. It has been held time and again that the F.T.C. can brand conduct as "unfair or deceptive" under that section even though it was performed with the utmost of honesty in motive and intent.

The reason given to justify that surprising latitude has been, as mentioned above, that the Commission's innovative rulings do not impose any *ex post facto* penalties or liability upon the company, but merely require it to modify its future activity. S. 3092 would pierce to the heart whatever justice there may have been to that argument.

Despite all the harm—and injustice—S. 3092 may work upon companies which have committed no misdeed to warrant such punishing legal involvement, it would be remarkably inefficient in securing speedy redress for those consumers who have been victimized to their substantial injury by hard core frauds. Other statements to your honorable subcommittee, such as that by the American Retail Federation, will specify the reasons for that; there is no need for me to reiterate them—they are soundly and lucidly presented.

My point in referring to them here is merely that, if expeditious and adequate redress for damaged consumers by way of compensatory damages is truly the objective of this bill, such good as it may accomplish is considerably outweighed by the harm it can do through being as available for *de minimis* or merely theoretical injury from highly strained constructions of section 5(a)(1) as it is for hard core frauds causing substantial harm.

The fostering of coercive and economically wasteful strike suit threats or litigation should be neither the goal nor the event of congressional action, unless it is an unavoidable consequence of serving a far greater good which cannot otherwise be achieved. That is not the balance I see in S. 3092, and I respectfully submit that it should not be passed unless the dominant purpose is to belabor industry more than to recompense injured consumers.

S. 3201: The comments which I have already made with regard to S. 2246 are equally applicable to Title I of S. 3201 dealing with preliminary injunctions. The only difference between the two bills in this department is the addition, in S. 3201, of the words "of need" following "upon proper showing" (p. 2, line 20).

I don't believe this makes any substantial difference, except, perhaps, to relax the traditional prerequisites to exercising the drastic procedure. Ordinarily these are a demonstration of the likelihood of the plaintiff's ultimate final victory in the case plus proof of his need for the immediate relief. By expressly mentioning only the latter, the reference phrase might be construed as dispensing with the former.

I also reiterate, with respect to section 204 ("Suits by Consumers Adversely Affected"), my criticisms of S. 3092. It does not seem to me that there is any meaningful distinction between the two.

The supposed limitation of class actions under this section to the unfair or deceptive practices listed in section 201(a) loses whatever purpose it might have had by the generality in section 201(a)(11) covering representations "that goods or services have . . . characteristics of . . . performance, . . . uses, benefits . . .". There is virtually no exercise by F.T.C. of its broad powers under section 5(a) (1), such as I have earlier described by illustration or in principle, which could not be brought within one or more of those characterizations. The "knowingly" requirement could be readily satisfied in almost any case by a court's or a jury's liberal application of the "disregard of reasonable safeguards or care" definition.

Similarly, the imposed condition precedent to a class action of a successful government action is rendered practically meaningless if it can be satisfied by an F.T.C. cease and desist order. The almost unlimited ability of the Commission to issue such orders, which I have documented above, makes that a very low hurdle indeed. Ironically, it may prove prejudicial to small businesses, which are less able than larger ones to bear the expense and the drain on manpower to vigorously contest an F.T.C. complaint and, therefore, may find themselves compelled, however reluctantly, to consent to the cease and desist order.

The President was quite aware of the different qualities of court judgments and Commission cease and desist orders; and he intended to distinguish between them as qualifications for launching a consumer class action. In his consumer message he stated, "I will recommend legislation to give private citizens the right to bring action in a Federal court to recover damages, upon the successful termination of a Government suit under the new consumer protection law." While this language fits perfectly a suit which has been brought by the Attorney General in a federal court, it is inappropriate to an F.T.C. cease and desist order, which is the result of an administrative *proceeding* (not a "suit") brought under the long existing Federal Trade Commission Act (not "the new consumer protection law").

I therefore respectfully recommend deletion from S. 3201 of section 201(a) (11), of section 201(b), and of that portion of section 204 which commences on page 6, line 15 immediately following the word "decree" and extends to line 22 immediately preceding the word "any".

With such changes and those indicated with respect to Title I, the Association of National Advertisers will support S. 3201.

Senator Moss. Our next witness is Mr. John Banzhaf, attorney, who is president or chairman of the Legislative Action on Smoking and Health.

We are glad to have you before us, Mr. Banzhaf, and we are looking forward to your testimony.

STATEMENT OF JOHN BANZHAF, CHAIRMAN, LEGISLATIVE ACTION ON SMOKING AND HEALTH, ACCOMPANIED BY DONALD W. SALTER

Mr. BANZHAF. Thank you, Mr. Chairman.

By leave of the committee, Mr. Donald W. Salter, a third year law student at George Washington University, who has done some work in this area under me, is sitting at my left.

Before I begin, I think I might reply to a number of points raised in the last discussion while they are fresh in your minds, starting particularly with the sandpaper case.

He used the word "ridiculous" with respect to it, and I would certainly agree with him, but I think for very, very different reasons.

Just to refresh you on that case, this is a case in which a nationally advertised product, a shave cream, claimed that if you sprayed or put this cream onto sandpaper you could then shave sandpaper, purported to demonstrate it before the eyes of a TV audience by spraying it on and instantly shaving.

The FTC found, and it is not disputed, that in fact this was a fraud because you could not shave the sandpaper unless and until you soaked it some 80 minutes in the shaving cream, probably anybody else's shaving cream, probably water, you could shave it. This was a blatant fraud.

The only issue that did finally reach the Supreme Court was the question of using the mockup. It took many, many years going through FTC proceedings, going up through two courts of appeals, two Supreme Court appeals, back down to the court of appeals and eventually back down to the FTC.

By the time there was a final action, the ads had long since disappeared, so that even the normal slap on the wrist penalty of a cease-and-desist order had very little effect.

I might point out that order was issued against the Colgate-Palmolive Co. which I think has a rather long history of being up before the FTC on such things.

The FTC spent quite a lot of time on this particular TV mockup, a lot of time, a lot of money, a lot of court time and lawyers. They thought they had it licked and they issued a cease-and-desist order but this cease-and-desist order was so very weak that today we have another one before the FTC which concerns Baggies which are manufactured by the same defendant, Colgate-Palmolive Co., and according to the FTC the commercial is done like this:

A Baggie and a competitor sandwich bag which have a sandwich placed in them are swished around under the water for a few seconds and according to the FTC the water is forced into the competitor bag, thus presumably demonstrating a Baggie is better whereas the FTC has charged and is prepared to issue another consent decree to the effect that the demonstration proves nothing.

So what do we have? We have a long and involved proceeding taking many, many years, not even a slap-on-the-wrist penalty, and here they are right back up to their old tricks again.

No doubt there will be a cease-and-desist order again, perhaps some more appeals, and then Colgate will go back and dream up something else.

In the meantime we do not know how many countless people may have gone out and bought their particular shaving cream believing that it had these properties or who are now buying Baggies pretending or believing they have these properties.

You asked the question about whether or not many of these things are national in scope. You were told either that they were not, they were principally local, or if they were national they came under the postal fraud section, the implication clearly being that you ought to

get out of the business and go back into the more important work of Congress.

One could sit down and draft an immense list of the major problems in the consumer area and one would find that many of them are in fact, national and the great majority are not in fact covered by the postal fraud sections.

I would cite some which I made notes on listening to the testimony. What about your deceptive gasoline ads over television, the detergent gasoline, which contains no more detergent than any other gasoline, gasoline with remarkable properties which it does not in fact have, gasolines which claim remarkable properties and in fact sell somebody else's gasoline to the consumer?

You go up to your Esso station to get the gasoline with go go go, you may very well be buying Shell gasoline which may or may not have the go go go, and we all remember the famous gasoline with or without the platformate. You could not buy a gasoline without platformate.

Take the analgesic ads on the air that contain these mysterious ingredients. It is only aspirin. They do not tell you that. How many people are going out spending a great deal of extra money on them, perhaps believing that it gives them something more than aspirin, perhaps delaying them going out and seeking and getting competent medical help and stronger medicine in this belief?

The same thing could be said for a wide number of the detergent ads, all of which have magic, miracle ingredients which upon tests by reputable organizations like the Consumers Reports, Consumers Union, prove to be very, very ineffective and perhaps even rather damaging to the environment.

We have nationwide games; Congress has investigated this—gasoline games, foodstore games, giveaway games, prizes being given out misleading. There are in some cases no prizes or almost no prizes. This is certainly a nationwide thing affecting everyone.

We have Firestone tires, they stop 25 percent quicker, so says Firestone, in direct violation of the FTC's longstanding regulation against dangling comparatives. We find that 25 percent of them tested, according to the very minimal standards, do not stand up. Clearly a major national problem.

We have problems of auto prices, both in the so-called list price which nobody ever pays or even in these so-called comparisons with last year's prices, except they change the vehicles slightly to make you think you are getting a better buy.

We have advertisements of dangerous products. We have 10,000 colored television sets which will catch fire this year, and everybody says we cannot do anything about it. Perhaps some of those 10,000 will be radiating the consumers watching them. If not, surely others will be.

Even articles that you do not think of as dangerous. Raleigh bike, it has a coaster brake and a gearshift. What they neglect to tell you is if your little 6- or 8-year-old child tries to put it in gear, it is often very difficult to get in gear, and if by any chance he does not get into gear, the brakes are disconnected.

The case came up when a father bought such a bike for a child, trying to protect the child because he felt the need for the coaster brake,

the child's hands were too small to operate handlebar brakes. The child found, much to his distress, going downhill that the brake was disconnected and broke both of his arms, a rather hard lesson for a 6-year-old child.

All of these national, not one of them so far as I can see, coming under the postal statute.

Senator PEARSON. The point has been made that if we are to correct some of these consumer problems we are going to add a great deal to the cost in the field of the environment today. If you really go ahead with the programs we are talking about, it is going to cost a lot of money. It is probably going to be passed on either in the form of taxes which the Government gets from people or increased costs of products. Do you believe, and your testimony is most impressive, that many of these things that you have spoken of involve substantial costs which can be passed on and which may or may not be worthwhile to the consumer?

Mr. BANZHAF. No, quite frankly, I suggest just the opposite, that many of the things that I am suggesting and that have been suggested and which are proposed in the legislation would in fact reduce the cost. This nonsense it will be passed along to the consumer is nothing more than nonsense. I refer you to Samuelson's basic text on economics. It is called one of his famous five fallacies. By making the Federal Trade Commission more efficient, presumably it should be able to do more with every dollar rather than less; that with the money Congress is already spending it will get more for its money, because the Commission will be able to do more and be more effective in what it is doing.

The beauty of class actions is they do not cost anything directly because they are brought by private attorneys, not paid by the Government; if they are paid at all, it is eventually out of the pocket of the manufacturer or in some cases, in fact, in most cases, what you will find is when there is a substantial recovery, the fee for the attorney comes out of the recovery, each consumer in effect paying 1 percent of the recovery for an attorney's fee.

So I think it would be just the opposite, but even if it were for just a moment, I think it is worth it. We are talking here about things like 10,000 TV sets every year catching fire in American homes, radiating fuel; we are talking about bicycles which injure, perhaps kill, young children; we are talking about hospital equipment which allegedly electrocutes I do not know how many thousands; we are talking about dangerous space heaters.

Even if we should take the less dangerous and more mundane things like aspirin, bleach, gasoline, does not the consumer deserve to get a high quality product? If the price increases a little bit, I think it will be worth it. I do not think it is going to cost very much to have a gasoline company advertise honestly rather than dishonestly. I do not think it will cost very much to make an automobile manufacturer advertise honestly rather than dishonestly. I do not think it is going to cost the consumer any money to get rid of misleading or deceptive giveaway games, green stamp and other such trading stamp programs. It is not going to cost him money. If anything, this is going to save him money. You are talking about a very, very slight increase in cost for a problem

which has already become very, very clearly one of the leading problems in the country, nationwide.

It is certainly a problem toward which many people feel the most personal dissatisfaction. Yes, we are aroused about the war in Vietnam, but it is somewhat far away for many of us.

Many of us are aroused about the problem of race relations, but for many of us it is far away or it is a crime which occurs somewhere else.

I have asked my class in law school—I said, “How many of you feel you have been cheated in one way or another by an automobile dealer, having not received what you deserved?” I did not see anybody who did not put his hand up. These are young people. They have not been around that long, so they have not bought that many cars.

I asked them how many of them felt they had gotten the short end of the stick recently from a manufacturer or a dealer, and again their hands go up and again these are consumers. If it is happening to college students, law students, if it happens to a guy like me who is not afraid to take a man to court, a lawyer who is an engineer and a mechanic to boot, and I cannot get my car fixed in accordance with the warranty, goodness help the consumer who does not know the carburetor from a clutch and who has not any idea what his legal remedies are.

Mr. Chairman and members of the committee, recently Congress passed, among others, two laws designed to protect the consumer. One was designed to guarantee him truth in packaging and labeling, the other truth in lending. Weak as they were, at least they were a step in the right direction. Congress has now been asked by the administration to pass a new law, the so-called Consumer Protection Act. This bill, however, is so bad that it fails to meet even the comparatively low standards set by these prior acts. By this I do not mean that it is just not as good. I believe S. 3201, proposed by the administration, judged by the standards of a consumer product, would fall afoul of these two acts.

In reality S. 3201 is a product, a product a clever merchandiser is trying to sell to the Congress and to the American people. I therefore suggest that we examine it and measure it by these meager standards of the prior acts.

The Consumer Protection Act is a product packed in a box bearing a very deceptive label. A closer examination shows that the box also has a false bottom, lots of stuffing and little substance, and upon a longer examination actually begins to smell. The consumer is made to think he is getting something for nothing, whereas in fact the value is low and the cost—in many cases a hidden cost—may be very high.

Section 101 changing “in commerce” to “affecting commerce” is a small change of little importance because the Commission already exercises a wide jurisdiction covering, for example, interstate advertisements.

Section 102 providing for injunctions pending long and drawn-out Commission proceedings is a step forward which has been long overdue. Yet the first part of that section appears to be deceptive because under section 13, the Commission already has the right to seek injunctions for violation of section 12 by “any person, partnership, or corporation” whereas the proposed section 102 appears to limit this to action against “any person.” The Lord giveth and the Lord taketh

away, but not Nixon. This is just like the advertiser who proclaims "New, Larger Size" while reducing the contents by 20 percent.

Section 201 defines as unlawful a number of practices—all of which have been repeatedly held by the Commission to be unfair or deceptive—but with loopholes or limitations big enough to drive several trucks through. Seven of the 11 specified acts use the qualification "knowingly," a very difficult standard to prove and less than we have with respect to some major crimes.

It appears to me that where the supplier misrepresents his goods, and the consumer is thereby deceived, the practice should be stopped and the money returned, whether the supplier did so knowingly, recklessly, negatively, stupidly, or even by accident.

Remember, we are not here imposing any penalty; the act calls only for a termination and a refund of the consumer's money through the subsequent class action procedure.

Before you ask the question, I will say I have looked further at the definitions, and I see the term "knowingly" which makes it in part a little bit better, but it is still a difficult subject. If we want to be efficient, if we want to save money, why make it a two-step process? Why ask the FTC or the Attorney General to first determine that such a deceptive act is going on and then to have to probe and find out whether it is being done knowingly, recklessly, stupidly or negligently or by accident? Why not have him do the first step of discovery that the practice is going on and is a detriment to the consumer and then put a stop to it? Why put in the loophole? Why add this additional burden?

Definition 11 apparently would allow a supplier to knowingly misrepresent the sponsorship, approval, origin, characteristics of safety or performance, ingredients, uses, benefits, or quantities of his products—and that is just about everything I could think of to misrepresent in a product I wished to misrepresent—or services as long as he did not take unfair advantage of the level of knowledge, ability, experience, or capacity of the consumer.

Yet the Commission and the courts have repeatedly held that the standard to be applied is not just the average consumer but rather "that vast multitude which includes the ignorant, the unthinking, and the credulous."

Unfortunately there are too many of these. I am thinking particularly of people in the ghettos who do not or may not have the kind of education to recognize this kind of fraud. I am thinking of the young who are not yet so sophisticated that they can see through many of these languages. I am thinking also of those who perhaps have a little bit of trouble with our native language—Puerto Ricans, Mexican-Americans, others; all of these deserve the same, if not more protection, and yet we are opening it up, weakening the standard which the FTC has already developed by giving the manufacturer this tremendous loophole to make all kinds of misrepresentations.

Thus, at most section 201 restates old law, decisions of the Commission, and seems to substantially reduce existing standards and open up new loopholes.

I must object most strongly to the remainder of the bill which gives little and takes away much. I refer to the whole idea of the right of a consumer to bring an action being restricted to a "triggering" by the Attorney General.

The Federal Trade Commission was supposed to protect the consumer from such deceptive practices but it has not. Although I would be the first to admit that it clearly needs more power, it has not really used the power that it already has. Although it has the power to seek strong penalties for violation of its orders, up to \$5,000 in fines a day, it rarely has, preferring, particularly where the offender was a large one, to simply warn them that we are about to begin to consider enforcing a prior cease and desist order.

Now it occasionally writes a letter to the effect, "Are you violating our cease and desist order?" I would love to have somebody suggest that the Attorney General write to murderers, forgers, bank robbers asking if you are contemplating any bank jobs or forgeries or murders.

Although it has power to seek strong penalties for violation of its orders, it rarely has, preferring to warn the offender time and time again. Although it has the power to require an affirmative disclosure in future advertisement by an offender of the nature of its offense, it has failed to do this and is now working hard to keep five of my law students from requiring them to do so. That this is one of the ways they can use the power which they have, to do something to protect the consumer.

As the committee knows, the cease and desist order is simply nothing. It is a slap on the wrist which usually occurs after the practice has long been discontinued. Why not require in the ad that the person put down as for instance in the case of Campbell Soup that will be argued Thursday, "We have in the past placed marbles under our soup to artificially enhance the appearance of the ingredients"?

A simple step like that provides at once deterrence, information and warning to the public and at no cost whatsoever to the FTC, the public, nor even to the advertiser who presumably will continue to advertise.

Although the FTC is supposed to protect the public—and indeed admit that they rely principally on the public for information about deceptive practices—they refuse to allow any representatives of the public to participate in consent decree proceedings which is how the great majority of their cases are now settled. Even more incredible, two of my law student groups sought to examine some major advertisements heard daily on television. They wished to determine whether they were deceptive so that they could assist the Commission by filing a detailed complaint with citation and authority. They asked for copies of the ads which were available at the Commission and were told by the Commission, "We are very sorry, those are confidential." They are confidential! They are heard every night on television, and yet the FTC regards them as confidential.

I would suggest to you as long as the high-level staff of the FTC holds these views, one could only wonder about the efficacy of expanding their jurisdiction, giving them additional powers or even setting up new bureaus within them, although I certainly do not oppose any steps in those directions.

In short, I don't think any knowledgeable consumer or consumer groups trusts the FTC to protect his interests, even to the extent of their limited power.

Frankly, we have no more reason to believe that the Attorney General will do any better. This is the guy after all who has to go into court after this bill before I can go into court to seek redress for my money. After all, it was the Department of Justice which had sufficient

evidence, in the judgment of appropriate department heads, to seek criminal indictments against the major auto companies for conspiring to delay the development and installation of air pollution control devices on automobiles.

If this allegation was true and they had enough evidence to go for a criminal indictment, this meant that the automobile manufacturers were responsible for hundreds of million dollars worth of damages, and much of the air pollution in our major cities. For obvious political reasons the criminal charges were never brought, and the Attorney General waited until 10 days before the end of the previous administration before bringing even civil charges.

The new administration has now entered into a consent decree, arguing that the cost of prosecuting its case was too high, a rather dubious saving of money, and there was only very strong pressure from Members of Congress and others which kept the evidence from being lost forever from representatives of the consumers who were willing to go in and take the time and money to prosecute this case on behalf of the consumer.

Gentlemen, with all due frankness, I don't want my day in court to depend on people like this. It was, after all, the Department of Justice again which recently appeared in court, in the Supreme Court, to urge a further slowdown in racial integration of schools after 15 years of all deliberate speed. Should my rights to recovery depend upon such callous political decisions?

If we look only to Government to do something about consumer problems—and only the Government—we can never win. We could line Pennsylvania Avenue with Federal Trade Commissions and not have enough manpower to police one-tenth of the misleading ads and deceptive trade practices, and the same holds true for the Justice Department. No matter how you slice it, there will always be problems of bureaucracy, redtape, political pressures, incompetence, understaffing, and other problems if we rely principally on the Government or condition other actions upon their decisions.

This is why I am somewhat skeptical of adding a new division at the Justice Department, a new division at the FTC. In the beginning we set up the FTC to protect the consumer. Now we want to add a division within it to represent the consumer before it. There are other proposals to establish an outside organization which would represent the consumer in agencies which were originally supposed to represent the consumer, and I suppose in 5 years somebody will want to set up a special department within this outside department, which itself goes before other agencies to represent the consumer.

I certainly don't oppose them. I am simply a little dubious as to how effective they might be.

Let me suggest an alternative.

Why not encourage some of that self-determination we hear so much about today and let the consumer do some suing for himself. The purpose of consumer suits and class actions is to encourage the consumer to do the job because there are so many of them. They are collectively immune from a wide variety of pressures, and, best of all, they work for free.

To allow the consumer to sue only after the Attorney General has done so is to fly in the face of the purpose of individual actions which

is to allow the consumer to supplement whatever other tools and remedies the Government in its wisdom provides.

I therefore say to you, let us sue too; just give us the tools we need and then get out of the way if you want to see a real customer revolution and a real war on consumer problems.

Senator Pastore asked as I walked in, "Who is going to do all the suing?" I think that is a good question. I would suggest that there have been some remarkable changes in the last number of years.

I would point to the many new young public-spirited lawyers now about to graduate or who are now in private practice. I know them because I work with them and I teach them day-in-and-day-out. This is a very different breed from the lawyers we had 5 years ago graduating when I did. These people will bring these actions. They want to. They want to, either as a part of their practice and earn their living that way, or simply as a public service.

More and more of them are going to their law firms, and are saying as a condition of joining this law firm, I want so much time for doing public service work. Arnold & Porter has done it. Other law firms have opened branch offices in ghettos to do this kind of job. There has sprung up in Washington within the last year six so-called public interest law firms—attorneys who take nothing but public interest cases. These are the only ones I know about, and there are probably a dozen more. There are probably more around the country.

I get asked how to set up one in Kansas; how can we do one up there. Even the old-line firms are coming around increasing their emphasis on plaintiff action. This may be for a selfish purpose—they want to make some money at it.

Fine, they are working for free and they are working for the consumer, and if we open those doors just a little bit, I think they will do that kind of job.

There are new legal action public interest organizations springing up who do nothing but take public interest cases on behalf of the consumer. And I would say to you at this point even law students, even people not yet graduating are running out and bringing actions in their own names, as are some of mine and many others. This in the future will be part of the Army, and when they graduate they will become part of the standing Army.

It is for this reason that I support the class action bill of Senator Tydings. But even that does not go far enough. I am a member of a cooperative apartment house. We buy many things. Why cannot my apartment house bring an action? I am a member and a director of a number of organizations. We buy products. We receive ads. We are subject to all the consumer abuses. Why can't we bring actions as organizations? Why limit it to the individual consumer when many of the most powerful actions may come out of people large enough to be able to bring them themselves?

Furthermore, why limit this very powerful action to consumer problems, narrowly defined? We are also consumers of polluted air, polluted water; an environment further polluted by atomic radiation, pesticides and other substances; inferior services and unfair practices by monopoly suppliers; and of many other things, which, as I read it, would not be covered in the act.

Why not simply permit consumers, using the term in its broadest sense, to aggregate their claims to meet the limits set for the Federal

courts, as well as providing that they may be actions for violations of section 5.

In other words, provide that once a Federal court determines that the class action is otherwise proper, it shall look at the damages to the entire class in determining whether the jurisdiction amount has been met.

This in itself would do more and be far more important and be more significant than adding to the powers of the FTC, adding a new division to the Justice Department, or even a shiny new office of consumer affairs in the executive office.

I would like to make one more comment, and that was the suggestion that the consumer class action is limited, because each and every consumer would have to come into court and show that he was gypped out of his 5 cents.

With all due respect to my colleague, this is nonsense. A great many of the class action suits brought in the past have been able to get around this problem. The most recent and the most spectacular problem is the drug case. I think the damage settlements are in the nature of \$450 million.

The attorneys general of the States are acting in part as settlement agents. People coming in with any kind of proof, such as doctor bills and so on, that they have been victimized by this practice are allowed to collect.

Where there is money left over, it will be used to benefit the consumer in the area of the fraud.

In many other cases, it is possible to pass back the saving to the consumer. In the class actions brought with respect to the MTA bus and various actions against telephone companies, for example, the rebate is made right in the bill; the individuals do not have to come in with their individual telephone bills and show how they have been damaged.

The courts are adaptable, flexible; people do keep minimum receipts and they would not have to come in and prove the same facts over and over again. In most cases the courts, as the FTC, are able to assume that where there is a deceptive practice, the purchase in some measure depended on that deception.

I thank you for your attention.

Senator MOSS. Thank you, Mr. Banzhaf, for a very colorful and hard-hitting statement. I am well aware of your activities in this consumer field, and certainly you are one of the most active and effective advocates for consumer affairs.

Your indictment of the administration's bill was quite complete. I wonder if you think that this bill might be used as a vehicle, however, with changes to accomplish some of the things you have been talking about, or do you think the whole thing ought to just be scrapped?

Mr. BANZHAF. I would hesitate to advise a member of the Senate of the experience of Senator Moss and Senator Pearson how best to proceed. It is true that from an acorn—

Senator PEARSON. That is what your whole testimony is.

Mr. BANZHAF. No, Senator. I sought there to advise you about an area in which I thought I had expertise—consumer problems. I do not have particular expertise about how to go about translating the problems into legislative action and getting them through the two houses.

It is true that from an acorn a mighty oak can grow, and in some cases you might have to cut out the rotten part of the acorn. If this is the most feasible approach, I would cut out the rotten part of the acorn of this bill and build an oak tree upon it.

I think a better start would be Senator Tydings' bill, for example. Perhaps adding the two of them and a good bit stronger language would be better. I honestly do not expect that the Congress at this point will pass much of these suggestions because then you would have what everybody is talking about, and that is a real consumer revolution.

Give us these kinds of tools, give me 500 law students in the District of Columbia, and I would turn the FTC and the Justice Department and the major advertisers upside down and shake them. We are doing it with 50 or 60 of them already. Give us the tools we need, given the legal action organizations these tools, and there will be a consumer revolution, and I do not think the lobbyists and the manufacturers and the advertisers are going to allow this. I do not think Congress is going to pass this.

I think you have to use your best legislative judgment as to what you best can get through, and how you can graft what you think you can get through on to the best tree so it might sprout.

Senator Moss. Thank you. You have given us a large order. We will address ourselves to it.

I do appreciate your rather trenchant comments. Indeed, this is a field in which you do have some expertise. So we are very pleased to have it.

Mr. BANZHAF. I may be able to submit some additional suggestions in writing at a later time. I hope I might be able to. I do not know.

Senator Moss. You are invited to do so. It would be helpful if you would.

Senator Pearson, do you have any questions?

Senator PEARSON. No questions. Thank you very much.

Senator Moss. Thank you very much. We wish we had a longer time to talk about it. We are beginning to push the clock pretty hard now.

We have one final witness to be heard, Mr. George Gordin, Jr., of the National Consumer Law Center from Boston College.

Mr. Gordin, we are happy to have you down here. We appreciate your coming.

STATEMENT OF GEORGE GORDIN, JR., NATIONAL CONSUMER LAW CENTER, BOSTON COLLEGE

Mr. GORDIN. If I may, I would like to second most of the remarks that Professor Banzhaf has just made and indicate that my testimony, the statement that was prepared for the record, is perhaps a more sober-sided and slightly narrower confirmation of what he has said.

Senator Moss. We are very happy to have it. Incidentally, the entire statement will be placed in the record. You may handle it in any way you want. If you wish to highlight parts of it, you may do so.

Mr. GORDIN. I realize the time is now short, so I will limit myself to just a few minutes, but I would like to say that we did not receive your letter and therefore did not realize the scope of the hearing until it was too late to do a good analysis.

With your permission, we would like to submit in writing for the record a broader statement covering those propositions, particularly the consumer counsel part.

Senator Moss. That would be welcome. If you would submit it in writing, we would be pleased.

Mr. GORDIN. In commenting on the administration bill and the Tydings bill it is the feeling of the National Consumer Law Center, and my own feeling, that one of the major problems with the administration bill is that it in itself really sets up uncertainties, whereas the Tydings bill provides for more certain prognostication for the businessman.

This I realize is contrary to what Mr. Weil felt about the bills. But in dealing with the proposal of S. 3092 you have the fact of some 55 years of interpretation of the language of the Federal Trade Commission Act, and this has actually resulted in a great deal of certainty.

Secondly, the substantive law that the bill would actuate is largely the law of the States, and here again this is law that has been interpreted and set forth with a great deal of certainty by the various State courts.

I might point out that a good deal of this law is also in the very broad language of the Federal Trade Commission Act itself. Most of the States that have adopted this type of statute have used language similar to the broad general unfair and deceptive practices language of the FTC Act.

If you limit, as the administration does, to a series of 10 or 11 specific acts, all you are doing is inviting the unscrupulous, and after all it is the unscrupulous that these bills are aimed at, all you are doing is inviting them to find ways of getting around those particular prohibitions or finding new ways, new acts, new practices, that will take care of these particular problems.

We have seen this in the criminal law, that when you make the law too specific you are inviting an end run around it.

I think we find the same true in the tax laws, almost all laws. You are really saying you do not trust the courts to be fair and just. Yet I think our general experience with the legal system in this country is such that we can trust the courts to be honorable and just in their interpretation of a broad statement like "unfair and deceptive acts and practices."

So I think it is a mistake to limit the language. Moreover, we would surely have uncertainty with the administration bill because we would be using new language, the courts would have to go through perhaps 20 years of determining what intention is, what knowingly is in relation to each of the 11 practices involved.

We would also have to determine in relation to each one of the 11 specifics what the Congress intended to cover by each one of those acts in relation to a specific practice then before it.

Perhaps a vital defect in the administration bill is the so-called triggering mechanism, that is, the fact that a consumer would have to wait until the Attorney General had decided to bring an action, until that action had actually been successfully brought before he could file an action of his own which would result in a class action.

I think we are all aware of the delays inherent in bureaucracies; this is inevitable whether it is a Government bureaucracy or a private one, a private organization.

It is far better if we would simply take this opportunity to let the consumer handle these things on his own, not bother setting up new bureaucracies. In this way we do not take a chance that the consumer might have to lose all of his remedies simply because of delay. By this I mean the situation where you have a supplier who may go bankrupt over a period of time or who may manage to seclude his assets while the Attorney General is in the process of bringing suit or perhaps is only in the process of thinking about bringing suit.

The consumer at least would have the opportunity as soon as he finds out that he has been defrauded or deceived of bringing the action forthwith and doing whatever the law permits by way of attaching assets.

I would like to make one other point in relation to the problem of national against local acts. Many of these acts in defrauding the consumer or deceiving the consumer may well be local in nature. I would not dispute that for a minute.

I think actually almost everything that is done that is covered by any Federal law is basically local in nature. But the problem is national in a sense perhaps not mentioned by some of the other witnesses who commented on this. The problem is national insofar as we need to get at the assets of the deceiver because if it is covered only under State laws all he has to do is to keep his assets out of the jurisdiction of that State or if it is under a local ordinance, such as New York City, as you mentioned, Senator, all he has to do is to keep his assets out of New York City, and the courts of that particular jurisdiction cannot reach him, whereas the Federal courts have this ability to reach and preserve the assets until the termination of a suit.

Senator PEARSON. They could but it is a little bit difficult today. A judgment in one court can be transferred to another.

Mr. GORDIN. That is true. We are really talking about the unscrupulous, we are not talking about the average merchant here. I think the unscrupulous can always keep ahead of the courts, because the courts are a little slow moving. Even in the circumstances that we are now postulating, if the best of bills were passed we would still have the problem of catching up with some of these people. I think that is where the term "fly-by-night" originated—referring to some of these unscrupulous merchants.

Senator PEARSON. Let me ask a question, Mr. Chairman.

Senator MOSS. Surely.

Senator PEARSON. We really failed, and I am talking about the Congress now in relation to our agencies, using the tools we have had in the field of enforcement, FTC and all down the line. It is not a good record, is it? Whether it is bureaucracy or undermanpower or political pressure, we have not made a very good record in this field?

Mr. GORDIN. It is my personal opinion that we have not, Senator. I have my own personal feeling that bureaucracies are something that are a necessary evil perhaps, but I am very much in favor of doing these things by private action, and I think that one of the things we may have overlooked in the last 50 years in our history of trying to find liberal solutions to problems is the use of private remedies and the use of private citizens.

Perhaps it is only now that we have reached the stage where these remedies and this kind of action can be effective. But certainly, as

Professor Banzhaf pointed out, the private bar now is becoming increasingly concerned with protecting the rights of private individuals, and I think individuals themselves, given the kind of legislative proposals that we are dealing with here, would be willing to take advantage of them to protect their own rights. This, of course, to me would be the most satisfactory way of handling almost any problem that you could think of; that is, in a sense self-help under the aegis of the Congress of the United States.

Senator Moss. If you have finished your summary, we do appreciate very much the statement that you prepared which I have had a chance to leaf through. I see it is quite inclusive, and if it is supplemented by written reactions to the questions which were in my letter this would be most helpful to us.

I agree heartily with your last observations that if we can unleash the enforcement power, as it were, of the common consumer, the ordinary citizen, especially with the awareness that the bar is now showing in advising him and helping him acquire his rights, that perhaps we can get an enforcement that is not available in any way by using the bureaucracy.

This is when I had a little colloquy with Mr. Weil, and he said the postal laws, for instance, would cover most of these things. But there just are not enough postal inspectors and the motivation, money, or time to do all that, but if you could release the initiative of the individual so he could move, perhaps you could accomplish that?

Mr. GORDIN. This is the problem, Mr. Chairman, because you have thousands and thousands of consumers—well, millions of consumers who are defrauded or upon whom there are deceptive practices practiced.

Nor are these practices indulged in by one or two organizations but by thousands of retail or manufacturing organizations.

It just simply would be an impossibility for one agency to attempt to track down and take into court each one of these thousands of manufacturers or retailers who are being unscrupulous in their conduct.

Consequently, I think if you leave it to private action and give them the tools which they now lack, there would be an increase in the confidence of the consumer that he can get justice in the courts, and a consequent decrease in unscrupulous activity on the part of the manufacturer or retailer because he knows he is going to have to pay for it where he does not want to pay for it, out of his own pocket, and this I think is the result of using class actions and using them in an effective way. I do not think they should be thought of as the be all and end all. They are not the last word. There are some things that will simply not lend themselves to class action, but I think in the long run they will be very helpful in reducing some of the friction the consumer has with the purveyor of goods.

Senator Moss. I do have just one question I want to ask. The industry has expressed some fears that class actions will result in blackmail or strike suits. How would judicial supervision curtail this? Is this possible?

Mr. GORDIN. I think it certainly is not only possible but it is probable. The courts have never allowed themselves to be used for suits that are absolutely baseless.

I think that there are several judicial remedies that are frequently overlooked. For instance, attorneys are subject to the canon of ethics. There is no difficulty if the courts of this land wish to do it to enforce those canons of ethics and require that attorneys when they bring suit have at least a modicum of knowledge and belief that these suits are not frivolous, that is, are not simply a matter of harassment of an opposing party. That happens to be one of the canons of ethics. I believe I have stated it in the prepared statement which I submitted.

Senator PEARSON. Particularly under the Federal rules, the district court can just about do what it wants to just like that.

Mr. GORDIN. That is true. There is no question that the courts have great power; they have the contempt power which they can exercise, and on some occasions they have not been reluctant to do so.

Senator PEARSON. In pretrial, if you will let me interrupt you again, you can solve these things very quickly.

Mr. GORDIN. This, of course, is true under the Federal procedure. You have complete pretrial discovery rules, and, of course, under many State laws as well.

Senator MOSS. So you feel we can place reliance in the judiciary to screen out these blackmail or strike suits, these unwarranted actions that apparently industry fears in this legislation?

Mr. GORDIN. I have a good deal of confidence in the Federal judges, Senator.

Senator MOSS. Well, I certainly wish we had time to continue our colloquy. We appreciate very much your coming and testifying and bringing your testimony in writing, and we are looking forward to this additional material that you will submit and hopefully with the guidance we can get from you and the other witnesses before us we will be able to fashion some legislation that will be helpful in the direction we all want to go.

We see some problems in getting there, of course, but out of this we will try to fashion legislation that will give the consumer insurance that he is getting a fair deal in the marketplace, and by that, improve our marketplace and restore confidence in it. If not, confidence will continue to wane as some of the previous witnesses said is the case now—that consumer confidence is at a very low ebb at the present time.

Most consumers feel that within some recent period of time advantage has been taken of them in some way or other. Hopefully if their losses can be restored, they once more will have confidence in the market, that it is honest and fair and gives them the information they need.

Thank you very much, Professor Gordin.
(The statement follows.)

STATEMENT OF GEORGE GORDIN, JR., STAFF ATTORNEY OF THE NATIONAL CONSUMER LAW CENTER AT BOSTON COLLEGE LAW SCHOOL

INTRODUCTION

Mrs. Smith and two hundred of her neighbors were tricked by Mr. Jones into paying \$400.00 for a product worth no more than \$200.00. Under the present law it is probable that the merchant will never have to defend himself or his business practices in a civil action brought by Mrs. Smith or her neighbors. It will be difficult for Mrs. Smith to find an attorney willing to take a case in which such a small amount of money is involved; if she can engage counsel, she will soon

find that the costs of litigating her claim are much greater than the \$200.00 to \$400.00 she might recover. Even if she can organize her neighbors so that they unite with her to share the costs of a court action, it is unlikely that her state permits a group to sue as a class under these circumstances. Since neither Mrs. Smith nor any of her neighbors have individually suffered a \$10,000.00 loss, the suit cannot be brought in a Federal court. Therefore, 200 consumers with a combined loss of between \$40,000.00 and \$80,000.00 are denied a forum within which to litigate their claims.

As the law stands today, the dishonest merchant can calculate the dollar amount by which he can cheat a customer without fear of legal action. As pointed out by Ralph Nader, "The aggregate reward of minor cheats, deceptions and the like can now be planned with slide rule efficiency."¹ This pollution of the market place affects both the honest businessman and the consumer.

President Nixon, in his consumer address to Congress, recognized the benefits of a class action statute to both the consumer and the businessman when he stated:

"... it would allow a number of citizens to divide among themselves the high cost of bringing a law suit. Although each person's individual damage might be small, the cumulative effect of a class complaint could be significant and in some circumstances could provide a significant deterrent to extensive fraud or deception."²

The possibility that he might have faced an \$80,000.00 class action rather than the improbability that Mrs. Smith would bring an individual action for \$400.00 would most likely have deterred Mr. Jones' deceptive behavior.

A proper class action procedure will allow Mrs. Smith and her neighbors a judicial hearing, while also spreading the costs of litigation and conserving judicial resources. Mrs. Smith can sue as a representative for both her neighbors and herself. All will share the costs and rewards of the action. One case, not two hundred, will be brought.

Fortunately, the current recognition that consumer abuse is a mammoth problem has spurred a drive for consumer protection legislation. However, too often this legislation is based on the erroneous belief that further government action and spending will give the consumer the necessary relief. The problem is much too large, and the government much too small; at best, the government can reach but a small percentage of the everyday consumer abuses. Therefore, it is the position of the National Consumer Law Center that the best means of protecting the honest businessman, the consumer, and the marketplace is a program which enlists the participation of the private bar. The Center favors a joint attack on consumer abuse similar to that waged against antitrust violators within the provisions of the Clayton Act. The class action is the best means of encouraging private enforcement of the existing consumer law.

To meet the need for federal consumer class action legislation, two bills, one from the Nixon administration (S. 3201, H.R. 14931) and the other authored by Congressman Eckhardt and Senator Tydings (S.3092, H.R. 14585) have been introduced. In this position paper, the relevant provisions of each Bill will be compared and contrasted, and the ability of each to protect both the consumer and the honest businessman will be evaluated.

COMPARISON OF MAJOR PROVISIONS

A. Direct Consumer Class Actions v. Requirement that Government Agency Bring Successful Action Before Consumer Class Can Sue in Own Behalf.

If the Nixon class action legislation were in effect, Mrs. Smith would have to await a successful termination³ of a government action before she and her neighbors would be allowed to bring a class action for their damages. There is no guaranty that the government will act in her case; if it chooses not to act, she will never be allowed to bring her class action; the validity of Mr. Jones' practices will never be determined in a court of law. Even if the government decides to act against Mr. Jones, there is no guaranty that it will reach a prompt successful termination. It may be many years before Mrs. Smith gets the chance to litigate to recover the money she has lost. During both the period in which the government decides whether it will act, and later, the period in which it acts, there is no procedure by which Mrs. Smith can attach Mr. Jones' as-

¹ Ralph Nader, testimony before Senate Subcommittee on Improvements in Judicial Machinery, July 28, 1969.

² Address by President Nixon, October 29, 1969.

³ H.R. 14931, § 204, 91st Congress, 1st Session.

sets. Mrs. Smith cannot file an action and take steps to guaranty that Mr. Jones does not make himself "judgment proof" until after the government has acted. It is quite likely that before this point Mr. Jones will have either dissipated his assets, gone out of business, or entered bankruptcy proceedings. By the time Mrs. Smith can sue under the administration proposal, there is a good chance there will be no money left for her to recover.

The Eckhardt-Tydings proposal will not make Mrs. Smith suffer because of the delays inherent within bureaucratic government machinery. Her right to litigate her claims is not dependent upon her ability to stimulate government action. Upon learning of Mrs. Jones' deception, Mrs. Smith and her neighbors can immediately file an action. They need not petition and await government action. They can take immediate steps to insure that Mr. Jones will not render himself judgment proof. The Eckhardt-Tydings Bill offers Mrs. Smith and her neighbors the best possible chance for meaningful litigation and recovery upon their claims.

Underlying the different approaches taken in the two bills is a conflict between the confidence Senator Tydings and Congressman Eckhardt have in private enforcement of consumer laws, and the distrust of the private sector manifested in the administration's claims that the requirement of prior government action is necessary to protect the honest businessman from harassment.

The fears that a direct consumer class action procedure will lead to the harassment of the honest business community are unfounded. Through the provisions of the Clayton Act, this country has had a long history of private enforcement of antitrust laws. Although the Clayton Act does not require prior government action as a "trigger" to private litigation, there is no evidence that the statute has been used to harass the honest businessman.

Similarly, there is no evidence that the new Federal Truth-in-Lending statute, which allows for class actions, has been used to harass lenders; to this date, less than one dozen actions have been filed under its provisions.

The provisions of the Administration Bill, which require that government action precede private litigation, seem to be rooted in an improper characterization of the members of the private bar as "ambulance chasers" ready to stir up harassing litigation in hope of forcing the honest merchant into an unfounded settlement, which is profitable only to the attorney. All attorneys are charged to obey American Bar Association Canon Number 30, which states:

"The lawyer must decline to conduct a civil cause or to make a defense when convinced that it is intended merely to harass or injure the opposite party or to work oppression or wrong."

The Nixon Bill manifests a distrust of the ability of the private bar to police itself through the enforcement of its regulations and canons. It is unfortunate that the Administration Bill does not reflect the position taken by Mrs. Virginia Knauer in a speech before the National Association of Manufacturers in which she said:

"Some businessmen have asked me whether this bill [referring to a bill similar to the Eckhardt-Tydings proposal which contained no requirement of prior government action] might not generate waves of 'ambulance chaser' type suits which would necessarily harass business. Federal courts do not accept 'ambulance chaser' cases. The honest, ethical manufacturers who produce safe, quality products and honor their guarantees have nothing to fear."⁴

Existing Judicial Safeguards

However, assuming that Mrs. Knauer, Congressman Eckhardt and Senator Tydings are wrong and that harassment is a real byproduct of consumer class action legislation, there are safeguards, less severe and restrictive than government intervention, which offer the honest businessman protection from unjustified litigation. Many of these safeguards exist within current judicial procedure. The attorney representing the class can be required to file a verified complaint. Violation of this requirement, or the provision within Federal Rule of Civil Procedure 11 which states that no pleading can be signed and filed by an attorney unless "... to the best of his knowledge, information, and belief there is good ground to support it; ...", renders the attorney subject to disciplinary action.

⁴ Address by Mrs. Virginia Knauer to National Association of Manufacturers, 1969.

After the class action is filed, there are existing procedures such as the "motion to dismiss" and the "motion for summary judgment" which can be invoked by the defendant to stop spurious litigation before it reaches the trial stage. He can also stop harassing litigation by bringing an equitable "bill of peace".

Some opponents of class action legislation fear that class actions will be brought to "blackmail" defendants into out-of-court settlements. By requiring judicial approval of all settlements, the defendant can be assured that he will not have to "buy off" unfounded claims.

If it can be established that suits to harass the businessman are a real threat, then an additional safeguard, the requirement that the named parties plaintiff post bonds based on a statutory percentage of the amount they personally seek to recover, can be added to the legislation. The amount should be neither arbitrary nor based upon a percentage of the recovery sought for the entire class; in both of these cases the costs of posting the bond will make consumer litigation unprofitable for the plaintiff and render him financially unable to seek a judicial hearing on this claim.

Not only is the administration requirement of prior government action severely restrictive when viewed in the light of the other possible safeguards with which to protect the honest business community, but it also raises serious practical and political considerations.

Serious Delays Inherent Within Administration Proposal

Perhaps the provisions in the Administration Bill most damaging to the consumer are those which allow for the delay inherent within government action. Mrs. Knauer, in her testimony before the Senate Committee on Commerce, Subcommittee for Consumers, acknowledged that it is not uncommon for the Federal Trade Commission to take three years to reach a successful termination against a deceptive merchant.⁵ In the famous case of *Holland Furnace Co. v. FTC*,⁶ it took the government 29 years to reach a successful termination. Under the administration's class action proposal, the consumer cannot act to protect himself during this period.

The Nixon proposal places the initiative for consumer protection in the hands of the Justice Department and the Federal Trade Commission. In the past, both of these agencies have lacked either the initiative or the staff to protect the consumer. The staff of the Attorney General's office is already overburdened. The consumer can legitimately fear that criminal prosecution will once more take priority over consumer protection. The only way to insure a program of consumer protection is to encourage the private bar's participation in consumer problems.

Government Will Only Act On Significant or "Test" Cases

Consumer abuse is a mammoth problem. There are so many claims that even with expanded government machinery it will be impossible to investigate and take action on each of them. Therefore, a "selection process", that raises many political issues, will be necessary. As Richard W. McLaren, Assistant Attorney General in Charge of the Antitrust Division, Department of Justice, indicated in his testimony to the Subcommittee for Consumers, the government will establish a procedure for "... public selection of cases which are both sound and significant to consumers."⁷ (emphasis added) It is easily understood that with the vast number of claims that will flood the agencies they will have to limit their involvement to "significant" or "test" cases; however, in the context of the administration proposal, this selection process will leave the victim of the "everyday" consumer abuse without government protection; due to the requirement of prior government action, he will be unable to sue directly to protect himself. Senator Moss recognized the problem when he asked Mr. McLaren,

"What about the consumer, however, whose case is not taken by the FTC or the Justice Department and he still has a valid grievance and he wants to have it adjudicated?"⁸

The only solution Mr. McLaren could offer was,

"Senator, I suspect that Mrs. Knauer would be on the necks of the Chairman of the Federal Trade Commission and the head of the Antitrust

⁵ Statement of Mrs. Virginia Knauer, hearings on S. 2246, S. 3092, S. 3201, before Subcommittee for Consumers, Senate Committee on Commerce, 91st Congress, 1st Session CS (December 16 and 17, 1969) [hereinafter cited as 1969 Hearings].

⁶ 341 F. 2d 548 (7th Cir. 1965), cert. den'd, 381 U.S. 924 (1965).

⁷ McLaren, 1969 Hearings 23.

⁸ Moss, 1969 Hearings 42.

Division; and if she did not get action, they would probably hear from the President."⁹

Surely, neither Mrs. Knauer nor the President can be expected to guaranty that every valid claim will be acted upon by the government agencies; such a commitment of resources is not physically possible.

The Selection Process and Political Favoritism

The Nixon proposal involves a selection process that can raise issues of political favoritism. Not all of the claims against businessmen can result in government action. The decision as to which merchants will face government action and which will escape is open to political influence. Even if the decision is made honestly, the mere appearance of favoritism may cause a lack of faith in the government's institutions in those consumers whose complaints will not be acted upon. A far better solution to this problem of selection is to take these difficult decisions out of the political arena and place them within the adversary system of the private bar and the judiciary. A selection process that gives the government complete control over which consumers can bring class actions and which cannot, will not result in maximum consumer protection. This can only be achieved when the consumer is allowed to protect himself through private litigation.

Conservation of Judicial Resources

Some argue that a selection process is necessary to guaranty that the already overcrowded federal court system will not be flooded with consumer class actions. Actually, the opposite may occur; since in one suit the rights of many parties may be ascertained, fewer actions need be filed. However, if more suits are filed within the federal courts it will be because those consumers who previously had been denied a forum will now be given a hearing. It is a false economy that reduces the caseload of the federal court system at the expense of the consumer. Congress must adjust and enlarge, if necessary, the judicial system so that it can meet the needs of all of the people.

Finally, the administration requirement of prior government action will require either the creation of new government agencies or the expansion of the old. Both will require substantial government expenditures. By placing the burden of consumer protection on the private bar, the Eckhardt-Tydings proposal will require no further government action or spending.

B. The Source of the Substantive Law Defining Those Unfair or Deceptive Practices Under Which the Consumer Can Bring a Class Action.

The substantive law to be applied must be both specific enough to provide concrete guidelines for the honest business community and broad enough to protect the consumer from many common deceptive and unfair practices. The law must reflect the fact that business practices vary with local needs and standards; the states should be encouraged to enact consumer protection legislation, and these statutes should be the basis for federal class actions.

Title II Section 201 of the Administration Bill specifies eleven categories of acts which are defined as unfair or deceptive practices. These categories are far too vague and ambiguous to protect the honest businessman. Years of judicial interpretation will be required before they can be of sufficient content and meaning to provide guidelines for commercial behavior. Mr. Paul Rand Dixon, Chairman of the Federal Trade Commission, stated before the Subcommittee for Consumers that he was against limiting the unlawful practices to specific categories. He testified that:

"A substantial amount of time would be spent attempting to fit a deceptive practice into the proper category, taking maybe another *forty years* to get out and to have the definition of what each one of those eleven things might mean. . . ."¹⁰ (Emphasis added)

In effect this process will create a federal "common law" where none is needed. The eleven categories do not provide for the use of substantive state consumer law in the federal class action. The Tydings-Eckhardt approach incorporates the existing state common law, the state statutes and the entire body of FTC rulings.

⁹ McLaren, 1969 Hearings 42.

¹⁰ Dixon, 1969 Hearings 61.

Not only does the Nixon proposal fail to provide concrete business guidelines but it also leaves many practices, in the words of Mr. Dixon:

"... unfair and deceptive to consumer which would not fit into these categories."¹¹

Section 201(f) of the Administration Bill exempts the substantial number of consumer abuses which occur within the credit industry. Although in answering a question from Senator Moss, Mr. McLaren stated that the consumer could bring a class action for credit abuses by invoking the provisions of the Federal Truth-in-Lending Law,¹² the coverage of this statute is limited to those abuses stemming from the lender's failure to make the statutory disclosures. All abuses other than the failure to disclose, such as illegal, excessive or usurious charges that are disclosed, are not only outside the provisions of the Truth-in-Lending Law, but also specifically exempted from the administration class action proposal.

A second set of significant consumer abuses, the practices and techniques of harassment, intimidation, coercion and deception used by the disreputable collection agency, are not covered within the eleven categories.

In contrast, Section 4 of the Eckhardt-Tydings class action proposal defines an unlawful act in default of consumers as one which is either unlawful within the meaning of Section 5(a)(1) of the Federal Trade Commission Act, or one which gives rise to individual civil actions by consumers within state statutory or decisional law. In his testimony, Mr. Dixon favored a procedure by which unfair or deceptive practices are defined in terms of Section 5(a)(1) of the Federal Trade Commission Act. In support of his position, he stated:

"The unfair or deceptive acts or practices declared to be unlawful by the Federal Trade Commission Act are readily ascertainable. There is an existing body of law compiled over a 55 year period, consisting of thousands of Commission decisions, which defines these terms. There are also some 800 court opinions rendered during these 55 years interpreting the Act."¹³

The Federal Trade Commission rulings offer a broad range of specific guidelines.

The Tydings-Eckhardt Bill does not limit its provisions to practices found to be unfair or deceptive by the Federal Trade Commission. In addition, it incorporates the existing state consumer laws, thereby encouraging the enactment of local consumer protection programs.

In this way the Tydings-Eckhardt proposal not only provides the requisite specificity and concrete guidelines, but also includes the majority of abusive practices.

C. The Requirement that Plaintiff Prove that the Defendant Acted Intentionally or Recklessly.

Within Section 201(a) of the Administration Bill, it is not sufficient that Mrs. Smith prove that the act in question was one of those specified in the eleven categories. She must go further and prove that Mr. Jones committed the deception intentionally or recklessly. She must show that he knew his acts were illegal, and that he knew that his representations were false, or that he acted with a reckless disregard for the truth. This is a heavy burden to place on the injured consumer. Mr. Jones will not be held to the practices of the ordinary and reasonable businessman. His actions can be unreasonable and he can still escape liability. Between the consumer and the merchant, in determining the truth of a seller's representation, it is more just and rational to place the burden of investigation on the businessman. He has the business background and experience with which to determine the validity of his representations. The consumer should be able to assume that the merchant has undertaken a proper investigation. He has access to the information about his product. The consumer should be able to assume that the representations are true. When they prove to be deceptive or unfair, the consumer should not have to prove that the merchant acted intentionally.

D. The Need for Punitive Damages for International or Reckless Violations of the Act.

Closely related to the element of knowledge is that of damages. In order to deter the type of intentional or reckless violation of the law that the consumer must prove under the Nixon Bill, the plaintiff must be able to recover punitive damages. As long as the merchant need only return the money he took by conscious deception, there is no effective deterrent against such behavior in the future. It is this deterrence, the traditional basis for punitive damages, for which Section 204 of the Administration Bill makes no provision.

¹¹ *Ibid.*

¹² McLaren, 1969 Hearings 45.

¹³ Dixon, 1969 Hearings 62.

E. *Recovery of Legal Fees.*

The success of a program of consumer protection through private enforcement of the law will depend on the consumer's ability to encourage, by offering fair and adequate compensation, the participation of the private bar. Both proposed statutes allow for attorney participation on a contingent fee basis. However, in those cases where the attorney and client negotiate a non-contingent fee contract before the litigation, the Administration Bill allows the court the unprecedented power to upset the contract provisions *after* the case has been decided. Faced with the possibility that he will work a certain number of hours and incur certain expenses only to have his contracted-for-fee lowered after his work is completed, many an attorney will refuse to take the case. On the other hand, the provisions can be interpreted so as to empower the court to allow the attorney to charge his client a sum greater than that for which they had previously contracted. Either way, this provision will discourage the type of joint participation of consumer and private bar that is essential to a program of private enforcement of the consumer laws.

F. *Parties Subject to the Proposed Federal Trade Commission Injunctive Power.*

Section 102 of the Nixon bill gives the Federal Trade Commission the much needed power to seek either a temporary restraining order or a preliminary injunction. However, the scope of this power is severely limited by Section 101 (a) (1) whereby the Federal Trade Commission Act is amended so that it reads:

"Whenever the Commission has reason to believe—(1) that any *person*, is engaged in . . ." ¹⁴ (Emphasis added), rather than "that any person, *partnership or corporation* is engaged in . . ." ¹⁵ (Emphasis added)

The express deletion of the corporation and partnership as possible parties defendant creates a serious loophole through which many disreputable merchants can escape the protective efforts of the Federal Trade Commission.

SUMMARY AND CONCLUSIONS

The need for consumer class action legislation is clear. The Tydings-Eckhardt class action proposal will bring the benefits of this procedure to the Federal courts. It offers the class of consumers a forum, regardless of the size of an individual class members' claim. By expressly incorporating the Federal and State law that the honest businessman is already following, the proposal gives the business community clear and certain standards by which to plan its conduct. The Tydings-Eckhardt proposal will not require the creation of new and cumbersome government machinery or a further expenditure of Federal funds; the aggrieved consumer, with the aid of the private bar, is given a means of protecting himself through the present judicial system. The proposal allows for and encourages state regulation and control of local business. Because of its more comprehensive coverage, its greater specificity, and its provisions which encourage the private enforcement of the consumer laws, the National Consumer Law Center calls for the enactment of the Eckhardt-Tydings class action proposal.

Senator Moss. The committee will be adjourned until Thursday at 9:30 a.m.

(Whereupon, at 12:15 p.m., the subcommittee was recessed, to reconvene at 9:30 a.m., Thursday, February 5, 1970.)

¹⁴ H.R. 14931, § 101 (a) (1), 91st Congress, 1st Session.

¹⁵ Federal Trade Commission Act, 52 Stat. 114, 15 U.S.C. 53 (a).

CONSUMER PROTECTION

THURSDAY, FEBRUARY 5, 1970

U.S. SENATE,
CONSUMER SUBCOMMITTEE,
Washington, D.C.

The subcommittee met at 9:55 a.m. in room 5110, New Senate Office Building, Hon. Frank E. Moss (chairman of the subcommittee) presiding.

Present: Senators Pastore, Moss, and Pearson.

Senator Moss. The subcommittee will come to order.

I apologize for being tardy in starting, and I apologize to my colleague Senator Pearson who was here, ready to start on time. It was I who was late.

I am very pleased this morning in the continuation of our hearing on the three bills that are before the subcommittee, S. 2246, S. 3092, and S. 3201, to have several very excellent witnesses. We are going to begin with Mrs. Bess Myerson Grant, who is the Commissioner of Consumer Affairs for the city of New York, a leader certainly in this consumer field and whose testimony we look forward to receiving and know that it will be most helpful, as it always is.

I understand she will be accompanied by Mr. Philip Schrag, who will come to the table with her.

We are pleased to have you, Mrs. Grant, and certainly look forward to hearing from you. I apologize to you for being late in the beginning.

STATEMENT OF BESS MYERSON GRANT, COMMISSIONER OF CONSUMER AFFAIRS OF THE CITY OF NEW YORK; ACCOMPANIED BY HARRIET V. RABB, FORMER SPECIAL COUNSEL TO THE NEW YORK CITY DEPARTMENT OF CONSUMER AFFAIRS

Mrs. GRANT. Thank you very much, Senator Moss. I must apologize for Mr. Schrag's absence. He is, I believe, right now at the House.

Senator Moss. He certainly is excused. We would like to have had him.

Mrs. GRANT. He is testifying on behalf of the bill before the House.

Senator Moss. I see, he is over on the House side.

Mrs. GRANT. We are working both sides, you see.

Senator Moss. I must say that we have the more beautiful half of the team.

Mrs. GRANT. Thank you.

Senator Moss, members of the subcommittee, I want to thank you for this opportunity to speak to you today about consumer class actions. May I say that it is an honor to be one of the members of this

committee's Advisory Council. By establishing the Advisory Council, Senator Moss has created an important avenue of communication between the Congress and those of us concerned with the problems of consumers. I would like again to congratulate you.

Senator Moss. Thank you.

Mrs. GRANT. This is the second time I have come to Washington to testify on consumer class actions. Last year I addressed the Senate Subcommittee on Improvements in Judicial Machinery on this subject. At that time, I said that S. 1980, the predecessor of the Tydings-Moss class action bill before you today, was one of the most powerful instruments of economic justice which the Senate has ever considered. I did not mean that as hyperbole. The idea of consumer class actions is, indeed, one of the most important proposals for economic reform which has appeared on the Nation's legislative agenda since the New Deal. A meaningful Federal class action law will promote fairness to consumers, and deter dishonesty by manufacturers and merchants, as or more effectively than the landmark consumer protection laws of past eras—the Pure Food and Drug Act, the Federal Trade Commission Act, or the Interstate Commerce Act, to name just a few examples.

A Federal class action law will have more impact on the marketplaces of the Nation than all the myriads of laws and ordinances against fraud and deception which are hidden away in the statute books of the 50 States and their various subdivisions, put together. All these laws make fraud illegal. But they have not made fraud unprofitable. Many of these laws can only be invoked by administrative agencies, which long ago lost their concern for the consumer and their appetite for action.

A Federal class action law—at least one which is not hamstrung by needless procedural roadblocks to consumer justice—will put the power to seek justice in court where it belongs—beyond the reach of campaign contributors, industry lobbyists, or Washington lawyers—it will put power in the hands of the consumers themselves and in the hands of their own lawyers, retained by them to represent their interests alone. But all of us here know this.

We know that a class action law is needed this year. Consumers know it, this committee knows it, the Senate knows it, and the administration knows it.

I appear before this committee with a much more specific objective; to help you shop comparatively for the best such law. Brand A is S. 3092—the Tydings-Moss bill, which would allow consumers to initiate Federal class actions, whenever their rights were violated. Brand B is S. 3201, the administration bill which would enable consumers to start such lawsuits only in 11 narrow categories of circumstances, and only after the Federal Government had successfully sued the violator.

The administration bill—Brand B—is a consumer fraud.

Two weeks ago, I told the Consumer Federation of America that “we face a critical danger—the danger that we will be fooled by fake reform. Deceptive packaging and mislabeling are as insidious on the congressional calendar as they are on the supermarket shelf.” The administration's so-called class action bill is like balloon bread: Substantial at first glance but short on weight.

I think that we should bear closely in mind that this administration bill is not the product of the President's valiant special assistant for

consumer affairs, Mrs. Virginia Knauer. The administration bill is the product of White House assistants—and by the look of the legislation they have drafted, these are assistants whose primary concern is not the interests of the consumers. I have two complaints about the administration bill: Its substance and its implementation procedures.

It waters down the substance of the Tydings-Moss bill in two ways. First it contains an inadequate list of types of misrepresentations which are to be labeled unlawful. I have no objection to the concept of a list of wrongs, so that businesses can know with specificity what their obligations are, but the list in S. 3201 requires proof that the accused merchant knew he was making false statements.

In the typical case, proof of such knowledge is impossible. For that reason, civil consumer protection laws such as the Federal Trade Commission Act, the Uniform Deceptive Trade Practices Act, and the New York City consumer protection law do not require it; rather it is sufficient to show that the merchant did not tell the truth.

Even centuries-old equity doctrine allows restitution to consumers who have been deceived by innocent misrepresentations. By imposing a willfulness requirement for class actions—a standard heretofore applicable only in criminal proceedings against merchants—the administration is rolling back 200 years of consumer protection law.

Let me give you an example. If Consolidated Carbohydrates sells a pill which the company says will "cure all of your ills," when in fact it can only give temporary partial relief in a few kinds of cases, the consumer should not have to bear the burden of searching through Consolidated's organizational chart, to find some individual officer who covered up the product's inadequacies. This is not the point. The point is that the company lied. Its lies induced consumers to pay, and they enabled the company to profit. What a class action law has got to insure is that those ill-gotten profits are turned back to the consumer's pocket, where they belong.

I have a second bone to pick with the administration bill. The 11 categories of wrongs to which the administration bill is addressed boil down in reality to only two categories—misrepresentation, and failure to return deposits for goods not delivered. Omitted are some of the major problems about which consumers complain and which are already violations of State law, although class actions are not presently available to remedy them.

One such problem is the ordinary breach of warranty, especially the warranty of merchantability. Take a thousand consumers, each of whom buys a camera which was defectively manufactured and does not take pictures. Under section 2-314 of the Uniform Commercial Code, those consumers are entitled to a functioning camera or damages. But they cannot afford to bring a thousand individual lawsuits to enforce this right. Under the Tydings-Moss bill, they could bring a class action. Under the administration bill, they cannot.

Another common situation is unconscionable contracts, under section 2-302 of the UCC. In New York, the courts have deemed referral selling to be unconscionable; that it, promising a buyer a small discount for each friend or neighbor he refers who also makes the purchase. But one of the many victims of this practice cannot economically sue for restitution in a single case. Under the Tydings-Moss bill, he could start a class action. Under the administration bill, he could not.

Consider also the myriad of State installation sales acts, which govern in detail the granting of consumer credit. Suppose that a particular State limits the interest rate to 18 percent per annum. Suppose further that a creditor charges customers 20 percent, being careful to disclose this fact so that he does not violate the Federal Truth-in-Lending Act. Under the State law, consumers would be entitled to recover the excess charge, in some States they would be entitled to recoup the entire interest charge. But this right is only illusory unless a class action can be brought to exercise it. One could be brought under the Tydings-Moss bill, but not the administration proposal.

But the single most disingenuous provision in the administration bill is its prerequisite of a Justice Department or FTC action before a class suit may be brought. What assurance would consumers have that these agencies would have sufficient funding or personnel to prosecute the many thousands of instances of systematic consumer abuse which occur every year?

Senator PASTORE. May I interrupt here?

Senator MOSS. Yes.

Senator PASTORE. I think you emphatically bring out a neglect that has existed for some time. I brought this point out only the other day. I come from a jewelry manufacturing State, complaints were being made that certain jewelry was being sold as gold, as 14-karat gold and in fact it was brass.

So, in order to overcome this, because you find that the individual consumer sometimes doesn't have the potentiality, financially and otherwise, to recover in a case of deception and he has to look to class enforcement, and that is the reason for class enforcement; so, I introduced a bill providing that a lawfully organized and chartered nonprofit organization in the industry could bring suit and even obtain a judgment of cease and desist in case of this kind of deception.

When you buy yourself a pair of earrings, you have to take the prestige and reputation of the seller, you have no way of knowing—you can't bite it to find out whether it is gold or brass, all you know if you wear it and your ear begins to stain or you get an infection, you didn't buy a gold matter.

This bill was resisted by the Justice Department. They said there were sufficient laws on the books in order to give adequate protection. The fact still remains that not one case was ever brought, and our market is loaded with these deceptive pieces of jewelry, and I think you bring out a very good point here.

Mrs. GRANT. Sir, I am pleased that we are in accord.

I do want to tell the Senator, too, that the FTC in 1969 issued only 65 complaints of deceptive practices in the Nation, while my office alone gets 65 complaints a day. Even if they had the funding, can consumers know that they will have the will to use this authority fully? What is to stop the Attorney General from opting for an arrangement with the target company, whereby the company agrees to mind its manners in the future in return for Government's promise to immunize the company from liability for past misconduct?

Such practices would subvert the entire purpose of a class action law. One has only to look at the antitrust suits filed by the Justice Department in the last week of every presidential administration to know that political considerations strongly influence the Government's decisions to sue major American corporations.

And even if the relevant agencies had both the money and the will to sue, the sheer time it takes for the Government to win a case precludes a meaningful subsequent consumer action. Sharp corporate lawyers can stall an FTC action for up to 30 years, as in the famous *Holland Furnace* case. And the average time between the time the FTC receives a complaint and the time it issues a cease-and-desist order—which is then appealable—is nearly 5 years. Consumers who wait this long to sue a merchant will often find that the store has dissolved or gone bankrupt long before he begins the action, particularly if the store is a ghetto fly-by-night. And even if the store remains in existence, by the time the consumer completes his case, which may be 8 or 10 years after the abuse, it is likely that very few members of the class entitled to share in the award will still be living at their old address. The administration bill may be nothing more than a subsidy to private investigators who will have to be hired to track down the successful, but aging, plaintiffs.

The administration claims that governmental selection of proper class actions is necessary to protect business from strike suits by unethical lawyers. There are two answers to this. First, far from generating corrupt practices, the availability of private class actions has been a major factor in maintaining the honesty of another segment of American business—the securities industry. Stockholder class actions against securities misconduct have led to extensive judicial praise of this device, as in Judge Weinstein's opinion in *Dolgov v. Anderson*, 43 F.R.D. 472 (EDNY 1968). And second, the bar associations and the judiciary stand ready, as they always have, to discipline attorneys who abuse any legal procedure.

Antitrust is another example—indeed, an example which may show that major consumer lawsuits have trouble getting started even where there are so such impenetrable procedural barriers as the administration wants to put in the path to consumer justice. Consumers rarely exercise their right to seek treble damages under the antitrust laws. Even the plaintiffs in antitrust cases are generally corporations. Indeed, consumer treble damage actions were virtually unheard of before New York City corporation counsel, J. Lee Rankin, initiated the landmark lawsuit against five drug companies which has led to a \$120 million settlement on behalf of consumers, municipalities, and State governments across the Nation.

The fact is that lawsuits are expensive. The costs of going to court are so great that many valid claims are never asserted. That, in fact, has been one of the single greatest sources of the injustice which the consumer suffers under present conditions. There is no need to make consumer justice altogether impossible to obtain, out of deference to unwarranted anxiety that, if consumers obtain access to the courts, they will use their freedom to press frivolous claims and to harass honest businessmen.

Incidentally, Mr. Chairman, I have heard comments from some industry groups to the effect that consumer class actions are not necessary because consumers with individual complaints can easily use the small claims court.

I am a great supporter of small claims court. My department recently published a simplified guide on how to use those courts in New York City. But I do not think they are an institute for class action for several

reasons. First of all, not every area in the country has small claims courts. Then they often have unreasonably low maximum jurisdictional limits. In New York, a claim for more than \$300 cannot be brought in small claims court. Third, despite the simplified procedure, the rules are too complex for many consumers.

For example, if you name as the Gypsum Co., when it is really the Gypsum Corp., you will lose the case.

And very importantly, the courts are often held at night in municipal office buildings located in very deserted parts of town which consumers are reluctant to venture into.

Even if small claims court worked very well, it would be silly to try 500 identical cases in separate small claims cases when they could be combined into a single class action.

So, I think, sir, that my position is very clear. As presently drafted the administration bill is no reform. It may be useful to provide, as the administration bill does, for a specific list of violations—as long as that list is not exclusive, and as long as that list is expanded to cover all the major consumer abuses. But under no other circumstances can the administration's proposals be regarded as anything but a cynical ruse and a wholly illusory step forward.

I am confident that the members of this committee are sophisticated consumers, and that they will give the American public a law which actually lives up to the promises on its label.

Senator Moss. Thank you very much, Mrs. Grant, for your testimony. As the commissioner of consumer affairs in New York City, you have, of course, been very actively engaged in the problems about which you testify, and I believe New York has been once again pretty much the bellwether in moving along in consumer matters so far as the local jurisdiction is concerned.

We, therefore, like to draw on your experience when we measure it in considering national legislation in this field. I congratulate you highly.

I have just two or three little points I would like to perhaps have you underline for us. You have criticized the administration bill, brand B, because it requires proof that the merchant knew he was making false statements.

Could you elaborate on this a little bit? What practical problems arise when the consumer is required to prove knowing misrepresentation?

Mrs. GRANT. I object to knowing, and I also object to the fact that the supplier must have used reasonable safeguards.

Let me give you a very simple case which is the best way for me to explain things to myself and to others, since I am not a lawyer. Let's take a seller of refrigerators who advertises that he has refrigerators at the lowest price in town, when in fact his refrigerators are much more expensive than average. Now, it would not be hard for the consumer to prove that the seller's statements were false, but it will be infinitely more difficult to prove either that he knew they were false or that he disregarded reasonable safeguards. Who really can know what reasonable safeguards would consist of in a particular case or in this particular case?

Now, undoubtedly, the accused merchant would find other merchants to testify that in the refrigerator business, reasonable safe-

guards means checking around by telephone which the offending merchant might have done.

But this standard puts too great a burden on the consumer who should only have to show that misrepresentations were made.

Under the present law the misled consumer is theoretically entitled to his money back. I think that this knowing business is very bad.

Under traditional concepts of law, going back hundreds of years, a consumer is entitled to his money back if he is deceived whether or not it was knowing, and as I said in my testimony, the Nixon administration, the administration bill will set back the laws hundreds of years by requiring a knowing violation. It is just very difficult to prove that a violation is a knowing violation.

Senator MOSS. The knowing factor really tries to elevate it into the criminal field. Before a person is convicted of a crime you usually have to show that he knowingly did the criminal act; but that is because if he is convicted of a crime he is going to suffer the penalty of imprisonment, or a fine or both, and other impediments that follow from being convicted of a crime, whereas we are talking about a civil action here, just a person being able to get out of the deal in which he was induced by some false representation to get himself into; am I right?

Mrs. GRANT. Yes. I think that possibly there could be some language in the bill concerning knowing violations, because whether or not a violation is knowing, justice requires restitution to the consumer. But as you point out, if it can be proven that a violation was knowing, then the violator should be subject to criminal penalties as he is under our New York City Consumer Protection Act now.

Deliberate lawlessness by merchants should no more be condoned than deliberate lawlessness by muggers or robbers or thieves. The Justice Department should be given the authority to punish crime in the shops.

Senator PASTORE. But would you go so far as to say where, let us say, double damages or treble damages are required that maybe in that instance you ought to show a little bit of intent to defraud?

Mrs. GRANT. Yes.

Senator PASTORE. You would subscribe to that, would you not?

Mrs. GRANT. Yes.

Senator PASTORE. But as far as recovery of what the purchaser paid, you feel that if there is a breach of representation that is enough.

Mrs. GRANT. Absolutely, sir. That is what the law has been.

Senator PASTORE. You make a statement here to the effect—I am referring now to your statement—you say:

For that reason, civil consumer protection laws such as the Federal Trade Commission Act, the Uniform Deceptive Trade Practices Act, and the New York City Consumer Protection Law * * *

Do you follow me where I am reading?

Mrs. GRANT. Yes.

Senator PASTORE. My question is this: Would you say that the administration bill would actually water down the New York law?

Mrs. GRANT. Considerably.

Senator PASTORE. Considerably?

Mrs. GRANT. Oh, yes, sir. I do not know if you are familiar—as a matter of fact, I brought along, since I am very proud of it and I would like to enter it into the record—

Senator PASTORE. I think that should be entered either by reference or into the record.

Senator MOSS. Since it is not voluminous, I think it should be printed in full in the record.

(The document follows:)

DEPARTMENT OF CONSUMER AFFAIRS

Local Laws of the City of New York for the Year 1969—No. 83

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

Be it enacted by the Council as follows:

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

(e) The commission, in the performance of said functions, shall be authorized to hold public and private hearings, administer oaths, take testimony, serve subpoenas, receive evidence, and to receive, administer, pay over and distribute monies collected in and as a result of actions brought for violations of laws relating to deceptive or unconscionable trade practices or of related laws, and to promulgate, amend and modify procedures and practices governing such proceedings, and to promulgate, amend and modify rules and regulations necessary to carry out the powers and duties of the department.

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

CHAPTER 64—DEPARTMENT OF CONSUMER AFFAIRS—TITLE A

Consumer Protection Law of 1969

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

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

b. Unconscionable trade practice. Any act or practice in connection with the sale, lease, rental or loan or in connection with the offering for sale, lease, rental or loan of any consumer goods or services, or in the extension of consumer credit, or in the collection of consumer debts which unfairly takes advantage of

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

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

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

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

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

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

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

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

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

c. Upon a finding by the commissioner of repeated, multiple or persistent violation of any provision of this title of any rule or regulation promulgated thereunder, the city may except as hereinafter provided, bring an action to compel the defendant or defendants in such action to pay in court all monies, property or other things, or proceeds thereof, received as a result of such violations; to direct that the amount of money or the property or other things recovered be paid into an account established pursuant to section two thousand six hundred one of the civil practice law and rules from which shall be paid over to any and all persons who purchased the goods or services during the period of violation such sum as was paid by them in a transaction involving the prohibited acts or practices, plus any costs incurred by such claimants in making and pursuing their complaints; provided that if such claims exceed the sum recovered into the account, the awards to consumers shall be prorated according to the value of each claim proved; to direct the defendant or defendants, upon conviction, pay to the city the costs, and disbursements of the action and pay to the city for the use of the commissioner the costs of his investigation leading to the judgment; or if not recovered from

defendants, such costs are to be deducted by the city from the grand recovery before distribution to the consumers; and to direct that any money, property, or other things in the account and unclaimed by any persons with such claims within one year from creation of the account, be paid to the city, to be used by the commissioner for further consumer law enforcement activities. Consumers making claims against an account established pursuant to this subsection shall prove their claims to the commissioner in a manner and subject to procedures established by the commissioner for that purpose. The procedures established in each case for proving claims shall not be employed until approved by the court, which shall also establish by order the minimum means by which the commissioner shall notify potential claimants of the creation of the account. Restitution pursuant to a judgment in an action under this subdivision shall bar, pro tanto, the recovery of any damages in any other action against the same defendant or defendants on account of the same acts or practices which were the basis for such judgment, up to the time of the judgment, by any person to whom such restitution is made. Restitution under this subsection shall not apply to transactions entered into more than five years prior to commencement of an action by the commissioner. Before instituting an action under this subsection, the commissioner shall give the prospective defendant written notice of the possible action, and an opportunity to demonstrate in writing within five days, that no repeated, multiple, or persistent violations have occurred.

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

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

§ 2203-5.0 Settlements.—a. In lieu of instituting or continuing an action pursuant to this title, the commissioner may accept written assurance of discontinuance of any act or practice in violation of this title from the person or persons who have engaged in such acts or practices. Such assurance may include a stipulation for voluntary payment by the violator of the costs of investigation by the commissioner and may also include a stipulation for the restitution by the violator to consumers, of money property or other things received from them in connection with a violation of this title, including money necessarily expended in the course of making and pursuing a complaint to the commissioner. All settlements shall be made a matter of public record.

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

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

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

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

§ 2203d-8.0 Separability.—If any provision of this title or the application of such provisions to any person or circumstances shall be held unconstitutional or invalid, the constitutionality or validity of the remainder of this title and

the applicability of such provision to other persons or circumstances shall not be affected thereby.

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

THE CITY OF NEW YORK, OFFICE OF THE CITY CLERK, S.S.:

I hereby certify that the foregoing is a true copy of a local law of The City of New York, passed by the Council on December 11, 1969, and approved by the Mayor on December 29, 1969.

HERMAN KATZ,
City Clerk, Clerk of the Council.

CERTIFICATION PURSUANT TO MUNICIPAL HOME RULE LAW SECTION 27

Pursuant to the provisions of Municipal Home Rule Law Section 27, I hereby certify that the enclosed local law (Local Law 83 of 1969, Council Int. No. 873, Print No. 1036-1127), contains the correct text and:

Received the following vote at the meeting of the New York City Council on December 11, 1969: thirty-four (34) affirmative votes.

Was approved by the Mayor on December 29, 1969.

Was returned to the City Clerk on December 29, 1969.

J. LEE RANKIN,
Corporation Counsel.

Senator PASTORE. If we pass the administration bill, that will in large measure vitiate the New York law for the protection of the consumers; is that what you are saying?

Mrs. GRANT. Absolutely. Our act imposes a comprehensive ban on deceptive and unconscionable trade practices in New York City. It gives the commissioner the power to define by regulation specific deceptive or unconscionable trade practices. For a single violation, the minimum fine is \$50. For a single knowing violation the fine is \$500.

Where there are multiple or repeated violations, the commissioner may seek an injunction and may recover from the violator all the money received from the consumer in transactions related to the deceptive practice and return it to the consumer.

Now, our department anticipates possible the majority of complaints will go through the simple procedure of a complaint, an investigation, possibly a dismissal, an administrative hearing, and a settlement in our offices requiring restitution.

But the act authorizes the department to obtain assurances of discontinuance from the merchants, gives us an injunctive remedy for violation of an assurance, and the settlements include restitution to the consumers. Where past history of the practice demands, then litigation will replace the settlement procedure.

Too, the Consumer Protection Act provides the department with very important jurisdiction, jurisdiction that we did not have in the past.

When I said we receive more than 65 complaints a day, in the months I have been there, which is about 11 months, we have gotten something like 48,000 complaints.

Senator PASTORE. Do these complaints come mostly from the poor?

Mrs. GRANT. They come from a cross section. They do not come mostly from the poor at all.

Senator PASTORE. I was wondering whether or not this deception even goes—is prevalent among the so-called part of the society that you would expect to be sophisticated?

Mrs. GRANT. Absolutely, sir.

Senator PASTORE. It does?

Mrs. GRANT. We are concerned—

Senator PASTORE. In others words, you can fool a smart guy just as easily as anybody else.

Mrs. GRANT. If you deal with a disreputable merchant it does not really matter how well educated you are; you can get deceived as easily as the poor man.

We are very concerned about the fact that we do not get as many complaints from the innercity, the ghettos, that we know exist. They are disillusioned; they have a sense of hopelessness; they do not feel that anybody at city hall will help them. So the great majority of our complaints come from the white middle-class, working class people.

As I said, of the 48,000 or 49,000 complaints that the department received, we had jurisdiction only over about one-third, and that would be in the area of misleading advertising, food adulteration. We regulate weights and measures, and we license over 100 businesses.

So where the businessmen that we license abused a particular consumer, we would bring them in. We could not get restitution; we could fine the man; we could possibly suspend or revoke his license. The consumer might be satisfied with that, but it did not return here to the position she was in before she entered the transaction.

Senator PASTORE. Do you have a common cheat law in New York?

Mrs. GRANT. I do not know.

Senator PASTORE. When I was a prosecutor, if you got a multitude of complaints against one merchandiser, it could touch the realm of being a common cheat. I prosecuted some of those when I was in the Attorney General's Office. That was sometime ago.

I was wondering if you have a comparable law in New York?

Mrs. GRANT. I am sorry. I will find out and I will let you know.

Senator PASTORE. I think where you have a number of cases that flow from one individual or one establishment, I think you are getting yourself really into the area of criminal common cheating.

Mrs. GRANT. I must tell you why our Consumer Protection Act became so tremendously important to us, and why I am concerned about the administration bill because it omits this particular area. Our nonjurisdictional area included deception in the sale of most of the household goods, and this is really where the majority of our complaints came from, and this is where we could not move. Now, we can. We now have real capability for fighting consumer crime in New York City, and—

Senator PEARSON. Would the Senator yield?

Senator PASTORE. Yes.

Senator PEARSON. I want to ask you a question about the New York consumer law now that we are on this particular point. I just say, Mrs. Grant, that I share your concern about the limitation of categories and also the triggering device in the Attorney General's Office. But I understood from talking to staff counsel, and I have not had a chance to see your particular statute or ordinance yet, that under

the New York Consumer Protection Act the corporation counsel must first make a judgment that a suit will be instituted and then he institutes the action on behalf of the class.

Mrs. GRANT. No, sir, that is not—well, the first part is not as I understand it. The corporation counsel does not decide whether or not this is a class action.

Senator PEARSON. Let me ask the question this way: If there is a class action under the New York ordinance, is it brought by the corporation counsel?

Mrs. GRANT. Yes. The corporation counsel is the lawyer for the city of New York.

Senator PEARSON. I understand. The Attorney General is the lawyer for the U.S. Government. Now, I am not trying to develop anything other than to see if the New York ordinance is not perhaps somewhat similar to the Attorney General's position, because if the corporation counsel is the only person authorized to bring the class action, then he does make the judgment, he does trigger the device. So they are very similar.

Mrs. GRANT. No, sir, you did not let me complete my answer. What it is, we have received from the corporation counsel permission to have our consumer advocate go to court.

The person we choose—the machinery has not been implemented yet. We have the problems you have here; that is, budget, and when the money is granted to us and we can have the people that we have already chosen in our department, we will have a law enforcement division headed by a consumer advocate who will be able to go to court on his own.

Senator PEARSON. Does he go on his own name or of the agency, your department name?

Mrs. GRANT. He is a deputy as well as the consumer advocate, but the decision is made by us and not determined by the corporation counsel.

Senator PEARSON. Under the New York ordinance, if I was a resident of that city, could I initiate a class action in the courts of the city of New York?

Mrs. GRANT. Yes.

Senator PEARSON. But I would do it through your department.

Mrs. GRANT. Well, you need not.

Senator MOSS. I am wondering if there are not two ways to go.

Mrs. GRANT. I would like to introduce Harriet V. Rabb who was special counsel for my department, and we are very sad to lose her.

Senator PEARSON. If you are getting into a legalistic area, I will not proceed any further.

Mrs. RABB. There is one major distinction between the two bills. The bill that Commissioner Grant has authority over in New York City is a bill which allows the government to bring action for a class of individuals. The bill which you are discussing here is one which ostensibly and hopefully when it is passed will allow consumers to get together and bring actions on their own behalf. By throwing in the triggering mechanism which you describe in the Justice Department, it in that instance becomes a monkeywrench, and in New York City the consumer cannot presently go to court by himself and bring a class action. That is presently being litigated. Mr. Schrag is litigating that.

We in New York City must have the authority through the government to bring the action because the consumer cannot, and that is what the commissioner has been testifying in regard to, that the consumer must be able to bring it himself.

Senator PEARSON. But your point is whether or not it is in the New York ordinance or whether or not it is in the administration bill, the point you really want to develop today is consumers ought to have a right to class action?

Mrs. GRANT. And they should be able to do it immediately and on their own and without waiting for anybody to decide whether or not they should be allowed to go.

Senator PEARSON. Whether it is your department's attorney or a corporation counsel or an Attorney General of the United States?

Mrs. GRANT. Right.

Senator MOSS. Would it be your position that perhaps a consumer ought to have both remedies, he ought to be able to go to the consumer advocate, in the Federal case perhaps the Federal Trade Commission, and have the Federal Trade Commission bring an action or he ought to have the other election if he wanted to do it by bringing a class action of his own and all the others would join with him in a class action.

In our discussion before, we talked about really the great enforcement manpower that it released in effect. Your testimony to me indicating that relatively small numbers of suits or orders that were issued by the Trade Commission indicated that there is something of a roadblock in just not having enough investigators, enough officers, enough manpower to do the job, whereas, if you released this out to the consumers themselves, then you have got a couple of million people available who are acting as policemen, and that the only worry that seems to have occurred to people on that is that suddenly there would be so many lawsuits they would burden the court down. We have had witnesses testify about that.

I do not know whether you have an opinion on that or not. Do you think this would so flood the courts that they would bog down if we permitted the class action by consumers?

Mrs. GRANT. I think far from harassing the individual businessman or industry that class action has really served to keep industry honest.

In terms of the first question that you raised, I think that neither the consumer nor the Government can do it alone. Sometimes an individual will take the initiative and bring a class action and agency action is needed to enforce the law. But the agencies are understaffed compared to the needed law enforcement, and I think that consumers working with private lawyers and with, for example, the OEO legal services would be able to get a lot further than the agencies might.

We desperately need both. Both should have the power to sue for restitution and each, I think, should be permitted to intervene in the lawsuit initiated by the other.

Senator MOSS. First of all, on this business of flooding it, I think your discussion about the small claims court put this rather aptly, rather than have 25,000 actions brought on small claims, if you could have one class action brought that was going to cover this problem for a large number of people, you really have only one action going in the court, and the lawyer prosecuting it and defending it, and when

the court's decision is made, it then applies to a large number of people.

So in that sense a class action might in fact reduce the burden on the court if people were inclined to bring actions for frauds or misrepresentations.

Mrs. GRANT. I think, too, Senator, it would obviously act as a great deterrent; you hit somebody with a thousand individual cases of abuse, it is a lot stronger than one at a time.

Senator MOSS. The other factor it seemed to me that I would like your possible comment on is the class action, of course, a civil restitution action by a private citizen, and a private citizen never gets involved except as a complainant or a witness in a criminal action. If there is a criminal action brought against the manufacturer or a retailer, that would have to be brought by the corporation counsel if it is the city of New York or the Attorney General if it is by the United States, and this is to punish that corporation or individual criminally for what he has done, and it does not get involved with this restitution to each of the customers who have been defrauded or misled or in some way taken into the deal; is that your understanding?

Mrs. GRANT. Yes, sir, it is.

Senator MOSS. I yield to Senator Pearson.

Senator PEARSON. First let me say I am not so much concerned about flooding the courts. If that takes place and there are legitimate claims, the courts will have to be enlarged. Litigants must not fit into courts or their dockets. Courts must serve litigants.

You said you have 65 claims per day. Out of the 65 per day that come in or any number how many of them are just disagreeable people who are unhappy about many other things? You know what I am talking about. What percentage of those that come in?

Mrs. GRANT. Let me correct the figure. I said we have many more than 65 a day. I said the FTC handles 65 a year. We have many, many, complaints that fall into nonjurisdictional areas, and by that I mean not only those that we cannot prosecute but also those that belong to other departments, complaints about sanitation and traffic and a lot of other things. I do not know what the percentage of those are. But we also, of course, are very wary of the consumer who makes the complaint that we think is irrational, unfounded, and many times the hearing is settled in favor of the merchant. So, we are aware of that as well.

I am sure that the judge would behave in the same way. If he felt an action was being brought against a merchant and it was unfounded, he would simply dismiss it. So, I am not concerned about that.

Senator PEARSON. My point is your particular department does filter out a great number of these illegitimate and unreasonable claims?

Mrs. GRANT. I do not think so. I do not know the statistics, but I would not say they were more than about 3 or 4 percent. That is all.

Senator MOSS. I did not hear you.

Mrs. GRANT. Three or four percent, a very small number.

Senator MOSS. In other words, you say most of the complaints are legitimate and are in need of some kind of remedy, but you do have a few crank ones?

Mrs. GRANT. Of course we do. We recognize that, and we try to negotiate with the consumer not to be unreasonable. But the great,

great, majority of those are because people have a right to complain and they feel that they have been deceived and defrauded and they call us to help them get their money back and help them solve their particular anger.

Senator Moss. Your comment is interesting and helpful to us, because in another bill that is pending before this committee is the question of whether Independent Consumer Councils should be created, and if they did come into existence, that would be one of their functions, to accept all complaints and evaluate them and then help the person who had a legitimate complaint to get restitution or justice, but certainly to weed out those who had no legitimate complaint.

I think all of us recognize that human nature being what it is there is just going to be a certain number that do not have a genuine legitimate complaint, but they need some place to have it stated and somebody with enough perception and authority to tell them they have no complaint and it must be dismissed, they just cannot be helped under those circumstances.

Mrs. GRANT. We are also assuming that a good lawyer will not take a case before the courts unless he feels that it has merit and it is a good case.

Senator PEARSON. I used to be a good lawyer, and I used to find that out at most embarrassing times, after I was already in it.

Senator Moss. One thing in this consumer field, and particularly in the Federal jurisdiction, we ordinarily had orders for future conduct and now we are talking about really stepping back and providing remedies for conduct that has already occurred rather than a cease and desist order or a consent decree which had been the normal practice in this area of selling and deception in this field. Do you think this is the next reasonable advance we ought to be taking federally?

Mrs. RABB. I think the answer is obviously yes, Senator Moss. It is clear that that is necessary, because cease and desist, while it was useful to prevent further deception, did not really take care of all the hundreds of people who had lost money. It is that kind of frustration about the marketplace that has created all the interest in consumer affairs and has allowed Commissioner Grant to accomplish as much as she has in New York which is really quite a lot.

Senator Moss. Thank you.

Commissioner, do you believe that really by providing tools of this sort that in the long run we are actually doing a service to the producer, the legitimate producers and sellers by restoring confidence, as it were, in the marketplace? We had a witness the other day who said that we were going through a period when really the confidence of the consumer had been shaken. He thought or he was fearful that he had been swindled or misled in so many ways that the confidence in the marketplace was beginning to collapse, and if that ever happened, of course, it would be disastrous to the producers and the retailers. Now, if we can restore confidence in the marketplace so that competition remains there but it is a competition based on amount and quality and competing in that way and the consumer really feeling that it did that, then the marketplace has been restored and is stable.

Mrs. GRANT. I think for too long it has been a one-way street. I think obviously, and it is constantly quoted, that the consumer does have rising expectations and these expectations are not being met, and

we have come to a great big stop sign which says to the businessman you no longer can have your way; you must go back all the way up from that perch you are sitting on and go all the way down and see about the product you are producing; it is defective or not; are you just sending it out on the market because there has been such an enormous demand. I hope what will happen from this tremendously important proposal is that caveat emptor will be replaced with a new concept of the seller being concerned with his product and making full disclosure. Once he has to tell us what he is selling, he is going to have to be mighty careful about what it is.

I talk about the ghetto having a sense of hopelessness and disillusion, but when I go out to a place like Staten Island or even Park Avenue in New York City and get a sense of the anger of the consumer who can afford to buy what she has gone out to buy but is so angry when she brings it home, it is not at all what she thought it was, and she has no recourse, and the problem of getting back to the merchant and getting back at him becomes such an impersonal and difficult thing. This is really our only answer in New York City, and, of course, the problems in our city actually are multiplied many fold. This is just an essential—tremendously essential thing in terms of Federal law. I really wish you well.

Senator Moss. Do you think this class action bill might stimulate the merchant to providing a better and more reasonable attitude and forum whereby complaints could be registered and resolved rather than taking the other way that has existed heretofore of putting the whole burden on the consumer to find his way back and he can't find his way back as you said? If the class action was available to the consumer, it might stimulate the merchant to try to provide even a simpler forum than that to get his complaints settled so he would not be subject to a class action, do you not think that might be so?

Mrs. GRANT. There is an indication that some of this is happening. I have noticed recently that one or two large companies are taking on consumer ombudsmen to handle complaints and make settlements without people having to go to court. Large advertising agencies are even doing this now, and accepting complaints from consumers in terms of the advertising that they perpetrate on the people. So, we in this consumer revolution are making people stand up and take notice, and where before I felt all of this self-regulating and self-policing was having absolutely no effect at all, if they are going in this direction, then there is some hope. It is rather dim, but it is hope.

Senator Moss. That, of course, is a happy note to underline. Of course, all manufacturers and distributors are not trying to take advantage of the consumer. Many of them are trying hard to do a good and reasonable job, but there are many who take advantage of the circumstances, the protection that has been given them under the limitation that we have in the law that they do take advantage of the consumer, and that is the reason we have to provide a means that all can be made to make this effort to serve honestly.

Mrs. GRANT. Senator Moss, let me make one very important thing clear, and that is when we put together this Consumer Protection Act, its purpose was specifically and only to target in on the dishonest merchant. Those who function on the periphery of the law, you know. At the hearings, people in commerce and industry came in and sup-

ported this act and wanted it, because they with their better business bureau, with their own self-regulating policies and so on had not been able to dispose of that un reputable merchant who was taking business away from them and creating an impression of everyone being dishonest and evil. We were tremendously encouraged. We passed this bill in record time. It was introduced in May and it was passed in December. It sounds rather dramatic, but it was a May to December bill and supported by commerce and industry. Even at the signing ceremony before Mayor Lindsay, we had members from industry speaking for the act and asking him to sign it.

Getting at the dishonest merchant and the disreputable businessman is the purpose of the law. It is absolutely essential. It is not anti-business.

Senator MOSS. I can understand why the legitimate businessman would welcome it because the market is fiercely competitive, and if some competitor of his by cutting corners, by misrepresenting, by doing various things can draw trade away with misrepresentation, it is harmful to the legitimate businessman who is honest and does disclose. So, a law that would cause his competitors to observe the same rules that he wants to observe would be to his advantage. Then he can compete in another way by quality and quantity, can he not?

Mrs. GRANT. A bad merchant not only takes business away but creates angry consumers which the honest businessman does not want either.

Senator PEARSON. When you speak of angry consumers, this administration bill, which you did not exactly endorse this morning, keeps referring to goods or services. I would imagine an enormous amount of complaints that you receive have to do not only with products but with services, warranties, service contracts, and services themselves. The demand today and the inflationary figures that we have just received indicate that the increase in the cost of living, increase in relation to goods, is 6.1 percent or maybe even lower, but the increase in the cost of services, particularly those that deal with the homeowner, is up to about 91½ percent now. So the angry consumer is one who is paying a great deal more for services today and receiving less, so to speak.

Mrs. GRANT. We have frightening cases in our department, particularly in the area of home improvement contractors, home improvement contractors who promise service, have the homeowner pay thousands of dollars, never deliver on the work, and frequently go into bankruptcy and open up the next day under some other name. We license home improvement contractors, and when we receive a complaint we do bring in the licensee. We have been able to through negotiation, through moral suasion, because we have not had real muscle before, we have gotten fines, and I think last year we got as much as, it is miniscule, \$35,000 back to consumers from home improvement contractors, but in most cases we just have not been able to really get the kind of restitution that people should have. People should be returned to the condition they were in before they became involved with this fly-by-night operator. They are frightening from two aspects. One is the dishonesty of the merchant, and second a great deal of the gullibility of the consumer he does trust, he comes into the marketplace—many of them do, a majority of them do trusting and believing, and we feel

as much as our mandate is to educate the consumer we must really first protect him from the merchant, the dishonest merchant and from himself.

Senator PEARSON. I thank you very much.

Let me say that Senator Charles Goodell is a member of this subcommittee. He got caught at a press conference and he is still there, and his staff member is here, and she will take a copy of your testimony to him.

Mrs. GRANT. Thank you very much.

Senator MOSS. Thank you very much, Mrs. Grant. Thank you for coming to testify for us this morning. We appreciate very much your doing this for us.

Our next witness is Mr. Edward Berlin, who is the general counsel for the Consumer Federation of America.

We are pleased as always to have Mr. Berlin come before the subcommittee. We look forward to your testimony.

STATEMENT OF EDWARD BERLIN, GENERAL COUNSEL FOR THE CONSUMER FEDERATION OF AMERICA

MR. BERLIN. Thank you, Mr. Chairman. The Consumer Federation of America appreciates the opportunity to appear before the subcommittee to speak to the resolution of one of the most serious problems now confronting the consumer—that of being able to redress a wrong that has been committed against him.

While we have a long way to go in the establishment of consumer safeguards, thanks to your efforts, Mr. Chairman, and to those of the committee, progress has been made in the recent past. But one of the things that we have learned, as a result of this progress, is that the legislation of protections, the establishment of rights, itself offers no guaranty that the intended beneficiaries of those important actions will in fact benefit.

Declarations of policy, no matter how clearly stated, are little comfort to the defrauded consumer unless he can translate those statements into the recoupment of overcharges, the rescissions of fraudulent contracts, or whatever other form of relief is appropriate. For all practical purposes this cannot now be done. Thus we are left with an even more frustrated consumer. He has been led to believe that justice will triumph, if the legal war is waged, but he lacks the ability even to initiate the battle.

He lacks the ability simply because of the economics of the situation. The typical consumer claim, notwithstanding its significance to the individual, involves a modest amount of money. Invariably, therefore, the costs and delays of prosecuting a wrong, no matter how clear the law may be, are prohibitive.

While this problem affects all consumers, the impact may well be greatest on those in the middle-income bracket for they are unable to secure the services of legal service and legal assistance programs.

We might as well recognize the situation for what it is. To continue to advise the consumer of his rights without affording him a reasonable opportunity to perfect them does him no service.

We are convinced that the answer is to ensure the availability of the class action suit. It makes enforcement of small claims feasible and,

of even greater social and economic significance, it an effectively enjoin the wholesale continuation of illegal practices. Rarely are consumer frauds of limited effect. Usually the discovery of one fraudulent transaction is indicative of a pattern of conduct. But rarely does successful prosecution of an individual claim result in the cessation of similar wrongs committed against others, others who cannot afford the time and expense of litigation.

Senator PEARSON. A question that has been bothering me, and I wish able counsel would give me his view on this, the good big companies as distinguished from small fly-by-night companies are not going to perpetrate the kind of frauds and bring class actions.

I say that by way of trying to make the point I am concerned about having class actions that are fundamentally going to be against judgment proof type defendants.

Mr. BERLIN. I wish I could completely accept your premise, Senator Pearson.

Senator PEARSON. I am not sure I accept it either. The point I am trying to make is—let's use an example. One of the great appliance companies in the United States, whether it be Westinghouse, General Electric, or some other, are they the type defendants that are going to be subject to a defendant in class actions or are we going to have A.B.C. Quicky Refrigerator Co., which is set up today and gone tomorrow?

Mr. BERLIN. I expect that we will have a mix of both. I say that because of the experience in the area thus far.

Senator PEARSON. What has been the experience?

Mr. BERLIN. We do have some experience with class actions, I guess most notably in the antitrust field, where there was a very successful class action brought against a rather major, certainly reputable, drug company. There was a class action—

Senator PEARSON. These are antitrust suits?

Mr. BERLIN. That is right.

Let me get to the nonantitrust aspect for a moment. There is a class action pending in the District of Columbia presently, against all of the national banks doing business in the District. I would assume that the Chamber of Commerce would have no difficulty listing them among the more reputable merchants in town.

Yet, if the class action is correct on the law, those banks have been charging usurious rates of interest for the last 50 years.

I think in terms of numbers of companies, it certainly will be the case that the smaller fly-by-night companies will fill up the dockets more so than the larger national manufacturers, but I think experience indicates that national manufacturers are themselves guilty of practices which, though perhaps not fraudulent, perhaps not even deceptive, are certainly practices that should be scrutinized by a court because they do raise legal questions. I am not sure I can answer your question in terms of percentages.

Senator PEARSON. I think you have.

The point I want to make is that situation which is always present has two edges. First, the deceived customer doesn't have the means of bringing the action and quite often the defendant doesn't have the means of satisfying the claims.

Mr. BERLIN. Yes, we might want to consider whether, if the consequence of bringing a class action against the fly-by-night, disreputable merchant is to put him out of business; that is, perhaps not in and of itself a desirable end result of the class action remedy. I think it cuts in several different directions.

My last point was that the individual prosecution of a suit rarely has sweeping corrective effect. The class action suit makes sweeping corrective action possible.

It is said, however, that to establish the utility of the class action suit is to encourage litigation thereby exacerbating the existing, and intolerable, court backlogs. The credibility of that suggestion is, of course, premised on the notion, with which we do not disagree, that individual consumers cannot, and therefore will not, prosecute their claims which if prosecuted, would truly inundate our courts.

As Senator Pearson said much better than I could a few moments ago, if the availability of the class action will for the first time make our courts meaningful instruments of justice for the consumer, so be it. Let us meet the judicial backlog problem constructively and directly, but let us not choose the simple expedient of effectively closing the courthouse doors.

As far as we are concerned, it no longer is appropriate to debate the advisability of affording to consumers the class action mechanism, it is appropriate only to debate how that mechanism can most effectively be formulated. Alternative proposals are before the committee, that offered by Senator Tydings and yourself, Mr. Chairman, S. 3092, and that proposed by the administration, S. 3201. In our view, if the objective is truly that of affording consumers a meaningful way in which to obtain legal redress there is no choice: S. 3201 must be rejected in favor of legislation similar to S. 3092.

The administration's bill relegates consumers to second-class status before the courts. Even as to the very limited kinds of claims that are made actionable, the consumer can seek legal relief only when the administration says he may do so. We know of no precedent in the law for this notion and we consider it totally objectionable and insulting.

By requiring, as a predicate, a successful prosecution by the Government itself, the administration has subjected the class action relief to the full range of political pressures that already replace open discourse in the administrative decisionmaking process. Consumers will now not only require professional assistance for the prosecution of the class claim, they will require similar assistance for the purpose of convincing the powers that be to take the action necessary to satisfy the condition precedent to suit.

We will have succeeded in solving one problem only to create a far more difficult, if not totally unsolvable one in its place. For the Attorney General's decision as to whether or not he will prosecute a wrong will not have to be made by the application of judicial standards, political considerations invariably will prevail. And it can be expected that those who desire immunity from the prosecution of consumer class actions—and the unscrupulous will obviously desire it most—will lobby vigorously to make certain that the administration does not perfect the right to redress.

Even leaving aside the operation of these influences, it is totally impractical to assume that even the best motivated administration will be able to move in all areas. Priorities will be established. The result would be not only a new area of delay but that those consumers who have what in one year may be considered low priority problems, would effectively be barred from the courts. The very need for class action legislation stems from the inability of government to respond adequately to consumer problems, we will have come full circle if we predicate justifiability on government action.

Apart from these fundamental inadequacies and inequities, S. 3201 is fraught with difficulties. First, its list of wrongs is far too narrow and ignores completely the ingenuity of industry. There is no reason for such rigidity, even assuming that the enunciation were comprehensive. Since it is far from that, it is utterly lacking in justification.

Second, even as to the 11 enumerated wrongs, the consumer can prevail only if he is able to establish a knowing or intentional violation. In effect, this supposedly procedural legislation would, if enacted as proposed, alter the substantive law in several areas. In many States a showing that the merchant acted negligently would be enough to establish the basis for relief.

Finally, it is not at all clear that the administration's bill would remove the \$10,000 jurisdictional amount that now bars claims for less from the Federal courts. This is most significant in view of the Supreme Court's recent holding that you may not satisfy the jurisdictional amount by aggregating the claims of the individual members of a class. *Snyderv. Harris*, 89 S. Ct. 1053 (1969).

For all of these reasons we must urge you to reject S. 3201. To label it as an act "to provide increased protection for consumers" is itself patently deceptive. Indeed, because of its regressive effects, we would urge its defeat even were there no satisfactory alternative. Fortunately there is: S. 3092 introduced by Senator Tydings and by yourself, the Chairman, and its companion measure, H.R. 14585, introduced by Congressman Eckhardt and 60 cosponsors.

S. 3092 does not relegate consumer claims to second-class status; it does not have a rigid and therefore easily circumvented reach; it does not interfere with established substantive principles of law; it clearly waives the \$10,000 jurisdictional amount; and most importantly perhaps, it requires no bureaucracy to administer it with all of the costs that would involve.

I think this is significant for a couple of reasons. There has been a lot of criticism leveled against the Federal Trade Commission in recent months, as this committee well knows, most of it with ample justification; but one of the problems that we face whenever we are critical of the Federal Trade Commission is that the Commission comes back and reminds us that it is lacking in funds, inquiring what it is expected to do with the very limited budget that it has been able to convince the Budget Bureau and then the Congress that it is deserving of?

One striking example is in an area that you are very concerned with, Mr. Chairman, that of truth in packaging. I forget the precise number now, it has been a while since I looked at it, but I testified earlier this year on truth-in-packaging before a House committee, and at that time I reviewed what was being done in terms of implementation by the various agencies that have responsibilities under that act.

I don't want to misstate the FTC's efforts, but the amount of effort among the three agencies ranged from no people assigned to truth-in-packaging to five. I believe it was not the FTC who had five people assigned. I am not sure that they were the ones that had no one assigned, I believe it was two or three people.

This is a serious problem. The administration's bill would require an entire bureaucracy to administer it if in fact it is going to be effectively administered. Coming as it does at a time when the administration is very sensitive to the budget situation for this coming fiscal year, as well it should be, we have to explore whether there are not more feasible alternatives that would accomplish the same beneficial result without necessitating the dedication of public resources, and this is another very important distinction between your bill, Mr. Chairman, and that of the administration.

Your bill is concerned with establishing an equitable procedural framework in which to make the class action a meaningful tool of consumer protection. Since we are convinced that if consumer protection is to become a reality the courts will have to be involved on a regular basis, the Consumer Federation of America considers the enactment of effective class action legislation of highest priority. We urge, therefore, that S. 3201 be rejected and commend to you for early enactment legislation patterned after S. 3092.

If I may add one additional note. I found, when I walked in this morning, a press release from the American Retail Federation. I assume that you will have the benefit of their full testimony a little later this morning. I find the press release, and I assume I would equally find the testimony itself, curious to say the least. The press release says, "Consumer class actions are a harsh, vindictive remedy." And that, "Defendants are generally selected on their ability to pay substantial damages rather than the degree of guilt."

I find that premise fantastic to say the least. It completely ignores the fact that before there will be any recovery in a class action suit you will have to establish your right to recover, you have to convince a judge in a Federal court, and undoubtedly in the major cases three judges in an appellate court, that you are right on the law.

To label the procedure as being vindictive, to cast the impression that it is a blackmail device, is a most unfortunate characterization.

I see from the press release that the American Retail Federation would prefer, "a more effective use of small claims courts and arbitration procedures." Of course, they would prefer it, and they prefer it for a very obvious reason.

Small claims courts and arbitration procedures, even assuming they are effective, that they are available to consumers, that you don't have all of the procedural problems that Mrs. Grant effectively alluded to, and you can't avoid those, you are going to have them, but let's assume that an arbitration mechanism could be set up that could avoid that, they would still prefer it to the class action for the obvious reason that the only thing you resolve when you resolve an individual claim is that individual claim.

You have no injunctive effect. The big advantage of the class action is its injunctive implications. It will end that particular deceptive practice, at least vis-a-vis that particular merchant, if not on a far more sweeping basis.

If we defer to an arbitration system, I can well imagine that especially the most unscrupulous merchants will certainly quickly utilize that machinery to settle out a claim before it receives public exposure, and then merrily go on their way continuing their pattern of fraudulent conduct in full realization of the fact that should they ever get tripped up again they can always go back to the arbitrator and settle another five, ten or hundred dollar claim.

I am sure the committee will not be fooled by any suggestion that the Small Claims Court or arbitration procedures can ever be fashioned to accomplish the injunctive aspect of a class action remedy, and, therefore, I would hope you would reject those suggestions.

Let us be very clear what we are talking about. We are not talking about consumer extortion of business as some of the trade associations that are appearing before this committee would have you believe. We are not even talking about the broadening of consumer protection on a substantive basis. And we certainly need to move in that area.

The only question before this committee relates to whether consumers are to have realistic access to our courts to prosecute substantive rights that the law already gives them, but rights that they have been unable to prosecute.

I hate to get off on this tangent, but we are talking about a law and order issue. The law is there. The question is whether or not we are going to effectuate that law.

We are not talking about a substantive broadening of consumer rights or giving the consumer a blackjack, lest giving him access to the courts that we in this country cherish so much is to be considered tantamount to giving him a blackjack.

Senator Moss. The arbitration thing is available now, is it not? If the consumer goes back to the seller and says I got a bum toaster or something else, they could adjust his claim at the present time if they want to and satisfy him and he is on his way. But we are speaking of instances where the consumer cannot get this kind of adjustment.

Arbitration, maybe arbitration presupposes a third party, but the complaint can certainly be arbitrated out now. What we are talking about is a case where the consumer cannot get satisfaction in that manner.

Mr. BERLIN. That is certainly right, Mr. Chairman. I had not realized that certain segments of industry have in fact gone so far as to establish ombudsmen as Mrs. Grant indicated, and I certainly welcome that, and do not get me wrong, I would welcome the establishment of arbitration procedures. I do not reject that as an important tool in the effectuation of these rights, but not at the expense of denying to consumers effective access to their courts.

If business wants an arbitration procedure, fine, let's have one. I would endorse that without qualification. But let us also make sure that the consumer has the option—as business has always had—of going into court on an effective basis.

Senator Moss. Thank you.

Does the Consumer Federation support my concept of developing a comprehensive program for consumer protection?

Mr. BERLIN. Let me say, Mr. Chairman, that it came as no surprise to us to realize that you were considering comprehensive consumer protection legislation because anyone who follows the consumer move-

ment even tangentially has grown accustomed to seeing your name associated with just about every consumer advance that this Congress has enacted in the last several years.

I am sure I am not making any bold disclosures if I say it has become vogue to initiate and to introduce consumer protection legislation, so much so that we are facing a rather serious problem now.

There is so much floating around that it is rather difficult to put them all side by side to see how the consumer is really going to come out when and if any combination or all are finally enacted.

It is for this reason that we are particularly concerned with the need for a comprehensive consumer protection proposal and very much welcome the fact that you are considering it and have invited us to supply comments to you, and we hope that we could use the next several days to digest the morass of materials that we have now and perhaps supply to you something that could be more beneficial than I could suggest at this very moment.

Senator Moss. Thank you very much. I, of course, appreciate the comments of the Consumer Federation on that. As you say, we have been moving piecemeal in a lot of fields and there are a lot of bills pending. It seems that we ought to pull them together in a sort of comprehensive whole and make sure we are moving in the areas we need to and relate all the different statutes one to another so they can be effectively used by our consumers.

Just one or two more questions. You noted that class actions might be of greatest benefit to middle-income consumers. Could you elaborate on that point and give us examples of what you mean by that?

Mr. BERLIN. Certainly. When I said that, I should not be misunderstood to have been saying that they are not of benefit to low-income consumers. They are in my view of principal benefit to middle-income consumers because of the general availability now of legal assistance on a pro bono basis to low-income consumers. For example, the bank case I mentioned a few moments ago. The bank case involves installment loans being taken out by residents of this city. The loans range from \$300, \$400, \$500 up to a maximum of \$1,500, perhaps \$2,000.

What is involved there is a usurious interest rate or so it is alleged in the complaint. The recovery would be the interest compounded in certain fashions as prescribed by statute, but all we are talking about there is a nominal amount for each particular claimant.

It is the middle-income consumer basically who takes out the \$1,000, the \$1,500 loan; yet, he cannot possibly go to court to recover the \$150 or \$200 excess interest payments that he has been made to pay.

Another example that comes to mind is an experience that I recently had in the Washington area where a very middle-income consumer purchased a refrigerator from what I think would be classified as one of the more reputable merchants in town, and it became very clear that the store was not standing behind the warranty.

It took my office about 9 months to work that out. The store eventually did satisfactorily do the work that was required to be done, but that took about 9 months of sporadic effort.

This is an area, the warranty area, where I think the middle-income consumer is being taken on a regular daily basis. Yet, again you cannot afford to go to court to perfect your right to \$50 worth of repairs.

There is one additional area that Mrs. Grant recently brought to

mind. Mrs. Grant held hearings before her commission up in New York on the problems that consumers are confronted with in the moving industry, and the record she developed there was astounding to say the least.

There you will find, if you examine that record, repeated fraudulent practices by intracity, intrastate and interstate moving companies, and again we are dealing with situations where the entire bill to the consumer is anywhere from \$50 to \$200 or \$300, and although he has a very valid right to complain about perhaps \$50 or \$75 worth of that bill, he has no effective way of really negotiating that out.

Senator Moss. Just one other question. It was suggested on Tuesday in our hearings here that Congress should intentionally leave vague the law defining business' liabilities and duties, and the burden would then be upon business to determine the legality of their practice. Do you agree with that concept? This was aimed, I think, at the list of prohibitive actions that are in the administration bill.

Mr. BERLIN. I do not believe in vagueness. I believe that business has a right to know what standard of conduct is expected of it and that consumers have a right to know what standard of conduct they can expect from business. But specificity is not synonymous with rigidity.

The problem with the administration bill is that it does not attempt to be specific in terms of defining a comprehensive standard of conduct for business. It instead imposes a rigid list which unfortunately serves as the triggering element for the consumers' right to seek relief.

So I think we have to keep in mind that while specificity may well be a very desirable objective, both for the businessman and the consumer, we have to be careful that we do not confuse rigidity with specificity. That is the real difficulty in the administration bill.

I think we see developing now in our States and certainly in this city a fairly well-defined body of consumer law. I think this has come about largely as the result of the efforts of legal service programs and the remarkable work they have done on behalf of the consumer.

I think the business community knows what is expected of it. Sure, it would be desirable if we had a little more definiteness, but I cannot agree that the answer is to impose a rigid schedule as would the administration.

Also, the administration bill, I find this rather striking, really replaces State law with a new Federal code of conduct.

I think, especially in terms of the small merchants; that Senator Pearson referred to before, that we should defer to State law wherever possible. I think State law is evolving, people in the area know what it is and can adopt to it without great difficulty. Therefore, I am very much in favor of your concept which really builds on what is already developing in each local area.

Senator Moss. Thank you very much.

Senator Pearson.

Senator PEARSON. Just one, and I do not want to develop it very much. I understood that an action brought under an act of Congress affecting commerce did not require a jurisdictional amount.

Mr. BERLIN. I believe that is not entirely correct. We have to distinguish—

Senator PEARSON. You mentioned some case last year.

Mr. BERLIN. The *Snyder* case—the Supreme Court case?
 Senator PEARSON. Yes.

Mr. BERLIN. The Supreme Court has held that where the \$10,000 jurisdictional amount applies, leaving aside for the moment the question of where it does apply, that you cannot solve the jurisdictional amount by aggregating the claims of individual claimants to make up a class; that each of the plaintiffs must himself have a claim for \$10,000 in order for the jurisdictional amount to be satisfied.

That does not go to the question of whether or not the jurisdictional amount applies in a particular case. There may well be situations—for example, antitrust actions—where the jurisdictional amount may not apply and where you have Federal jurisdiction.

This is not the case I think in most consumer claims that we are talking about here. Most of them, if you do get into Federal court, you will get into Federal court on the basis of diversity of citizenship and there the \$10,000 amount will apply.

Senator PEARSON. I have a lawyer who raises this point, and I do not think we need to pursue it, but I understand a couple of the testimonies today raise this point. You might clear it up. We will check on it too.

Mr. BERLIN. The point of the Supreme Court case does not go to when the jurisdictional amount applies. It holds only that if it does apply, you cannot satisfy it by aggregating individual claims.

Senator PEARSON. It gets to be important in a class suit.

Mr. BERLIN. There is no question about that.

Senator MOSS. Thank you very much, Mr. Berlin. We appreciate your testimony and place great value on it because you are working in this consumer field all the time. We are glad to have you before us.

Mr. BERLIN. Thank you.

Senator MOSS. Mr. Herbert H. Schiff, who is chairman of the consumer relations committee of the American Retail Federation.

Mr. Schiff, we are glad to have you, sir, and look forward to your testimony here today.

**STATEMENT OF HERBERT H. SCHIFF, CHAIRMAN OF THE BOARD
 AND PRESIDENT OF SCOA INDUSTRIES, INC.; ACCOMPANIED BY
 EUGENE A. KEENEY, PRESIDENT OF THE FEDERATION; AND
 JAMES M. GOLDBERG, VICE PRESIDENT, GOVERNMENT AFFAIRS
 DIVISION**

Mr. SCHIFF. Thank you for inviting us here. On my right here is Mr. Eugene Keeney, president of the American Retail Federation, and on my left here is Mr. James Goldberg, vice president, government affairs division of the American Retail Federation.

Senator MOSS. Welcome to you, gentlemen.

Mr. SCHIFF. Mr. Chairman and members of the subcommittee, my name is Herbert H. Schiff. I am chairman of the board and president of SCOA Industries, Inc., of Columbus, Ohio, and I am appearing here today as chairman of the consumer relations committee of the American Retail Federation.

The American Retail Federation is a national organization which, through its 50 state and 29 national retail trade association affiliates, represents more than 800,000 retail establishments of all types.

A ball park figure would be that we represent about \$150 billion worth of retail volume and we employ somewhere around 10 million people.

We appreciate the opportunity to appear here today to express retailing's views with regard to three bills which would broaden the authority of the Federal Trade Commission and which would provide access to the Federal court system for consumer class actions.

The retail industry, which acts as the purchasing agent for the consumer, believes that the interest of its customers is paramount. We believe that a customer who feels he has been defrauded, and who cannot obtain satisfaction through the normal complaint procedure, is entitled to a remedy.

In our own company, we have a policy to give the customer's money back immediately and then investigate the claim.

As Virginia Knauer, the President's Special Assistant for Consumer Affairs, has pointed out, the remedy should be "convenient, expeditious and effective." Underscoring these criteria is the fact that the vast majority of consumer complaints involve relatively small amounts, most often ranging from 10 cents to \$100.

But what remedy is possible that would be fast, efficient, effective? No legislative proposal to date—and that includes the class action proposals pending before this subcommittee—meets these requirements. Class actions, as we will explain later, are a particularly unsuitable remedy in these instances. There are, however, existing approaches which are available to the consumer, and which, if pursued with vigor, could provide the remedy that is needed.

ALTERNATIVES TO CLASS ACTIONS

First, there is Federal Trade Commission enforcement of its section 5 authority. The FTC has, of course, been the target of many criticisms and suggestions in recent months—first through the report of the so-called "Nader's Raiders" and later through the investigation of the WhiteHouse—requested special commission of the American Bar Association.

With these reports as guidelines, the new FTC Chairman, Caspar Weinberger, has taken steps to speed up the internal procedures within his agency. We are pleased that the Chairman has indicated he will reactivate the Commission's long-dormant Office of Program Review. We believe that if Chairman Wienberger is given a free hand to reorganize the agency as he sees fit, the FTC can play what he foresees as an "aggressive role" in protecting the consumer.

Second, the Commission should be given the authority to obtain preliminary injunctions in cases of consumer fraud. Even a revitalized FTC, with its programs and priorities firmly in mind, is limited in its effectiveness without this authority.

For this reason, the American Retail Federation supports S. 2246, the Deceptive Sales Act, introduced by the Distinguished chairman of this subcommittee. We recommend that amendments be added to S. 2246 to make it conform to the version of this bill which was passed by the Senate nearly 2 years ago. We would be pleased to submit legislative language.

In addition, we believe that S. 2246 should be amended to require the issuance of an FTC complaint prior to the time that a preliminary injunction is sought. This will assure that the Commission will not

use the injunction technique as a substitute for actual investigation of an alleged violation of the laws which it administers.

A third alternative to class actions is more vigorous use of small claims courts throughout the country. We believe that such courts provide an effective means for fast, efficient, effective relief. If the procedures for using small claims courts are not widely known, then we suggest that more localities follow the lead of Mrs. Bess Myerson Grant in New York City. Her department of consumer affairs recently published a consumer-oriented brochure entitled, "How to Sue in Small Claims Court."

Fourth, the National Center for Dispute Settlement, an offshoot of the American Arbitration Association, has volunteered its efforts to help resolve consumer disputes.

In this same vein, it should be noted that Mrs. Knauer is using the authority of her Office of Consumer Affairs to help bring consumer and business together in settlement of the complaints which come across her desk. We support legislation which would make this Office a statutory one within the Executive Office of the President.

These are by no means the only alternatives to class actions. We believe, however, that they can work if used properly. We recommend efforts by both business and consumers to use these existing and suggested remedies more effectively.

The potential impact of indiscriminate consumer class actions on business is devastating. I might deviate to say this: We spend millions of dollars every year building up our names and our good will, and just one action calling it wrong can ruin everything you have done over the years.

Senator Moss. Even if it isn't a successful action?

Mr. SCHIFF. Even if it isn't successful. This is the horror of it. It is unfortunate.

Senator Moss. I am not sure I can accept that, but I am glad to have you respond.

Mr. SCHIFF. We have a difference of opinion, sir, but I respect yours.

This subcommittee is aware, I am sure, of the pending class action on the west coast involving a nationally known manufacturer of auto accessories. Being sued because of some allegedly defective truck tires, this defendant's potential liability is in excess of \$400 million.

Other consumer class actions which are pending, while they may not involve such an enormous figure, still pose a staggering threat to business.

Because of the great recoveries possible, consumer class actions are a harsh, vindictive remedy which are used, not against those who perpetrate so-called "hardcore" fraud, but against reputable business.

I repeat, not against those who perpetrate so-called "hardcore" fraud, but against reputable business.

The consumer abuses against which class action legislation is being directed are those unconscionable practices which exploit the unsophisticated consumer on a widespread basis. But such consumer frauds are generally engaged in by fly-by-night operators or marginal businesses skirting the fringe of legality.

Such defendants would generally be judgment-proof against substantial awards, and for this reason would not fear the deterrent of a consumer class action. Further, class action lawyers will be uninter-

ested in instituting suits against such businessmen. Accordingly, class action would be least effective where consumer abuses are most pronounced.

Class action defendants are generally not selected on the basis of their degree of guilt, but rather on their ability to pay substantial damages. I must say here we spend hundreds of thousands of dollars every year, and it goes into millions, just protecting ourselves by insurance against what may happen.

Experience demonstrates that the expectation of high legal fees at the expense of large businesses encourages "strike suits" which misuse the class action mechanism.

A decision to bring a class action is simply not based on a judgment that particular consumer problems require litigation in the public interest—the kind of judgment which would be made by a responsible public official. Instead, the determination to sue is placed in the hands of a private attorney who personally benefits from the litigation.

Plaintiffs' attorneys are simply not motivated to bring suit against those who are most likely to engage in widespread consumer frauds. They have no public interest to be concerned about. We do, sir. Thus, lawsuits will invariably be brought against financially sound enterprises who may be trapped with respect to insignificant, technical, or isolated violations—for which any responsible public official would seek from the businessman an assurance of greater care in the future or, at most, a minor penalty.

Private class action suits also involve a hardship on consumers.

First, they involve cumbersome and time-consuming procedures devoted to accumulating the interests of numerous individuals in a single proceeding, including questions involving the makeup of the class itself, intricate requirements for notice to all class members, protracted pretrial procedures, and extensive hearings.

Second, class action litigation will place heavy burden of management on the courts, already faced with heavy backlogs of pending cases. Because of the complex notice requirements, unwieldy pretrial procedures, protracted trials and difficult damage determinations which are inherent in class actions, there will be further delay. Is that a fast, efficient consumer remedy?

Third, the class action mechanism may actually prevent the settlement of consumer claims. Because the financial interest of the plaintiff's attorney is far more substantial than the interests of each member of the class, the lawyer, rather than the client, becomes the participating litigant and real party in interest, thereby abusing the judicial process.

The class action, with its promise of huge fees not commensurate with work expended, offers a bonanza to the lawyer who runs first to the courthouse to file suit rather than seek informal resolution of a claim. And I call that ambulance chasing.

Moreover, he has no interest in advising his clients to seek the assistance of a government agency or seek individual means of recovery. It is relatively simple for an enterprising law office to marshal an expansive list of clients through the class action notice provision. Thus, alternatives to class action litigation are not considered, and the remedial mechanisms otherwise available to the consumer are not utilized.

In addition, the rules governing procedure in a class action auto-

matically operate to increase the number of plaintiffs by forcing all potential members into the litigation unless they affirmatively request exclusion. In this instance, the consumer who is a potential member of a class is easily persuaded to join the suit. The persuasion is even easier when the consumer does not feel he has been cheated, or feels that his claim has been satisfied through self-help, is told that he can get "something for nothing" merely by declining to withdraw from the suit.

In conclusion, Mr. Chairman, the Federation believes that a private class action brought to remedy consumer abuses does not properly perform its intended task.

There are consumer protection vehicles presently in existence, and still others currently under consideration, which may do the job. Specifically, we recommend swift passage of legislation to give the Federal Trade Commission the authority to seek preliminary injunctions for consumer fraud. We have indicated our willingness to make suggestions on improving this proposal.

But before adopting inappropriate class action legislation, the other remedies should first be analyzed in order to determine if and how they fail to provide adequate consumer protection.

It has not yet been shown why these other remedies, particularly if vigorously enforced or strengthened, will be ineffective. Until such a demonstration is made, effort should not be misdirected to a "remedy" with nothing to offer other than large attorneys' fees and the opportunity to be vindictive with reputable business.

Thank you very much, Mr. Chairman.

Senator Moss. Thank you, Mr. Schiff.

We certainly accept your offer to make suggestions about the proposal to give the Federal Trade Commission authority to seek preliminary injunctions, which is one of the matters before us, but to say I am astonished to have you style a class action bill as one that provides the vehicle to be vindictive by the consumer is stating it mildly. Class action suits are not new to the law. We have them now in many things. In tort actions we can have class action suits. We have them all the time in antitrust. Why is it suddenly going to be a vehicle for vindictiveness if they are given to consumers who have suffered some kind of unfairness or misrepresentation or something of the sort in purchasing goods from a distributor or a manufacturer?

Mr. SCHIFF. Senator, you and I do not disagree on the fact that if something is wrong it should be righted. We do not disagree on it. We disagree on the means to get it.

We feel that the remedy is not through class action bills or class action.

A recent case in Pittsburgh on the new credit law is a suit against Gimbel Bros. for two and a half million dollars, not for violation of the law but a violation of a small technicality of print.

Now, Gimbel's credibility that they have spent years building up is being questioned in court.

Senator Moss. Of course, I know nothing about the case, I have only your description of it, but I have enough faith in the courts to think if it is a small technicality in the print that there isn't going to be any recovery in a case like that.

Mr. SCHIFF. Sir, who do you seek the redress from on the good will that you have lost from your customers?

Senator Moss. Of course, I don't agree with you on this, that merely filing a suit destroys the good will that has been built up by a distributor or a manufacturer of a product. As a matter of fact, I think it would require a recovery in the class action plus quite a bit of publicity to be damaging to the good will that they have established over a period of time.

Mr. SCHIFF. The first publicity, sir, is all that is needed.

Senator Moss. I accept that as your point of view, and there may be some damage in it, but I was interested in your suggestion here that they ought to make great use of the small claims court, and you commended Mrs. Grant because her department had put out a brochure telling people how to use this small claims court.

Why doesn't this same damage to reputation come if a whole flock of small claims court suits go on?

Mr. SCHIFF. A small case to recover anywhere from 10 cents to a hundred dollars or \$500, sir, does not have the publicity of a hundred million dollar suit or a four hundred million dollar suit or a two and a half million dollar suit will have.

It will be the legitimate businessman who is trying his best to please the customer, because this is his livelihood, and he is going to be there for years, who will be affected. It will not be the merchant who daily fraudulently does things, because he will be out of business by the time that thing is settled. He will be elsewhere. He will not be in business.

This is the unfortunate thing of class actions, sir.

Senator Moss. The kind of businessman you describe is the one I would expect would have a complaints department and an adjustment procedure so that he would arrive at an adjustment on his problem without being subjected to a class suit.

Mr. SCHIFF. Senator, we do \$270 million of business, 80 percent at retail, in department stores and in shoe stores. We have a policy of our company which we rigidly enforce, and yet this does not mean that somebody of our 11,000 employees is not going to displease a customer.

When we receive a letter from a customer of complaint, that is the first time my office receives it, at the particular time we send a customer a check, we ask the regional manager who is in charge of the area as well as the district manager and the manager of the store to contact that customer and do everything in the world to please that customer because what that customer can say nice about us is much more important to us than he can say bad about us. We do that procedure.

But I cannot guarantee as we sit here right now that one of our people across this great Nation—we are in practically 44 of the 50 States—is not displeasing a customer. I don't care whether that customer is right or wrong, if that customer is dissatisfied, that is important to me, how to make that customer satisfied.

Senator Moss. And I would agree with you very much, but I can't see that having one of your employees displease a customer could lay the basis for any kind of a class action.

Mr. SCHIFF. Sir, I wish you were right. It just takes one dissatisfied customer to tell one attorney, whom I will call an ambulance chaser, and the whole procedure starts.

All you have to do is check the records of insurance companies as to how many of these complaints are settled out of court and don't get into court, and settled for much, much more than the damage

that allegedly happened to the customer, and I will take the customer's word for it that the damage did happen to him.

Senator Moss. How could this dissatisfied customer and the lawyer get up a class all of a sudden to come in on an action because of something that one customer did not like?

Mr. SCHIFF. Are you familiar with the Playboy incident in California—I am not a lawyer, so I am not exactly sure of the case. I know I am quoting you approximate facts, but I may not be quoting you the complete facts—in which membership was charged at \$25 a year and then a billing of \$5 a year and then a surcharge of \$8?

A class action bill was started and everybody was asked to have themselves included, and those who were excluded were even sued with the Playboy people. So, it was to your benefit to do it.

The individuals recovered their \$8, but the lawyers got a nice fee.

Senator Moss. I don't know whether you read the terms of this bill which first of all limits the attorney's fee to 10 percent unless the court makes a finding that this is not commensurate with the service that he is rendering.

Mr. SCHIFF. On \$2 million that would be \$200,000 and 10 percent of \$400 million would be \$40 million.

Senator Moss. If that much damage has been committed, perhaps the attorney deserves a large attorney's fee—

Mr. SCHIFF. That is a lot of money and you may be out of business.

Senator Moss (continuing). Having carried a case of that complexity to a successful conclusion.

I must say I don't share your apprehension about the failure of the Federal courts to be able to handle litigation or complaints that come before them, to winnow out suits that are frivolous—that are manufactured in any way—nor do I lack your faith in the disciplinary measures of the Bar Association and the courts for ambulance chasers, as you call this type of lawyer. Disciplinary actions are taken if this sort of thing goes on.

I could understand your apprehension. I am going to have to go down and make a quorum.

Mr. SCHIFF. Our testimony supports strengthening the FTC's ability to handle these matters, and our testimony also indicates that we believe Virginia Knauer's office should become a statutory one.

Our testimony does not support and we are against class action.

Senator Moss. I am going to have to be excused for just a few moments.

I am sure Senator Pearson has some questions and will continue the hearing, and I will be back in just a moment.

Senator PEARSON (presiding). I understand your testimony. Let me ask you in relation to the class suit whether or not your position would remain the same and your opposition to it for the reasons you have stated if the class suit was authorized in the terms of the administration bill which provides for a triggering mechanism in the Attorney General's Office?

Mr. SCHIFF. As I understand the New York bill, and I am not as familiar with it as Mrs. Grant, I understand that there it comes from their office, and if there is recovery that their office makes sure—whether it is a corporation counsel who does it, but it is directed

by law that when the relief is granted by the court, if there be relief, that it is given to the consumer where and when they can find them and the remainder goes back to the city.

We would be against that, but, on the other hand, we would be in favor of the Federal Trade Commission getting an injunction to stop the practice and making sure that the individual did get some relief.

Senator PEARSON. My question was directed toward one of the bills that is the subject of these hearings. The administration bill indicates that before a class action may be brought that the Attorney General makes a judgment that a class action is legitimate.

Mr. SCHIFF. We oppose the President's proposals.

Senator PEARSON. Even with the triggering mechanism?

Mr. SCHIFF. Yes, sir.

Senator PEARSON. What would be your reason for that opposition?

Mr. SCHIFF. We do not believe in any class action of any type, sir. We believe it is damaging and irreparable to legitimate business. On the other hand, we do not take cognizance of those who do fraudulent practice. We know that if we do our business legitimately and we satisfy our customers daily to the point where even some of our members will take goods off sale if they do not fit the quality of their advertising requirements, we believe that that is sufficient. We do not believe in class action suits; therefore, we cannot support the President's bill.

Senator PEARSON. You do not believe that there will be any conceivable circumstances under which a class action would be justified?

Mr. SCHIFF. Sir, we do not believe there would be any circumstances, nor do we believe if it were enacted that for the relief it was trying to obtain that it would serve its purpose. We believe it would be definitely a weapon to punish legitimate business, because we believe that is the only place that anybody can get relief.

Senator PEARSON. I share with you—as a matter of fact, I believe I have got more confidence in the American businessman than you have in the American lawyer.

Mr. SCHIFF. Yes, sir.

Senator PEARSON. And I have got a great deal more confidence in the American judicial system to weed out frivolous complaints. I do know whether you have ever been before a Federal judge in a pre-trial hearing—

Mr. SCHIFF. Thank God, no.

Senator PEARSON. Well, maybe someday you will thank God there is one there, too, because the protection of rights works both ways, and I am sure many businessmen day in and day out rely upon the certainty and the equity of the law.

But in the Federal procedures when you go in there for pretrial procedures, you must show you have a legitimate case or the judge just says to you, "dismiss your case or we will go in and direct a verdict."

Mr. SCHIFF. Unfortunately, business spends millions of dollars on advertising its name.

Senator PEARSON. And they get it from consumers.

Mr. SCHIFF. They get it from the consumers. They spend this money advertising their name daily in the media. The same media

will have on the front page the start of a suit even before pretrial proceedings.

Senator PEARSON. I understand that. I am in politics.

Mr. SCHIFF. They will have it on the back page as dead news when you are vindicated.

Senator PEARSON. You are right. When someone says Senator Pearson has done a foolish thing, it is on the front page; when someone decides he has not done a foolish thing, it is back with the funny papers.

Mr. SCHIFF. This is our point.

Senator PEARSON. You are in favor of strengthening the FTC?

Mr. SCHIFF. Yes, sir.

Senator PEARSON. Well, they have not done the job to date.

Mr. SCHIFF. They have a new chairman; they are going over their procedures; they have done a job to date. They can do a better job.

Senator PEARSON. I hope so, and I think this is a good man we have got in there.

I am most respectful of your position on this thing and I know what you are fearful of, the proliferation, the agonizing procedure of having to defend, the adverse publicity of business people that will tarnish, as you have said, their good name.

It is improper for me to lecture or even to make speeches, but there is a tide in the movement in this consumer thing today which is manifested not only by the great flood of legislation that is coming in. I say to you very frankly that I think I have some understanding of this.

The forgotten man of the 1930's, the common man of the 1940's has now become so affluent he is a consumer. He is a great mass of voters out in the land, and we tend from time to time to fall, in the legislative course, into what might be called fads.

That is an improper name. But had it not been for Vietnam, had it not been for the turmoil on the streets and on the campuses of this country, this would have been a consumer or a protectionist Congress in the last three sessions we have had.

You look back over the legislation that has been passed, truth in lending, truth in package, highway safety, auto safety, car safety, on and on and on, and the tide is flowing this way.

It has to have some basis, some reasoning, some rationale under the whole thing, and yet the business community is what has made this country great.

Mr. SCHIFF. We want to help you, and in our servicing the consumer and your servicing the consumer—the general public—the public has one difference between us and you. They vote every day, and if they do not like our products their vote is by not coming into our establishments and buying them. And the merchant who does not look at his sales figures daily and who does not look at the merchandise that has not sold on his shelves will eventually go out of business, because the public has voted against him.

Senator Moss (presiding). Mr. Schiff, I appreciate your testimony and I appreciate your assessment of Mr. Weinberger, the new Chairman of the FTC, who I think we agree is a very competent and able man and we expect him to do well in his new assignment.

He appeared before the House of Representatives yesterday with other members of the Commission, and they recommended, among

other things, empowering the FTC to seek temporary restraining orders as well as rulemaking authority, assessment of civil penalties, and award of damages to injured consumers.

Do you support those recommendations of the FTC?

Mr. SCHIFF. Sir, we have not read his testimony as of yesterday, so I cannot comment at this particular point. I am sorry.

Senator Moss. Does this seem to be inconsistent now to recommend availability of class action along with this power that the FTC would have?

Mr. SCHIFF. Sir, we are against class action in any manner or form.

Senator Moss. You have mentioned this class action on the west coast which you said involved about \$400 million. Is that the case of General Motors—the wheel case?

Mr. SCHIFF. Yes, sir.

Senator Moss. In which General Motors subsequently acknowledged that the wheels supplied for their trucks were defective and they advised to replace them at the purchaser's own expense?

Mr. SCHIFF. I believe that is the case, sir. I am not familiar with all the detail. I am familiar with the implication if they are found to be doing wrong.

Senator Moss. In this case I am certainly not shocked by the suit, but I am shocked by the practice that was brought to light and that gave rise to the suit; so, in this instance I certainly cannot agree with you that a class action should not lie in that case.

Mr. SCHIFF. Sir, I still feel there could have been other remedies. I am not familiar with all the details. I am sorry. I am not a lawyer.

Senator Moss. Do you think, then, if we provided for severe criminal penalties against hard-core fraud, that that would be an alternative to this class action that you object to categorically?

Mr. SCHIFF. Yes, sir; and we also feel that a remedy has to be fast, efficient, and effective. The longer a thing draws out, the less the consumer can be protected, sir.

Senator Moss. I think we can agree on that very much, which is one of the things that limits the effectiveness of the small claims court route I think; you cannot get resolved a situation that applies to a vast number of people in a quick, relatively short time, because they have all got to individually bring their suits.

Mr. SCHIFF. Nor will class action, sir.

Senator Moss. That is your point of view.

Mr. SCHIFF. I respect yours; I think you respect mine, sir.

Senator Moss. Yes, I do, and I appreciate your coming here, I appreciate the gentlemen coming who have joined the table with you. We are glad to have this in our record. We certainly hope we never look at these things solely from one side or one point of view. So we want to have your assessment of the situation along with others who do not agree with your assessment.

Mr. SCHIFF. Thank you, sir.

Senator Moss. We have one final witness, Mr. Edward Dunkelberger, the general counsel for the National Cannery Association.

We appreciate your coming, sir, and we look forward to hearing your testimony. We are sorry we delayed your getting on this long, but we are sure nevertheless we will be enlightened by what you have to tell us.

STATEMENT OF EDWARD DUNKELBERGER, GENERAL COUNSEL,
NATIONAL CANNERS ASSOCIATION

Mr. DUNKELBERGER. Thank you very much, Senator. We enjoyed listening to what the other witnesses had to say as well as the questioning of the witnesses.

My name is Edward Dunkelberger. I am a member of the firm of Covington and Burling, which is counsel for the National Canners Association, a nonprofit trade association of almost 600 members from all parts of the country. Members of the association pack approximately 85 to 90 percent of the national production of canned fruits, vegetables, juices, specialties, meat, and fish.

If I may, in the interest of time, I will excerpt on occasion from the statement and not read all of it, but I would request that the statement be printed in the record.

Senator MOSS. That will be granted. It will be in the record in full.

Mr. DUNKELBERGER. Mr. Chairman, we very much appreciate this opportunity to present the views of the National Canners Association on the consumer protection legislation currently being studied by this subcommittee. The three bills under consideration—S. 2246, S. 3092, and S. 3201—are extremely broad in scope and would directly affect virtually every commercial enterprise in the United States.

The range of deceptive and fraudulent practices that have been cited by proponents as establishing a need for new consumer protection legislation has been broad, indeed; but we have seen no evidence that such practices have been found in the canning industry or that the comprehensive Federal regulatory structure presently applicable to canned foods has significant weaknesses or gaps. Particularly because the remedies proposed would have such a broad impact, far beyond the limits of the claimed need, we urge upon this subcommittee that corrective legislation be carefully fashioned and that basic principles of fairness, due process, and sound government not be overlooked.

Our testimony today will focus primarily on S. 3201, for that bill has received the most attention at these hearings; but much of what we will say also is responsive to other bills before the Commerce Committee and to other related issues that have been raised.

Under preliminary injunctions, one aspect of S. 3201 (and S. 2246) requiring serious consideration is the authority that would be given the Commission to obtain preliminary injunctions and temporary restraining orders.

The association believes that the Federal Trade Commission should have the power to prevent the continuance of allegedly deceptive acts or practices pending trial on the merits in appropriate cases. Because of the drastic nature of the remedy, however, it is critically important that the circumstances in which such an order is appropriate should be carefully and clearly prescribed.

The measures before this subcommittee would authorize the Commission to seek, and a U.S. district court to grant, either a temporary restraining order or a preliminary injunction. As to the temporary restraining order, there is no apparent justification for it in the commercial context to which this legislation will apply.

We are talking here about an ex parte order, which may in effect constitute a decision without trial, without even an opportunity for

the alleged violator to present his side of the case. We urge that the mere possibility of such an occurrence is sufficient ground in itself to warrant removal of the temporary restraining order aspect of the bill.

Similarly, even a preliminary injunction should not issue prior to the issuance of a complaint in the Commission, as is contemplated by the legislation as presently drafted. There appears no justification for the imposition of this harsh penalty unless information sufficient to warrant a complaint has been accumulated.

In a commercial context, a preliminary order may well bring an end to the whole controversy and, indeed, the entire enterprise. The possibility of ultimate vindication in the Commission is strictly theoretical in many cases after public announcement that an injunction has been issued.

Such a power over economic life and death should not be left free for exercise at whim or on surmise. If information sufficient to warrant issuance of a complaint exists, the complaint should issue. If such information does not exist, the preliminary order should not be available.

Even when a complaint issues, the preliminary injunction should be available, not as a matter of course, but only under carefully circumscribed conditions, where the danger posed by the allegedly deceptive act or practice is so great as clearly to warrant imposition of so severe a penalty before trial.

Initially, it should be made manifest in the legislation that the traditional rules of equity applicable to the consideration of whether or not a preliminary injunction should issue are to be fully applicable to the operation of this section.

I might add here as a footnote that the Senate in the last session did pass a version of preliminary injunction legislation that specifically called for the invocation of traditional principles of equity before such an injunction could issue.

Senator PEARSON. Could I interrupt you there?

Mr. DUNKELBERGER. Yes, sir.

Senator PEARSON. That same point was made 2 or 3 days ago by one of the witnesses, and I don't think I understood what he meant except to say there were two cases in the two different circuit courts that had not gone to the Supreme Court of the United States that had a different measurement as to the rules of equity, as to the granting of a restraining order or a temporary injunction.

Are you referring to the same situation?

Mr. DUNKELBERGER. Senator Pearson, I am. This provision of S. 3201 and S. 2246 will of course amend a provision already in the Federal Trade Commission Act, section 13, which applies to the advertising of foods, drugs, and cosmetics, and which of course would include canned foods. So our industry is basically under that provision now.

In interpreting that provision, the Federal courts have taken two different approaches. A number of courts have suggested that they would not issue a preliminary injunction, that is, prohibit a practice before there had been a trial, without considering all the factors involved, without balancing the injury to the public as against the injury to the company, and without considering the likelihood of the Commission prevailing in its ultimate trial. That is, it would look

at the principles that traditionally apply before a court will issue a preliminary injunction.

Other courts have suggested, however, that all they have to find is that the Commission had reason to believe a violation had occurred and it would be in the interest of the public in some general way to issue a preliminary order. And indeed that is the position that the Federal Trade Commission has taken in these cases. It has urged that the only question should be, Did the Commission have reason to believe there was a violation, and if it did then that alone should be enough to satisfy the public interest requirement.

We are merely asking in this part of our testimony that the Congress make is clear that this is not to be carved out as one exception where a preliminary order could be issued by a court before a trial without a balancing of all the factors involved, without looking at the potential injury, as I said, to the person allegedly engaging in the practice as against those who would be injured, and without considering the likelihood of prevailing on the merits.

Senator PEARSON. I tend to agree; but I view either the restraining order or the temporary injunction as an absolute essential tool to be used in cases where a condition exists which is harmful to the public. But all the traditional measurements of equity, I think, have to be applied, particularly when the Government is a party because they don't put up a bond.

Mr. DUNKELBERGER. That is correct, sir. Let there be no mistake, we support—

Senator PEARSON. I don't know anybody who is working on this legislation who thinks in terms—and I am sure the Chairman here who was a distinguished U.S. district attorney for a long time—things in terms of temporary injunctions except within the concept of strict equity provisions.

I don't speak for you, Mr. Chairman, but I know that is the way most of us have been thinking.

Mr. DUNKELBERGER. We appreciate that.

Senator PEARSON. As a matter of fact, I didn't know about these contrary type cases.

Mr. DUNKELBERGER. We appreciate that. I should also make it clear that we are here supporting preliminary injunctions to prohibit those practices which are deemed by a court to be so injurious they should be stopped before a trial.

Industry itself may be the victim of unfair competitive practices by which, unless restrained in appropriate cases, a competitor would be seriously affected.

Our only concern is we do have the experience of a bill having passed the Senate and amended on the floor to be sure to invoke these equity principles, and then in the next Congress we get a bill reintroduced which does not pick up the amendment on the Senate floor, and we are faced with the Federal Trade Commission determination specifically that it should not have to make any such showing before it gets a preliminary injunction.

I would like, if I may, now to turn to the private recovery aspects of our testimony.

Possibly the most troublesome of the proposals before the subcommittee are those providing for the payment of damages, or civil or

criminal penalties, for violations of section 5 of the Federal Trade Commission Act. The Federal Trade Commission was not established as an agency to penalize offenders, and its statute is not drafted in a manner that such a purpose can be fairly achieved. In fact, the Commission, as conceived by Senator Newland and Louis Brandeis, was originally intended to serve only an advisory function; it was to be an overseer of business, responding to a growing fear of economic concentration. It was only by amendment of the original bill that the section 5 proscription of "unfair competition" enforceable by a cease and desist order became part of the act. A reading of the legislative history indicates that the language was intentionally vague to afford the Commission broad opportunity, in effect, to write its own law of unfair competition.

As the result of subsequent court cases limiting the Commission's power to proscribe "unfair competition" to situations where it was shown that a competitor, and not merely consumers, was injured by the practice, Congress passed the Wheeler-Lea Act of 1938, amending section 5 to include a prohibition of "unfair or deceptive acts or practices." It is under this broad proscription that the FTC has proceeded literally to create a law of false and deceptive advertising.

This very flexibility—this effective delegation of the congressional power to legislate over a broad spectrum—renders section 5 totally inappropriate as a vehicle for creating a direct private remedy. No one knows what section 5 prohibits until the Commission speaks, and, when necessary, its word is sustained by the courts. It is difficult to conceive of a more vague proscription than that of "deceptive acts or practices."

Simply stated, no one should be punished for doing what, until he did it, had not been deduced to be wrong. Businessmen should not be required to become seers in order to predict on pain of penalty what the Federal Trade Commission—or a court—may determine are deceptive acts or practices. In a very real sense, what we are talking about here is in its effect a retroactive or *ex post facto* lawmaking.

I cannot stress too greatly the importance of this concept of the need for notice, for fair warning, for clear definition of what the law forbids; a concept basic to Anglo-American law; a concept that is inherent in all our laws that prescribe a penalty for failure to observe a prohibition. When Congress chose to delegate its legislative function to the FTC with respect to unfair or deceptive acts or practices, it carefully limited the Commission's authority to that of enjoining continuation of a practice found to be in violation.

The administration bill, S. 3201, was apparently drafted with this problem in mind; for it would confine the imposition of a penalty in the form of damages to those instances in which a person committed one of the unfair or deceptive practices specified in section 201. Even this approach raises troublesome questions, however, for the specified practices are in some instances phrased so broadly or ambiguously as to give inadequate notice to those who will be regulated and penalized. I give a few examples in my prepared statement of how we suggest the so-called "laundry list" might be revised not to refer to broadly stated or ambiguous proscriptions, but to be limited to those kinds of practices that we would all clearly regard as improper, and for which the payment of damages would be entirely appropriate.

But even if the "laundry list" were revised to eliminate ambiguous and subjective terms, substantial questions would remain concerning

the proposals to introduce the class action technique into consumer protection suits at the Federal level.

You have just heard another witness who testified on some of the problems of class actions; and we are, of course, aware that the proponents of this legislation obviously do not share the concern of some of those in industry and the bar with the class action techniques. But there are some dangers in the technique which we would like to cover just briefly.

The first serious difficulty is the potential, too often realized, that the threat of a class action lawsuit and the attendant publicity and expense may be employed as a vehicle for harassment and coercion. The second and related concern is that it provides an incentive for the filing of suit in situations where, if the potential fees to be derived by an attorney were not so great, the merits of the case would not justify the filing of a suit.

Society obviously has an interest in the existence of an effective means for the prevention of fraud and deceit and for compensating those found to be injured by such practices. There is also a substantial public interest in discouraging frivolous, harassing or inconsequential litigation, which unduly clogs our judicial system, constitutes an unnecessary social cost, and threatens the economic life of the potential defendants.

We firmly believe that the degree of regulation applicable to food products—and in particular to canned foods—strikes a reasonable and effective balance between the competing needs of the public. As we have indicated, we are not aware that the fraud and deceit said to give rise to a need for new consumer protection legislation can be found in the canning industry.

Indeed, the intensive regulatory controls embodied in the Federal Food, Drug, and Cosmetic Act provide a high degree of protection for consumers against fraud and deceit in food labeling and composition. The great bulk of canned foods are governed by definitions and standards of identity, minimum standards of quality, and standard for fill of container. All of the labeling and adulteration prohibitions are backed up by strict criminal liability.

I would like to add here at this point, as the chairman pointed out earlier today, or I believe it was maybe Senator Pastore, that you should have an element of intent or knowledge before you can have a criminal violation. The Federal Food, Drug, and Cosmetic Act is one of the few acts on the books that does not require a showing of such intent, knowledge or willfulness.

It was thought by Congress to be so important that our food supply be not adulterated and not misbranded that a violation without a showing of intent can lead to criminal liability, and this aspect of that act has been explicitly upheld by the Supreme Court. We are now operating under that kind of regulation.

In addition, you can have seizure of violative products, and sweeping injunctive authority. In addition, the Wheeler-Lea amendments to the Federal Trade Commission Act provided special protection to consumers against false advertising of foods, drugs, and cosmetics—including provision for preliminary injunctions and criminal penalties.

I do not think enough attention has been focused on the fact, regardless of how important consumerism is today, that at least in the

food area consumerism of a sort was actively involved in the promotion and ultimate adoption of the 1938 Federal Food, Drug and Cosmetic Act and the Wheeler-Lea amendments. The Wheeler-Lea amendments, as I have already pointed out, authorized preliminary injunction for advertising of food products. Now in 1970 this is being proposed for all other products.

Our industry has been under this kind of regulation for years.

With this broad range of Federal controls against fraud and deception in the marketing of foods—most of which have their counterparts in State laws and regulations—we see no basis whatever for the canning industry being exposed to the potential harassment, expense, and publicity of class actions that cannot possibly provide consumer protection in as rational, comprehensive, and effective a manner as existing Federal and State regulatory controls.

Much of the emphasis in these hearings on the class action technique has been as a supplement; or as an additional means of enforcement where Federal regulation has proved to be inadequate or ineffective. We do not think that is the case in our industry. We think Federal and State regulation has been effective and has been adequate.

If there are some legitimate questions which one might raise about class actions and if a balance is to be drawn, our feeling is that at least where the Federal techniques and the State techniques of regulation are shown to be adequate, then maybe that balance might fall in favor of some other means of private recovery than a class action.

We are taking no position on the appropriateness of class actions where perhaps this degree of regulation has not existed for some time.

If some class action legislation is deemed by Congress to be necessary as a supplement to inadequate or ineffective Federal laws, then it would seem to be reasonable to limit the legislation to the problem areas, or to preclude its application to products now regulated under the Federal Food, Drug and Cosmetic Act and the Wheeler-Lea Act.

Perhaps the best approach would be to explore alternative means of private recovery, such as empowering the Federal Trade Commission to bring suit for damages to be held in custody for injured consumers. But here again it would be essential to provide for a penalty in the form of damages only for specified, well-defined fraudulent or deceptive practices. Carefully developed legislation along these lines might well avoid the serious problems inherent in unlimited class actions while at the same time making unnecessary the two step recovery contemplated in S. 3201. Thank you.

Senator Moss. Thank you, Mr. Dunkelberger. We appreciate your testimony. You have documented it well. I take it that your opposition to class actions would recommend as an alternative that recovery could be made through an action by the Federal Trade Commission; is that what I understood you to say?

Mr. DUNKELBERGER. Yes, sir; this is one possibility.

We cannot sit here and tell Congress that our position is in opposition to legislation that can provide for consumer restitution of losses in appropriate circumstances, and that is certainly not our intent. We are concerned with many of the aspects of class actions that some of the other witnesses have pointed out.

We certainly do not believe it should be Congress' intent to turn over all regulation to the class action technique, with all its disad-

vantages. But we are willing to explore and to consider other means of restitution.

You could put the decision of whether an action is to be brought in the hands of responsible public officials, so you would not get the question of harassment or frivolous litigation, and have that decision implemented by the Federal official bringing the suit, obtaining the recovery for the damages that resulted from the practice found to be in violation, and perhaps setting up a fund of some sort in the custody of the FTC, the Justice Department or the court, that could be drawn upon by injured customers who have been shown to be injured.

Senator MOSS. Does that not throw us back into the problem that we have heard described so often of inadequate personnel—that is, in numbers and funding for them—and really a small volume of cases that are handled by the FTC because of these factors. Does it not cut away from us the release of manpower, as it were, to get the recovery if we put it back just into the Federal Trade Commission?

Mr. DUNKELBERGER. There are problems there, Senator, that we will vouch for. Frankly, I cannot believe they are insoluble problems. The Federal Trade Commission is a creature of Congress. Its directions it receives from Congress. Its funds it receives from Congress. I cannot believe that the Federal Trade Commission, particularly with a new chairman dedicated to serving the consumer, would turn his back on a clear directive of Congress that he is to get out and find those areas of national concern appropriate for Federal Government activity where there have been widespread injury of consumers in such small amounts they may not be effectively able to protect themselves and seek damages.

This has been done in the Fair Labor Standards Act, for example. Other examples do not come to mind right now. But it is not a novel approach and it is an approach that does do one important thing. It puts the decision on whether an enforcement action is to be brought in the hands of a responsible public official who is responsible to Congress, and not in the hands of an individual who has nothing but personal gain to derive out of the action—and that does raise some concern.

You pointed out to the previous witness that the class action has been around for a long time. It has in certain areas. But I take it this does not mean that we cannot recognize that it may have spawned some problems, it may involve some difficulties, it may have some problems in implementation. If we recognize those problems here, why do we have to go to that technique if something else can be found that is just as effective?

Senator PEARSON. If the Pearson Canning Co. produced a product through negligence that made a hundred people ill in Kansas and they missed so many days from work, so much hospitalization, doctors' fees, and so forth, they could probably bring an action in my jurisdiction or perhaps in yours in a class action in a State court. They could bring it today, could they not, if the damages to each person so constituted in the class was equal to the jurisdictional amount?

Mr. DUNKELBERGER. If you had the requisite diversity of citizenship.

Senator PEARSON. With those you could bring a class action today, could you not?

Mr. DUNKELBERGER. In that instance, you are talking about illness induced by foods, you have a self-limiting class. You would have in most instances not inconsiderable damages. Injuries to the consumer, and the consumers themselves would have an interest in the outcome. Under traditional principles of tort law, the attorney would be compensated out of the fund, out of the judgment. There would be no litigation-stirring kind of situation here. You would not have attorneys in the community out trying to create situations for litigation that might not otherwise have justified litigations. You would have people who had been sick and who would have every interest in bringing a lawsuit. And they do bring lawsuits for allegedly defective food products; we are not aware in that situation that a class action is a very useful or a frequently used tool.

The private individual action usually is what is used.

Senator PEARSON. I have been away from it for quite awhile, but in many jurisdictions today they are putting a limitation on contingent fees both by the court and by bar associations and by canons of ethics and so forth. Maybe we are getting back to the old ambulance chasing argument.

Mr. DUNKELBERGER. Senator, I would like to make one point here. It may be a special plea but I think it is a realistic one. If there are consequential damages from the sale of canned food, there is no doubt about a right of recovery, and there is no doubt that consumers are able to recover and do recover every day in the courts. If we are talking about the kinds of misrepresentations that the witnesses here have been concerned about—that a product is not worth as much as it is represented to be—if you are talking about a can of applesauce that sells for 12 or 14 cents—it would be inconceivable to contemplate a class action if there were only a penny or two misrepresentation involved. Clearly that is not a situation where we are talking about making restitution to consumers. The restitution of a penny or two to one consumer cannot mean anything to her. A class action in that kind of a situation is purely an enforcement tool to be sure this company does not do it again. We are satisfied that those kinds of tools are now in existence in the Federal Food, Drug, and Cosmetic Act, in the Wheeler-Lea amendment, in the State food laws, and in the State unfair advertising laws, that achieve that purpose in our industry. That is our position as straightforward as I can state it.

Senator PEARSON. Thank you very much.

I am going to have to be excused, Mr. Chairman.

Senator Moss. You may be excused, Senator, and we are going to have to close. We do appreciate your testimony, Mr. Dunkelberger, and I regret that time is a limiting factor because I am sure we could have had a profitable colloquy. I am glad that you and Senator Pearson entered into this brief colloquy that you had. I think I understand your position that you have stated, and it is one that we will consider carefully as we look at the legislation before us.

We do want to consider carefully in the committee the legislation and move on such as is justified under the circumstances. There is a great need for consumer legislation and, as we were having an earlier colloquy, getting a comprehensive consumer bill of some sort that pulls together these various points that we have discussed here this morning

and on which we have other legislation either pending or recently enacted.

Mr. DUNKELBERGER. Senator, if I may interrupt for a minute, I would like to say I was one of many who had the good fortune to hear your talk at the National Cannery Association convention a few weeks ago, and I would like to say I think your talk made a great impact on virtually everyone in that audience who share a concern about the legitimate areas of need for consumer protection. Our major concern is that in searching for remedies; that the remedies not go beyond the established need; that they be consistent with what we believe is fair process, due process, and sound government.

Senator Moss. Thank you. I appreciate your coming here today and giving us the benefit of your testimony and the position that the canners felt should be represented here, and I am sure that our objectives are the same. We hope to arrive at the same place. We certainly do not want to create an unfair situation where the distributor and the manufacturer is placed at a disadvantage that he cannot possibly bear under the market circumstances in which he must operate. At the same time we want to be sure that the consumer is protected in his rights so he does have faith in the market and that quality and quantity are used as competitive factors in the pricing of goods. We want to be sure that competition is not perverted into other areas where selling is predicated on things other than quality and quantity.

(The full statement follows:)

Senator Moss. Thank you very much, Mr. Dunkelberger.

Mr. DUNKELBERGER. We appreciate that.

STATEMENT ON BEHALF OF THE NATIONAL CANNERS ASSOCIATION

My name is Edward Dunkelberger; I am a member of the firm of Covington and Burling, which is counsel for the National Cannery Association, a nonprofit trade association of almost 600 members from all parts of the country. Members of the Association pack approximately 85 to 90 percent of the national production of canned fruits, vegetables, juices, specialties, meat and fish.

Mr. Chairman, we very much appreciate this opportunity to present the views of the National Cannery Association on the consumer protection legislation currently being studied by this Subcommittee. The three bills under consideration—S. 2246, S. 3092, and S. 3201—are extremely broad in scope and would directly affect virtually every commercial enterprise in the United States.

The range of deceptive and fraudulent practices that have been cited by proponents as establishing a need for new consumer protection legislation has been broad, indeed, but we have seen no evidence that such practices have been found in the canning industry or that the comprehensive Federal regulatory structures presently applicable to canned foods has significant weaknesses or gaps. Particularly because the remedies proposed would have such a broad impact, far beyond the limits of the claimed need, we urge upon this Subcommittee that corrective legislation be carefully fashioned and that basic principles of fairness, due process, and sound government not be overlooked.

Our testimony today will focus primarily on S. 3201, for that bill has received the most attention at these hearings, but much of what we will say also is responsive to other bills before the Commerce Committee and to other related issues that have been raised.

FTC Jurisdiction

You have already heard conflicting testimony from the members of the Federal Trade Commission with respect to the advisability of expanding FTC jurisdiction to reach deceptive acts and practices "affecting commerce" in addition to those "in commerce." Then Chairman Paul Rand Dixon, at the December 16, 1969, hearings of this Subcommittee, strongly urged that this new jurisdiction not be conferred upon the FTC.

This expansion of FTC jurisdiction would have little, if any, impact on the canning industry, for we are confident that the interstate distribution of canned foods from even the smallest commercial canning establishment renders the Association's members fully subject to the Commission's existing jurisdiction. We concur, however, in Chairman Dixon's conclusion that this proposal will not effectively further the cause of consumer protection and believe that it may, if enacted, prove a greater disservice than service to the consumer.

In our view, the Federal Trade Commission does not have the capacity to handle the additional cases that this proposal would bring within its ambit. The limitation would be felt initially in terms of manpower and facilities. The Commission is simply not equipped to deal with the multitudes of small consumer complaints by which, if the provision had its intended effect, the agency would be inundated. As Chairman Dixon indicated, the FTC would be unlikely to be able to resist the strong pressure that would be brought to bear that it accept and resolve these complaints.

Perhaps the greatest criticism of FTC activity in recent years, voiced in reports of public and private study groups alike, has been an overriding absorption with small cases. FTC dockets, it has been said, are controlled by the "vicissitudes of the daily mail." This practice has led one Commissioner to voice the lament that in Commission activity, "there operates a kind of Gresham's law. The trivial and inconsequential cases leave little room for, and tend to drive out, the substantial and significant." (Gimbel Bros., 60 F.T.C. 359, 378 (1962) (Elman, Comm'r, dissenting).)

In our view, the local complaints that fall beyond the "in commerce" language of Section 5 of the FTC Act can much more readily be dealt with by local agencies which, because of their local character, can deal more directly and often extra-legally to resolve problems and disputes. There is a real danger that this amendment, if enacted, would discourage the continuation and expansion of consumer protection activities on the part of state and local units of government in this area.

Preliminary Injunctions

A second aspect of S. 3201 (and S. 2246) requiring serious reconsideration is the authority that would be given the Commission to obtain preliminary injunctions and temporary restraining orders.

The Association believes that the Federal Trade Commission should have the power to prevent the continuance of allegedly deceptive acts or practices pending trial on the merits in appropriate cases. Because of the drastic nature of the remedy, however, it is critically important that the circumstances in which such an order is appropriate should be carefully and clearly prescribed.

The measures before this Subcommittee would authorize the Commission to seek, and a United States district court to grant, either a temporary restraining order or a preliminary injunction. As to the temporary restraining order, there is no apparent justification for it in the commercial context to which this legislation will apply. We are talking here about an ex parte order, which may in effect constitute a decision without trial, without even an opportunity for the alleged violator to present his side of the case. We urge that the mere possibility of such an occurrence is sufficient ground in itself to warrant removal of the temporary restraining order aspects of the bill.

Similarly, even a preliminary injunction should not issue prior to the issuance of a complaint in the Commission, as is contemplated by the legislation as presently drafted. There appears no justification for the imposition of this harsh penalty unless information sufficient to warrant a complaint has been accumulated.

In a commercial context, a preliminary order may well bring an end to the whole controversy and, indeed, the entire enterprise. The possibility of ultimate vindication in the Commission is strictly theoretical in many cases after public announcement that an injunction has been issued. Such a power over economic life and death should not be left free for exercise at whim or on surmise. If information sufficient to warrant issuance of a complaint exists, the complaint should issue. If such information does not exist, the preliminary order should not be available.

Even when a complaint issues, the preliminary injunction should be available, not as a matter of course, but only under carefully circumscribed conditions, where the danger posed by the allegedly deceptive act or practice is so great as clearly to warrant imposition of so severe a penalty before trial.

Initially, it should be made manifest in the legislation that the traditional rules of equity applicable to the consideration of whether or not a preliminary injunction should issue are to be fully applicable to the operation of this section. President Nixon, in his October 30 Message on Protection of Interests of Consumers, stated in this context that:

"The judicial process includes safeguards which will assure that this authority is fairly used. *Courts will retain their usual discretion to grant or deny an injunction in the light of all the consequences for both the accused and the plaintiff.* Parties will, of course, retain their right to a fair hearing before any injunction is issued." (Emphasis added.)

The question of who should be authorized to seek injunctive relief before the courts also is a troublesome one. As the bill is presently drafted, it is the "Commission" which is authorized to obtain an injunction, through a designated attorney. This does not appear appropriate in view of the fact that the Commission must subsequently act upon the case in its judicial function, and the appearance, if not fact, of prejudgment would be exceedingly difficult to overcome.

Some have suggested that the Commission's General Counsel be given authority to seek a preliminary injunction, so as to screen the Commission from an appearance of prejudgment. Even this approach might be troublesome in view of the fact that the General Counsel is an employee of the Commission, but it would be preferable to the Commission itself becoming an advocate in a proceeding in which it will ultimately sit as a judge. Perhaps the authority should not be vested in the Commission at all, but should rest with some outside authority, such as the Justice Department.

Private Recovery

Possibly the most troublesome of the proposals before the Subcommittee are those providing for the payment of damages, or civil or criminal penalties, for violations of Section 5 of the Federal Trade Commission Act. The Federal Trade Commission was not established as an agency to penalize offenders, and its statute is not drafted in a manner that such a purpose can be fairly achieved. In fact, the Commission, as conceived by Senator Newland and Louis Brandeis, was originally intended to serve only an advisory function; it was to be an overseer of business, responding to a growing fear of economic concentration. It was only by amendment of the original Bill that the Section 5 proscription of "unfair competition" enforceable by a cease and desist order became part of the Act. A reading of the legislative history indicates that the language was intentionally vague, to afford the Commission broad opportunity, in effect, to write its own law of unfair competition.

As a result of subsequent court cases limiting the Commission's power to proscribe "unfair competition" to situations where it was shown that a competitor and not merely consumers, was injured by the practice, Congress passed the Wheeler-Lea Act of 1938, amending Section 5 to include a prohibition of "unfair acts or practices." It is under this broad proscription that the FTC has proceeded literally to create a law of false and deceptive advertising.

This very flexibility—this effective delegation of the Congressional power to legislate over a broad spectrum—renders Section 5 totally inappropriate as a vehicle for creating a direct private remedy. No one knows what Section 5 prohibits until the Commission speaks, and, when necessary, its word is sustained by the courts. It is difficult to conceive of a more vague proscription than that of "deceptive acts or practices."

Simply stated, no one should be punished for doing what, until he did it, had not been deduced to be wrong. Businessmen should not be required to become seers in order to predict on pain of penalty what the Federal Trade Commission—or a court—may determine are deceptive acts or practices. In a very real sense, what we are talking about here is in its effect a retroactive or ex post facto lawmaking.

I cannot stress too greatly the importance of this concept of the need for notice, for fair warning, for clear definition of what the law forbids—a concept basic to Anglo-American law—a concept that is inherent in all our laws that prescribe a penalty for failure to observe a prohibition. When Congress chose to delegate its legislative function to the FTC with respect to unfair or deceptive acts or practices, it carefully limited the Commission's authority to that of enjoining continuation of a practice found to be in violation.

The Administration Bill—S. 3201—was apparently drafted with this problem in mind, for it would confine the imposition of a penalty in the form of damages to

those instances in which a person committed one of the unfair or deceptive practices specified in Section 201. Even this approach raises troublesome questions, however, for the specified practices are in some instances phrased so broadly or ambiguously as to give inadequate notice to those who will be regulated and penalized.

For example, the term "new" in subsection 201(a) (6) is vague, and open to various meanings. It connotes considerably more than the negative formulation, "unused." The subsection might be more precisely phrased, without losing any of its intended or legitimate coverage, if it read "representing that goods are not used or reconditioned knowing that they are;"

The terms "grade" and "quality" in subsection 201(a) (7) are equally troublesome, since they may include within their connotation representations of opinion, taste or subjective evaluation of a product. Certainly, a manufacturer or seller should not be exposed to damage actions merely because some consumers—or even a trier of fact—might differ with his nonobjective description of a product as having a "good taste," a "pleasant fragrance," or "satisfying texture."

Similar difficulties inhere in the terms "performance" and "benefits" in subsection 201(a) (11), particularly where such factors are described in subjective terms. The more specific factors in the "laundry list" appear adequately to cover those situations where a supplier should be well aware that a contemplated claim or practice would be unfair or deceptive.

But even if the "laundry list" were revised to eliminate ambiguous and subjective terms, substantial questions would remain concerning the proposals to introduce the class action technique into consumer protection suits at the Federal level. Given the characteristics of the type of consumer fraud that has often been referred to in these hearings—one that is perpetrated in a substantially similar manner upon a large number of consumers and at a relatively small financial loss to each individual—the class action might appear to be a most appropriate means of insuring that the remedy afforded is both practicable and effective.

There are inherent dangers in the concept, however, with which the Subcommittee is undoubtedly familiar, but which are significant enough to warrant rehearsing.

The first serious difficulty is the potential, too often realized, that the threat of a class action lawsuit and the attendant publicity and expense may be employed as a vehicle for harassment and coercion. The second and related concern is that it provides an incentive for the filing of suit in situations where, if the potential fees to be derived by an attorney were not so great, the merits of the case would not justify the filing of a suit.

Society obviously has an interest in the existence of an effective means for the prevention of fraud and deceit and for compensating those found to be injured by such practices. There is also a substantial public interest in discouraging frivolous, harassing or inconsequential litigation, which unduly clogs our judicial system, constitutes an unnecessary social cost, and threatens the economic life of the potential defendants.

We firmly believe that the degree of regulation applicable to food products—and in particular to canned foods—strikes a reasonable and effective balance between the competing needs of the public. As we have indicated, we are not aware that the fraud and deceit said to give rise to a need for new consumer protection legislation can be found in the canning industry.

Indeed, the intensive regulatory controls embodied in the Federal Food, Drug, and Cosmetic Act provide a high degree of protection for consumers against fraud and deceit in food labeling and composition. The great bulk of canned foods are governed by definitions and standards of identity, minimum standards of quality, and standard for fill of container. All of the labeling and adulteration prohibitions are backed up by strict criminal liability, by seizure of violative products, and by sweeping injunctive authority. In addition, the Wheeler-Lea amendments to the Federal Trade Commission Act provided special protection to consumers against false advertising of foods, drugs and cosmetics—including provision for preliminary injunctions and criminal penalties.

With this broad range of Federal controls against fraud and deception in the marketing of foods—most of which have their counterparts in state laws and regulations—we see no basis whatever for the canning industry being exposed to the potential harassment, expense and publicity of class actions that can not possibly provide consumer protection in as rational, comprehensive and effective a manner as existing Federal and state regulatory controls.

If some class action legislation is deemed by Congress to be necessary as a supplement to inadequate or ineffective Federal laws, then it would seem to be reasonable to limit the legislation to the problem areas, or to preclude its application to products now regulated under the Federal Food, Drug, and Cosmetic Act and the Wheeler-Lea Act.

Perhaps the best approach would be to explore alternative means of private recovery, such as empowering the Federal Trade Commission to bring suit for damages to be held in custody for injured consumers. But here again it would be essential to provide for a penalty in the form of damages only for specified, well defined fraudulent or deceptive practices. Carefully developed legislation along these lines might well avoid the serious problems inherent in unlimited class actions while at the same time making unnecessary the two step recovery contemplated in S. 3201. Thank you.

Senator Moss. This then will close our hearings for today. We have no further hearings scheduled, but should they be, they will be announced publicly and made available.

If those who appeared as witnesses have additional comment they want to submit to us in writing, they may do so, and they will be placed in the record if they are timely received.

We appreciate those who have given attention to these hearings today and the previous ones we have held.

We are now adjourned.

(Thereupon, at 12:35 p.m., the subcommittee was adjourned.)

LAW OFFICES OF WEIL, LEE & BERGIN,
New York, N.Y., February 11, 1970.

Senator FRANK E. MOSS,
Chairman, Subcommittee on Consumer Affairs,
Senate Office, Washington, D.C.

DEAR MR. CHAIRMAN: May I again express my great appreciation for the privilege of partaking in colloquy with you and members of your subcommittee on Tuesday morning, February 3rd. Your courtesy and interest were most gratifying.

You will recall having extended me an opportunity to propose suggestions as to allowing consumer class actions for violations that are truly substantial, without precipitating what would amount to little more than strike actions based upon conduct that is classifiable as a violation only by the retroactivity of a new decision, or on the basis of a highly technical legal construction, or which, in any event, does not result in damage to individual consumers of any real significance.

Reduced to the simplest terms, it seems that we are dealing with the question of substantiality at two points: 1) substantiality of the "wrongdoing" and 2) substantiality of the injury it causes.

As to the first of these, I find no alternative that seems better than to eliminate violations of § 5 of the Federal Trade Commission Act (which can be so unpredictable, tenuous and legalistically hypertechnical) as a basis for class actions. This would mean, as I have already submitted to you, rejecting that aspect of S. 2246, as well as § 201(a) (11) from S. 3201.

As to the second, I am unable to think of any means to objectively formularize significance or substantiality other than by quantitative measure. While the present minimum amount of damage to create federal jurisdiction, \$10,000, is obviously astronomical for this purpose, I do propose that a minimum per capita amount to qualify one as a member of the class should be established, even if it be only \$10.

I am not insensitive to the fact that one can feel very put upon even though no more than a few pennies may have been involved in an incident. Nonetheless, since consumer class actions are bound to impose certain costs upon the community which must eventually recirculate back to consumers themselves, whether in the form of taxes, higher prices, further clutter of already overcrowded court calendars, I suggest that some practical limitation be established below which it may be deemed that potential recompense to given persons is quite outweighed by detriments it imposes upon the total society. One cannot expect much discipline

to be exercised over this by lawyers for plaintiff classes, since their legal fees (a not inconsiderable factor in the cost column) would seem to be assured regardless of how little their clients may benefit from the lawsuits.

Concededly these are not problems amenable to pat and conclusive solutions. All the more, therefore, is the balanced wisdom of Congress required to avoid delusively simplistic devices.

Again, my thanks to you for the opportunity to express the views of the Association of National Advertisers and of myself.

Yours respectfully,

