CONSUMER CONTROVERSIES RESOLUTION ACT

HEARING

BEFORE THE

SUBCOMMITTEE FOR CONSUMERS

OF THE

COMMITTEE ON COMMERCE, SCIENCE, AND TRANSPORTATION

UNITED STATES SENATE

NINETY-FIFTH CONGRESS

FIRST SESSION

ON

S. 957

TO PROMOTE COMMERCE BY ESTABLISHING NATIONAL GOALS FOR THE EFFECTIVE, FAIR, INEXPENSIVE, AND EXPEDITIOUS RESOLUTION OF CONTROVERSIES INVOLVING CONSUMERS, AND FOR OTHER PURPOSES

MAY 5, 1977

Serial No. 95-25

Printed for the use of the
Committee on Commerce, Science, and Transportation

U.S. GOVERNMENT PRINTING OFFICE
93-736 O WASHINGTON : 1977

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CONTENTS

CONSUMER CONTROVERSIES RESOLUTION ACT

THURSDAY, MAY 5, 1977

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

The subcommittee met at 10 a.m. in room 5110, Dirksen Senate Office Building: Hon. Wendell H. Ford (chairman of the subcommittee) presiding.

OPENING STATEMENT BY SENATOR FORD

Senator FORD. Good morning, ladies and gentlemen.

We are here this morning to hear oral testimony and receive written comments on S. 957, the Consumer Controversies Resolution Act, which I introduced this session.

Joining me in sponsoring this legislation are Senators Magnuson, Pearson, Durkin, Kennedy, Metzenbaum, Riegle, Humphrey, Huddleston, and Matsunaga.

The purpose of this bill is to articulate national goals for the development of means by which consume rdisputes may be resolved effectively, fairly, inexpensively, and expeditiously.

This measure provides for limited Federal involvement in this development through a Federal Trade Commission administered program of matching and direct grants as incentives to States and localities to achieve these national goals.

For many consumers, there is no readily available effective, fair, and inexpensive forum for the resolution of small consumer claims. The Senate Commerce Committee reported in May 1976 that over 41 million Americans, many of them in rural areas, have no access to a small claims court, let alone a responsive one. And, because the amount in controversy is generally small and relatively insignificant to anyone but to the consumer who feels himself wronged, legal representation is usually out of the question, since hiring a lawyer would be more costly than the claim itself.

The need for improving existing procedures for resolving disputes arising out of consumer transactions has been quite obvious to those who have studied the existing situation. For example, the National Institute for Consumer Justice indicated clearly that a modest infusion of Federal funds would stimulate States which now lack consumer redress mechanisms or have less-than-effective ones to establish an efficient redress system. In 3 days of hearings held on legislation simi-

Staff member assigned to this hearing: Sharon Nelson.

lar to this in the 93d Congress, not one witness opposed the approach set forth in the bill.

As noted in the introduction of the report of the Pound Conference Follow-up Task Force chaired by the Honorable Griffin Bell, I read and I quote:

> Constitutional guarantees of human rights ring hollow if there is no forum available for their vindication. Statutory rights become empty promises if adjudication is too long delayed to make them meaningful or the value of the claim is consumed by the expense of asserting it. Only if our courts are functioning smoothly can equal justice become a reality for all.

This legislation sets minimum Federal goals for consumer controversies resolution mechanisms and conditions the receipt of Federal money on taking steps to achieve these goals.

Through this approach, the Government can be sure that it will not be supporting ineffective mechanisms, while at the same time, we will be giving States and localities sufficient incentives, flexibility, and freedom to experiment and develop a system for the resolution of consumer controversies.

We will be hearing from a limited number of witnesses today, but will receive a fairly large number of written statements for the record.

The record will remain open until Monday, May 9, for those who wish to submit additional written statements.

Although this legislation has been the subject of committee scrutiny, specific language may need improvement in order to better effectuate the legislative intent.

We would, therefore, welcome specific suggestions on how the bill might be improved.

[The bill follows:]

95TH CONGRESS
1ST SESSION

S. 957

IN THE SENATE OF THE UNITED STATES

MARCH 9 (legislative day, FEBRUARY 21), 1977

Mr. FORD (for himself, Mr. MAGNUSON, Mr. PEARSON, Mr. DURKIN, Mr. KENNEDY, and Mr. METZENBAUM) introduced the following bill; which was read twice and referred to the Committee on Commerce, Science, and Transportation

A BILL

To promote commerce by establishing national goals for the effective, fair, inexpensive, and expeditious resolution of controversies involving 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 Controversies Resolution Act".

SEC. 2. FINDINGS AND PURPOSE.

(a) FINDINGS.—The Congress finds and declares that—

(1) for the majority of American consumers, mechanisms for the resolution of controversies involving consumer goods and services are largely unavailable, inaccessible, ineffective, expensive, or unfair;

(2) the total amount of money involved each year in consumer controversies exceeds $100,000,000 but the amount involved in any single controversy is apt to be small, less in many cases than the cost of legal representation for the affected consumer;

(3) mechanisms for consumer controversy resolution either do not exist or are inadequately handling the enormous volume of such controversies;

(4) meaningful remedies in cases of fraud, deception, or overreaching and effective protection in cases of improper service of process, abuse of default judgments, unfair repossession of consumer goods, and other similar practices are unavailable to most consumers;

(5) a major portion of the goods and services which form the underlying subject matter of such controversies flow through commerce, the circumstances of their sale and distribution to consumers affect commerce, and the unavailability of effective, fair, inexpensive, and expeditious means for the resolution of such controversies constitutes an undue burden on commerce; and

(6) while there have been substantial efforts on the part of the private sector to resolve consumer disputes and such efforts should be encouraged and expanded,

effective consumer redress will be promoted through a cooperative functioning of both public and privately sponsored mechanisms.

(b) PURPOSE.—It is the purpose of the Congress in this Act to assure all consumers convenient access to consumer controversy resolution mechanisms which are effective, fair, inexpensive, and expeditious, and to promote better representation of consumer interests in appropriate forums.

SEC. 3. DEFINITIONS.

As used in this Act, the term—

(1) "commerce" means trade, traffic, commerce, or transportation—

(A) between a place in a State and any place outside thereof, or

(B) which affects trade, traffic, commerce, or transportation described in subparagraph (A);

(2) the term "Commission" means the Federal Trade Commission;

(3) "State" means any State of the United States, the District of Columbia, the Commonwealth of Puerto Rico, the Virgin Islands, Guam, American Samoa, the Canal Zone, and the Trust Territory of the Pacific Islands;

(4) "State administrator" means the individual or

government agency which is designated, in accordance with State law, to direct, coordinate, or conduct a State system; and

(5) "State system" means all of the State-sponsored mechanisms and procedures within such State for the resolution of controversies involving consumers, including, but not limited to, small claims courts, arbitration, mediation, and other similar mechanisms and procedures.

SEC. 4. DUTIES OF THE COMMISSION.

(a) GENERAL.—The Commission shall, consistent with the purposes and goals of this Act—

(1) determine whether a State plan is in accordance with this Act, enter into or renew cooperative agreements with the States, and allocate and pay to the States funds appropriated for financial assistance to States under cooperative agreements pursuant to section 5;

(2) award discretionary grants pursuant to section 6;

(3) review the operation and effectiveness of State plans for resolution of controversies involving consumers which have been approved under this Act;

(4) encourage and assist the development and implementation of innovative concepts and approaches for

the resolution of controversies involving consumers by both the public and the private sector;

(5) within 12 months after the date of enactment of this Act formulate, promote, and thereafter revise from time to time model small claims courts acts and ordinances which may be adopted by the States;

(6) encourage the coordination and dissemination of information with respect to public and private sector-sponsored mechanisms; and

(7) take such other actions as are appropriate to fulfill the purposes of this Act.

(b) OFFICE OF CONSUMER REDRESS.—The Commission shall establish, within 30 days after the date of enactment of this Act, an Office of Consumer Redress to assist the Commission in the administration of this Act.

SEC. 5. FINANCIAL ASSISTANCE TO STATES.

(a) AUTHORITY.—The Commission, pursuant to the procedures and requirements of this section, is authorized to enter into cooperative agreements to provide financial assistance to the States for the development, establishment, improvement, or maintenance of State systems or mechanisms for the effective, fair, inexpensive, and expeditious resolution of controversies involving consumers.

(b) COOPERATIVE AGREEMENTS.—The Commission

may enter into a cooperative agreement with any State if such State—

(1) undertakes and submits the results of a comprehensive survey of the State system and major private sector-sponsored mechanisms for the resolution of controversies involving consumers pursuant to subsection (c) of this section; and

(2) in its application for a cooperative agreement under this section formulates and submits to the Commission a satisfactory State plan for the resolution of controversies involving consumers which (A) responds to the goals set forth in section 7 of this Act, (B) represents an effective response to the State's need for fair, expeditious, and inexpensive resolution of such controversies, and (C) meets the requirements of subsection (d) of this section.

(c) PROCEDURE.—(1) Upon entering into a cooperative agreement with a State under this section, the Commission shall publish in the Federal Register a summary of the State plan submitted by such State, notice of Commission approval of such plan, and a summary of such agreement.

(2) The Commission shall not finally disapprove any State plan submitted pursuant to this section, or

any modification thereof, without first affording the State a reasonable notice and opportunity for hearing. A State may submit a revised or improved plan designed to better effectuate the purposes of this Act at any time.

(d) STATE PLANS.—A State plan under this section shall—

(1) provide for a State administrator authorized under the law of the State to receive and disburse moneys, to submit required reports to the Commission, and to supervise, coordinate, direct, or conduct the State system;

(2) require that funds expended for the development, establishment, improvement, or maintenance of the State system or of consumer controversy resolution mechanisms within the State for which application for a cooperative agreement is made are distributed in accordance with need and in a manner which would further the purpose of this Act; and

(3) provide satisfactory assurances that consumers, including low-income consumers, have participated in the development of and have commented on such plan or plans, which comments shall be submitted as part of an application for a cooperative agreement;

(4) provide a satisfactory description of a State's

proposals for the development, establishment, improvement, or maintenance of the State system or of individual mechanisms located within the State; and

(5) be consistent with such other criteria for financial assistance as the Commission may establish pursuant to subsection (i) of this section.

(c) STATE SURVEY.—Any State which applies to enter into a cooperative agreement under this section shall undertake a comprehensive survey of the State system and major private sector-sponsored mechanisms within the State which discloses (1) the nature, number, and location of consumer controversy resolution mechanisms within the State; (2) the annual expenditure and operating authority for each such mechanism; (3) the existence of any program for informing the potential users of each such mechanism of its availability; and (4) data on the following factors with respect to each such mechanism, to the extent practicable and appropriate: (A) annual caseload; (B) amount in controversy jurisdictional limit, if any; (C) number of cases filed by corporations or partnerships and their disposition; (D) number of cases filed by individuals and their disposition; (E) availability and nature of legal or paralegal assistance; (F) number of default judgments entered each year, including an assessment of the nature of the case and the parties by category of plaintiff and method of service; and (G)

copies of the rules and regulations applicable to the resolution of consumer controversies.

(f) USE OF FUNDS.—Moneys appropriated for financial assistance pursuant to this section shall be available to the Commission for allocation to the States under cooperative agreements. The purposes for which such funds may be used include, but are not limited to—

(1) compensation of personnel who provide assistance to consumers involved in consumer controversies, including personnel whose function it is to assist such consumers in the preparation and resolution of their claims and the collection of judgments;

(2) recruiting, organizing, training, and educating personnel described in paragraph (1) of this subsection;

(3) public education and publicity relating to the availability and proper use of consumer controversy resolution mechanisms and settlement procedures;

(4) improvement or lease of buildings, rooms, and other facilities and equipment and lease or purchase of vehicles needed to improve the settlement of controversies involving consumers;

(5) continuing supervision and study of the mechanisms and settlement procedures employed in the resolution of consumer controversies within the State;

(6) research and development of more fair, less expensive, or more expeditious mechanisms and procedures for consumer controversy resolution; and

(7) sponsoring programs of nonprofit organizations to accomplish any of the provisions of this subsection.

(g) REVIEW.—The Commission shall periodically review any State plan for the resolution of controversies involving consumers, and the implementation thereof, which has been approved and funded under this Act and for which there is experience (1) to determine whether such plan is being implemented in accordance with the goals of this Act; (2) to evaluate the success of such plan in terms of the purpose of this Act, and (3) to determine whether the State is complying with the terms of the cooperative agreement. To assist such review, the State administrator in each such State shall submit to the Commission, not later than March 15 of each year, an annual report containing information in such form and detail as the Commission may require.

(h) REASONABLE NOTICE.—If the Commission finds, after giving reasonable notice and an opportunity for hearing to a State receiving financial assistance under this section, that—

(1) the State plan has been so changed that it no longer complies with the provisions of this section; or

(2) the State plan, as operated or maintained, fails

to comply substantially with any of the provisions of this section or with the applicable plan as approved;

the Commission shall notify such State of such finding of noncompliance. No further payments may be made under this section to such State by the Commission until it is satisfied that such noncompliance has been, or promptly will be, corrected, except that the Commission may authorize additional payments for any other program carried out by such State under this Act which is not involved in such noncompliance.

(i) ALLOCATION OF FUNDS.—(1) In allocating funds among the States available under this section the Commission shall consider, among other factors, (A) population, (B) population density, (C) need for consumer controversy resolution mechanisms, and (D) the financial need of States applying for financial assistance under this section.

(2) The proportion of the Federal share of the estimated cost of a cooperative agreement shall not exceed 70 percent of the total cost of such agreement. The aggregate expenditure of funds of the State and political subdivisions thereof, exclusive of Federal funds, for such purposes shall be maintained at a level which does not fall below the average level of such expenditures for the last 2 full fiscal years preceding the date of application for a cooperative agreement. Payments to a State under this section may be made in installments,

in advance, or by way of reimbursement, with necessary adjustments on account of underpayment or overpayment, and may be made directly to a State or to one or more public agencies designated for this purpose by the State, or to both.

(j) JUDICIAL REVIEW.—If any State is dissatisfied with the Commission's final action with respect to the approval of its application for a cooperative agreement under this section or with its final action under subsection (h) of this section, such State may, within 60 days after notice of such action, file with the United States court of appeals for the circuit in which such State is located or in the United States Court of Appeals for the District of Columbia a petition for review of that action. A copy of the petition shall be forthwith transmitted by the clerk of the court to the Commission, or any officer designated by it for that purpose. The Commission thereupon shall file in the court the record of the proceedings on which it based its action, as provided in section 2112 of title 28, United States Code. Upon the filing of such petition, the court shall have jurisdiction to affirm the action of the Commission or to set it aside, in whole or in part, temporarily or permanently, but until the filing of the record, the Commission may modify or set aside its order. The findings of the Commission as to the facts, if supported by substantial evidence, shall be conclusive, but the court, for good cause shown, may remand the case to the Commission to take

further evidence, and the Commission may thereupon make new or modified findings of fact and may modify its previous action, and shall file in the court the record of the further proceedings. Such new or modified findings of fact shall likewise be conclusive if supported by substantial evidence. The judgment of the court affirming or setting aside, in whole or in part, any action of the Commission shall be final, subject to review by the Supreme Court of the United States upon certiorari or certification as provided in section 1254 of title 28, United States Code. The commencement of proceedings under this section shall not, unless so specifically ordered by the Court, operate as a stay of the Commission's action.

SEC. 6. DEMONSTRATION PROJECTS.

(a) GENERAL.—The Commission, in accordance with the purposes of this Act, shall promote the development of consumer controversy resolution mechanisms through research and demonstration projects or other activities that will encourage innovation or effectuation of the purposes of this Act.

(b) DISCRETIONARY GRANTS.—Notwithstanding the provisions of section 5, the Commission is authorized to make discretionary grants, in a total amount each year not to exceed 25 percent of the financial assistance appropriated under this Act.

(c) ELIGIBILITY FOR GRANTS.—The Commission shall

establish criteria, terms, and conditions for awarding grants for research or demonstration projects which are consistent with the purposes of this Act. Such grants may be made to units of local government, combinations of such units, or nonprofit organizations.

SEC. 7. GOALS.

(a) FOR STATE SYSTEM.—A State system is responsive to national goals if—

(1) there are sufficient numbers and types of readily available consumer controversy resolution mechanisms responsive to the goals set forth in subsection (b) of this section; and

(2) a public information program is effectively communicating to potential users the availability and location of consumer controversy resolution mechanisms and consumer complaint offices in such State.

(b) FOR CONSUMER CONTROVERSY RESOLUTION MECHANISM.—A consumer controversy resolution mechanism is responsive to national goals if—

(1) its forms, rules, and procedures are, so far as practicable, easy for potential users to understand, free from technicalities, and it is inexpensive to use;

(2) it is designed so that assistance, including paralegal assistance where appropriate, is provided to consumers in pursuing claims and collecting judgments;

(3) it is open and available for the adjudication or resolution of controversies during hours and on days that are convenient for consumers, such as evenings and weekends;

(4) it provides for adequate arrangements for translation in areas with substantial non-English-speaking populations;

(5) it has an amount in controversy jurisdictional limitation which is adequate to permit most consumer controversies within its territorial jurisdiction to be resolved therein;

(6) it is governed by reasonable and fair rules and procedures such as those which would—

(A) provide an easy way for an individual to determine the proper name in which, and the proper procedure by which, any person may be sued;

(B) encourage the early resolution of consumer controversies by means in addition to the adjudication of claims, including, but not limited to, such informal means as conciliation, mediation, or arbitration;

(C) provide for the qualification, tenure, and duties of persons charged with resolving or assisting in the resolution of such controversies;

(D) permit the use of consumer controversies

resolution mechanisms by assignees or collection agencies but only in a manner consistent with the purposes of this Act;

(E) provide methods for assuring that process served is actually received by defendants, including, but not limited to, procedures for supplemental notification after service of process, and that all parties are informed of the status of the case; and

(F) discourage the entry of judgments by default by requiring, as a prerequisite thereto, that the appropriate judge find, after a proceeding in open court, that—

(i) the defendant was given adequate notice of such claim; and

(ii) the plaintiff established a prima facie case demonstrating entitlement to judgment;

(G) insure that all sides to a dispute are directly involved in the resolution of such dispute; and that the resolution of dispute settlement efforts is actually carried out (including promoting effective means for insuring that judgments awarded to aggrieved individuals are paid promptly) ;

(H) encourage the finality of the resolution of such controversies; and

(I) provide useful information about other

available redress mechanisms in the event that dispute settlement efforts fail or the controversy does not come within the jurisdiction of such mechanism.

SEC. 8. RECORDS, AUDIT, AND ANNUAL REPORT.

(a) GENERAL.—Each recipient of assistance under this Act shall keep such records as the Commission shall prescribe, including records which fully disclose the amount and disposition by such recipient of the proceeds of such assistance, the total cost of the project or undertaking in connection with which such assistance is given or used, and the amount of that portion of the project or undertaking supplied by other sources, and such other records as will assist in an effective financial and performance audit. This provision shall apply to all recipients of assistance under this Act, whether by discretionary grant or cooperative agreement with the Commission or by subgrant or subcontract from recipients of financial assistance from the Commission, or from any State administrator receiving financial assistance under this Act.

(b) AUDIT.—The Commission or any of its designated representatives shall have access for purpose of audit and examination to any relevant books, documents, papers, and records of the recipients of grants and financial assistance under this Act.

(c) COMPTROLLER GENERAL.—The Comptroller General of the United States, or any of his duly authorized

representatives, shall, until the expiration of 3 years after the completion of the program or project with which the assistance is used, for the purpose of financial and performance audits and examination, have access to any relevant books, documents, papers, and records of recipients of financial assistance under this Act.

(d) ANNUAL REPORT.—The Commission shall submit an annual report to the President and Congress simultaneously by June 15 each year. Such report shall include, but need not be limited to—

(1) a summary of any reviews undertaken pursuant to section 5 (g) ;

(2) the results of financial and performance audits conducted pursuant to this section; and

(3) an evaluation of the effectiveness of the Commission in implementing this Act, together with any recommendation for additional legislative or other action.

SEC. 9. AUTHORIZATION OF APPROPRIATION.

For purposes of this Act, there are authorized to be appropriated to the Commission not to exceed $5,000,000 for the fiscal year ending September 30, 1978, and not to exceed $25,000,000 for the fiscal year ending September 30, 1979: *Provided,* That not more than 10 percent of the amount authorized to be appropriated under this Act shall be used for Federal administrative expenses.

Senator FORD. First, we shall hear from Mr. James V. DeLong, Assistant Director for Special Projects in the Bureau of Consumer Protection of the Federal Trade Commission.

Mr. DeLong, you may proceed.

STATEMENT OF JAMES V. DeLONG, ASSISTANT DIRECTOR FOR SPECIAL PROJECTS, BUREAU OF CONSUMER PROTECTION, FEDERAL TRADE COMMISSION

Mr. DELONG. Thank you, Mr. Chairman.

Senator FORD. We might take the approach that your prepared statement will be included in the record as submitted. If you would summarize it, then we can get into questions.

Mr. DELONG. Thank you, Mr. Chairman.

At the outset, I should emphasize I am here as a representative of the staff of the FTC and my views do not necessarily represent those of the Commission itself or any Commissioner.

Senator FORD. I am often accused of interrupting witnesses and I am not going to apologize for it, but I read a lot of stories where staff run everything anyhow so maybe you're giving us the best opinion.

Mr. DELONG. Sometimes I wish that were true, but I'm afraid it is not so at the FTC.

Senator FORD. You may proceed.

Mr. DELONG. I thought I would speak briefly and then answer any questions.

The views of the staff on the proposed legislation can be summarized very quickly. We strongly support the concepts and purposes. In giving our reasons, well, I can hardly add to your opening statement. Lack of good dispute settlement mechanisms has been a continuing problem. The FTC, for example, gets complaint letters, some 60,000 a year as a matter of fact, in which often the major problem is simply that the consumer has no means of getting a fair resolution of the dispute at any price he can afford to pay.

The Magnuson-Moss Warranty Act mandated that the Commission promulgate rules for informal dispute settlement mechanisms for warranties, and that effort is going on. But we feel that this type of thing should be broadened considerably and that access to arbitration or mediation or small claims courts or whatever type of informal and expeditious resolution is appropriate for the situation should be available to everyone.

In preparing testimony, I found there are many difficulties in trying to devise a specific program. There is a general lack of information about exactly what is going on in the States and at the local level. I know of several studies that are trying to gather that information, but at present it is very difficult to specify an exact program.

There is also a lack of information about consumer complaints. For example, which products produce the most complaints on a nationwide basis? How often do consumers fail to complain at all because they see that there is no way in which they are going to get redress? When should agencies be taking action because there are a large number of complaints in a particular area? Given these kinds of deficiencies in understanding, the rather openended approach taken in the bill is

really the only one available. In this area we are going to have to learn by experience and change the mechanisms as we learn more.

FTC Staff also feels that a program like the one proposed would be invaluable to us because it would be possible for the funding agency to develop, for the first time, solid information on consumer complaints on a nationwide basis. I think that would help both us and the Congress in devising effective solutions for some of these problems.

The major issue, of course, is which agency should do it. As I say in my statement, the FTC staff is very wary of having responsibility given to the FTC. It would fit rather awkwardly with our present activities, which are largely investigative, prosecutorial, rulemaking, and quasi-judical. The agency lacks grant experience. We are not like one of the great Cabinet Departments that habitually grants millions and billions every year and has the mechanisms in place.

We are also a fairly small agency. The professional staff of the FTC's Bureau of Consumer Protection consists of about 200 lawyers and consumer protection specialists. There are another 200 in the regional offices and another 200 in the Bureau of Competition. So for us a grant program of this size would be a sizable increment in the scope of our responsibilities. We believe, as I say in my statement, that other agencies might be more appropriate.

The obvious choice, of course, is the proposed Agency for Consumer Advocacy where the suggested responsibilities would seem to fit very well.

A second alternative would be the Department of Justice, in part at least because in terms of State plans and followup this bill somewhat resembles the LEAA approach which Justice has administered. Of course, Justice also has a great interest in this whole area through its Office for the Improvement of the Administration of Justice.

Another alternative I suggested was the Department of Housing and Urban Development. They have both grant experience and, increasingly, a concern about consumers and consumer problems.

A final suggestion I have heard since I prepared the statement was that possibly the Department of Commerce should be the agency with this responsibility. I believe the thinking is that some of the business groups have been very involved in setting up dispute settlement mechanisms—Better Business Bureaus in various places, for example—and the Commerce has a logical connection with them. On the whole, the role of the FTC should probably be to continue to try to devise standards and to try to ascertain the nature of fair dispute settlement mechanisms. It is very important, of course, that consumers not be relegated to a settlement mechanism which always comes out against the consumer. It is very important that the settlement mechanism not become simply a way of denying or delaying enforcement of rights.

And, as we recognized when we were promulgating regulations on the Warranty Act it is also important that the dispute settlement mechanism not discourage businesses from going ahead and settling complaints quickly on a fair basis when they get them.

One of the concerns during the warranties hearing was whether this would in fact occur, whether businesses would dismantle their internal consumer complaint mechanisms. Some care was taken with drafting those regulations to be sure that this did not happen.

Except for these comments, I will just make myself available for your questions.

Senator FORD. Thank you very much, Mr. DeLong.

In your testimony which you submitted earlier, you referred several times to the problem of settling or adjudicating small interstate claims. I think you mentioned the example of mail order houses.

Mr. DELONG. Yes.

Senator FORD. You stated that the Commission could find a section 5 violation of the FTC Act if a particular respondent or an entire industry failed to create dispute settlement mechanisms. Has the Commission ever contemplated filing a complaint against a company on such grounds?

Mr. DELONG. There was one case I had in mind where a mail order firm was using the Illinois long arm statute in its dealings, so that the form of contract required the consumer to submit to the jurisdiction of the Illinois courts on any dispute whatsoever. The Commission held that the use of such a clause was an unfair practice, even though the clause was constitutional and was being used pursuant to Illinois law.

I know of a number of other consent orders in which as remedy for particular practices the Commission has required arbitration agreements be used. There are some furniture retailing cases and some debt collection cases, for example. I know of no case in which the Commission has filed a complaint against a company or an industry simply for failure to provide dispute settlement mechanisms in connection with its transactions.

I do not know how the Commission would decide such a case. From the staff point of view, I think it is a very interesting theory.

Senator FORD. Mr. DeLong, I recall that during the Christmas season there was an advertisement of inexpensive watches sold with a small calculator if you sent your money in by a certain time. However, it seemed nobody received them. Do you remember the case I'm talking about?

Mr. DELONG. No, I do not.

Senator FORD. I'm not sure that I am entirely correct in my description of the whole case but as I recall it was a mail order operation, and if you mailed in by a certain time for the watch, then you received the calculator bonus. It was such a good deal that everybody tried to buy them just before Christmas. I thought that the FTC was involved in this controversy.

It seems to me that there were thousands of people who were cheated, but apparently no remedy was available.

Is there any capability in the FTC to help those people that were defrauded? They are just out of luck, aren't they?

Mr. DELONG. I do not know if some other part of the Commission has been looking into it. In the type of case you cite, where you have a fraudulent scheme in which somebody collects the money and then leaves for Brazil, there is often not much anybody can do. Even if you find him, the assets may be dissipated. It's a constant issue with which we deal. You can find many cases of egregious fraud where you find there is really little point in bringing litigation because you can't recover anything.

Senator FORD. I think maybe we are getting a little afield from what we are trying to do here today, but such schemes seem to be a continuing consumer problem.

Mr. DELONG. Yes. As you emphasized in your opening statement, this bill deals not only with the possibilities of fraud but the problems I call problems of friction. In a society like this, with myriads of goods being sold, a certain amount of friction and disagreement between buyer and seller is inevitable.

At this time, the seller usually wins such disagreements because he is the one who has the money. There is really no way for the consumer to enforce rights against the seller unless the seller acquiesces as a matter of charity or as a matter of protecting future business reputation.

When you have a real fraudulent scheme a bill like this would help take a lot of financial incentive out of the pattern or practice in which somebody is systematically misrepresenting or defrauding consumers.

In some cases though, only early knowledge would help. Where you have a gross fraud by somebody who then goes out of business and leaves town, the only effective FTC action is to move fast enough to prevent the fraud.

Senator FORD. A solution to this problem may lie in another bill we have been discussing. When you know of pending consumer fraud and your investigation shows that the parties are attempting to liquidate, you can move in and protect the consumer.

Mr. DELONG. We don't have the authority to freeze assets at the present time.

Senator FORD. You seem to suggest that FTC would be the appropriate agency for developing standards applicable to Federal funding of consumer controversy resolution mechanisms even if the grantmaking authority were transferred somewhere else. Do you think such a system could be easily implemented or would it result in wasteful duplication of effort and maybe some unnecessary administrative expense?

Mr. DELONG. That is difficult to answer. Obviously, any agency that is actually implementing the program is going to have a very strong interest in developing standards. I feel that the FTC could usefully participate in such an exercise, and I don't think that it would create too much duplication or too much waste.

There are many areas now in which several agencies have some piece of the action. On the whole, they are usually able to work out who's going to do what with a minimum of duplication and waste. Not always, of course.

In connection with the condominium investigation we are doing I know that other departments, such as Justice and HUD are involved, and so is the VA in some respects, and we are managing to keep in close touch.

Senator FORD. You indicated that the $5 million, which is authorized in the bill is too low. What would be a realistic figure first year authorization level for a program such as this, in your opinion?

Mr. DELONG. On that point, I was thinking more in terms of the "10 percent for administration" limitation. My view is that $500,000 for administration during the first year would be too low. On the overall question of how much would be required here, I have to admit I have no idea.

At least partly because of our present lack of understanding about what is really occurring out there and our lack of knowledge as to how many complaints are never made because dispute settlement mechanisms do not exist, I really can't make any assessment of how much money it would take.

Senator FORD. Well, Mr. DeLong, let me make a suggestion.

You object to the $500,000 for administrative expenses. Is that correct?

Mr. DELONG. Yes.

Senator FORD. You are not sure whether the amount authorized should be $5 million or $25 million. I am not sure either. Five million sounds like an awful lot of money to a lot of people as you know. Would it be reasonable to leave it at $5 million, increase the start-up funds for the first year to 20 percent and then drop it to 10 the year after?

Mr. DELONG. Yes, I think that might well——

Senator FORD. Of course, 20 percent would mean $1 million for administration in the first year, and drop it to 10 percent the following year which would allow 500,000 for the next year.

Mr. DELONG. Yes.

Senator FORD. I am not sure about this approach; perhaps we should think this through.

Mr. DELONG. Well, the idea of having more money in startup costs seems to me more workable. I don't know exactly what it would take. I would have to sit down and think through what kinds of people do you need, what they would have to do and how many would it take to deal with setting up the agreements.

Senator FORD. Well, staff tells me that the second year funding is $25 million.

Mr. DELONG. Yes.

Senator FORD. So 10 percent of that would be $2.5 million. In the first year, if we would go 20 percent, that would give you $1 million. At least your feet would be on the ground that first year, and you would begin to get a sense of the problem out there with that funding.

Do you think that would be adequate, better than what we have?

Mr. DELONG. A million is better than half-a-million.

Senator FORD. It depends on what you are going to use it for. If it's against me, it is too much; if it is for me, it is not enough. That is the way a lot of people think.

Mr. DELONG. We share your reluctance to have a large portion going into administration, but there are economies of scale in administration as in everything else. It can cost almost as much to administer a small program as a large one. Sometimes even more, because when you have a small program you want to spread the money around to small projects and small groups and you actually have to be more intensive. Some large programs simply go out in tens of millions at a time and they manage to work with a low ratio of administrative costs.

Senator FORD. You suggest Congress should impose some limitation on what kinds of disputes could be handled in consumer controversy mechanisms. I am sure you know most small claims courts are not courts of record and thus, state statutes limit the subject matter jurisdiction of those courts.

Mr. DeLong. Yes.

Senator Ford. State law may exclude actions relating to real property, suits for equitable relief and so forth. Do you think Congress should attempt to tell the States what are permissible jurisdictional limitations for their courts?

Mr. DeLong. No, I don't think so necessarily. I raised this point in the statement because I was not clear on what the intent here was. I would say only that Congress should make its views clear, whichever way it decides.

Senator Ford. In your oral remarks you said that the FTC receives some 60,000 letters of complaint annually?

Mr. DeLong. Yes.

Senator Ford. Have you or your people made an effort to categorize these complaints?

Mr. DeLong. We have not done so in the past. The Commission now has a project which will attempt to do that and will attempt to make it retrievable by category so that we will have a much better picture of what is going on.

Senator Ford. Do you have any idea of the dollar values of these complaints?

Mr. DeLong. No.

Senator Ford. Have you read many of the letters of any of them?

Mr. DeLong. I can't say I have read a very large percentage of them.

Senator Ford. Well, in reading some of the letters, what are typical consumer complaints?

Mr. DeLong. It varies a great deal. One I read yesterday concerned the occupational licensure program. It was from a man who has worked as a surveyor for years and had moved to a different state. He says that because the engineers dominate the profession in the new state he can't get a license and thus can't practice his profession. He read a newspaper article on the FTC's activities concerning eyeglasses and wanted to know if we could do anything for him in his area.

Other complaints have concerned funeral practices. There has been a certain amount of publicity over our proposed funeral rule and people write and wonder whether a particular transaction would violate the proposed rule.

We have had complaints on nursing homes, on provisions where people have paid all the money before being admitted to the nursing home.

We have a constant stream of vocational school complaints. Those often involve amounts anywhere from $500 to $1,000, where somebody is obligated on a contract and feels that he's not getting anything for his money but he has to continue to pay.

Senator Ford. Are you discussing publicly operated vocational schools?

Mr. DeLong. No, proprietary schools.

Senator Ford. Private business college types?

Mr. DeLong. Yes.

We also have a rulemaking proceeding going there.

From what I have read I think most of the complaints we get concern issues where the consumer still wants something to happen, where he is still paying on a contract or where he has a continuing problem like the surveyor problem. Few are concerned with a closed deal. I

think that once a deal is over, many people even if they feel they got stung, will tend to write it off. A lot of complaints we get concern ongoing transactions.

Senator FORD. Do you get letters from people who say, I bought a product, it won't work; I can't get my money back. Can you help me get my $29.95 back?

Mr. DELONG. Yes.

Senator FORD. Would this be the largest majority of your complaints?

Mr. DELONG. I don't know.

Senator FORD. Apparently you, personally, see the licensure and vocational school complaints.

Mr. DELONG. Yes. I tend to see the complaints that deal with areas in which my staff is conducting proceedings. One way to get a better answer to your question would be from our regional offices. There, the attorneys will alternate doing what they call telephone duty, which means that for a day they will take all complaints that come in. It might be possible to ask them.

Senator FORD. You are talking about the hot lines, where consumers call in?

Mr. DELONG. Yes.

It might be possible to ask them to log what kind of complaints they get.

Senator FORD. I thing I have kept you long enough.

I appreciate your coming today. I appreciate your statements.

I hope we can move along with this legislation and work out some of the problems you have raised.

Mr. DELONG. Thank you Mr. Chairman.

[The statement follows:]

STATEMENT OF JAMES V. DELONG, ASSISTANT DIRECTOR FOR SPECIAL PROJECTS, BUREAU OF CONSUMER PROTECTION, FEDERAL TRADE COMMISSION*

I am James V. DeLong, Assistant Director for Special Projects of the Federal Trade Commission's Bureau of Consumer Protection. I am happy to be here today to discuss S. 957, the proposed Consumer Controversies Resolution Act. At the outset I should emphasize that I am here as a staff member and that my views do not necessarily represent the views of the Commission or any Commissioner.

The views of the FTC staff can be summarized succinctly: We strongly support the concepts and purposes of S. 957. I doubt that this position surprises the Committee. The legislation is designed to deal with a crucial problem in consumer protection, and much thought and experimentation by government agencies, consumer groups and business associations is already going on. In the course of these hearings you will hear from a diverse collection of witnesses and receive statements from many types of organizations. We will be surprised if you find anyone willing to say that consumer dispute settlement should not be cheaper and faster.

We also think that somewhat open ended approach taken by the proposed legislation is the wisest. As stated above, much is occurring in this area, the best methods of proceeding are far from clear, and it would be inadvisable to freeze design at this point.

The problems leading to the introduction of this legislation are obvious. As a society, we rely upon the judicial system to resolve disputes and provide relief for most grievances. Unfortunately, though unavoidably, using the system costs money. Laymen unfamiliar with the technicalities of procedure and evidence must retain lawyers or, even in small claims courts where attorneys do not appear, must invest varying amounts of time, often lost from work. In some cases,

*These remarks represent the views of Federal Trade Commission staff. They are not intended to be, and should not be construed as, representative of official Federal Trade Commission policy.

as where the other party is a mail order house in a distant state, the possibility of obtaining redress is realistically barred by the expense involved.

While these problems have long been recognized, and while small claims courts and informal dispute settlement mechanisms have made progress, the problem persists.

The high costs involved in pursuit of consumer claims provides an unfortunate opportunity for the dishonest. Someone who wants to set out on a course of systematic fraudulent or unfair dealing knows perfectly well that most of his victims will not take legal action. For most, the cost of doing so could well exceed their loss and they are better off economically to forget it.

One logical response to this problem would be class actions for dishonest conduct, which would tend to remove the financial incentive to engage in this type of calculated fraud.

The legal system, however, has had considerable difficulty developing viable theories upon which such class actions can be maintained. While some courts have recognized that a dishonest enterprise may rely on a specific sales pitch or fraudulent practice in all dealings with its customers and that a class action is proper, this is by no means a universal trend. Many courts still take the view that allegations of fraud or misrepresentation depend so much on the specific transaction between a business and an individual consumer that a class action is inappropriate.

If private rights are inadequate there is always the possibility of governmental action. Most states now have consumer protection units, and, of course, the Magnuson-Moss Federal Trade Commission Improvements Act of 1975 was specifically designed to allow the Federal Trade Commission to obtain consumer redress when someone engages in fraudulent or dishonest conduct.

It is a big country, however, and obviously the limited number of lawyers in the Federal Trade Commission's Bureau of Consumer Protection and regional offices can litigate only a small proportion of the available cases. Nor, in a time of increasing pressure on state and local budgets, can these entities allot adequate manpower to the job. Viewed realistically, because of the financial disincentives for the person most directly concerned, the consumer himself, to pursue his remedies, there is a substantial pay-off from fraudulent or dishonest conduct. As long as this is true the numbers are going to overwhelm government at all levels.

Fraud and dishonesty are not the only problems, though. A certain amount of friction is inevitable in consumer transactions, even when both parties are acting in complete good faith. It is important that mechanisms exist that will resolve such disputes fairly, cheaply, quickly, and in a manner that all parties perceive as impartial and just. It is not only the dishonest businessman who is tempted to use the expense of the system to stymie his opponent. Someone who believes that this own side of a legitimate dispute is correct is equally tempted to assert such an advantage. And even if a scrupulous business makes every effort to avoid taking advantage of the leverage built into the system, there is no way in which dispute resolution that depends upon the whim of one side is going to be perceived as fair by the other.

This kind of a problem does not lend itself to solution by existing government agencies, such as the Federal Trade Commission or state or local consumer protection units. None of us is designed to be or can possibly function as tribunals deciding a myriad of individual disputes.

In some cases, of course, the Commission could decide that the failure of a particular respondent or even an industry to create dispute settlement mechanisms was itself an unfair practice that violated Section 5 of the Federal Trade Commission Act. It could also decide that a requirement that such mechanisms be created was necessary to prevent unfair practices in the future. The Commission has, in several orders, mandated that a respondent use arbitration for dispute resolution.

The particularly acute problem of dispute settlement of warranty claims was recognized in the Magnuson-Moss Warranty Act of 1975. In accord with that Act the Commission has promulgated regulations on appropriate dispute settlement mechanisms. A copy of the relevant sections of the regulations and the Commission Statement of Basis and Purpose is attached to this Statement for the record.[1]

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[1] See Federal Register, Vol. 40, No. 251; Wednesday, December 31, 1975; pp. 60190–60218.

At present, considerable internal thought is being given to how the Commission can build on this prior work to encourage the creation of dispute settlement mechanisms that are both efficient and fair. As Chairman Pertschuk said during his confirmation hearings:

I favor establishing a grant mechanism as a good means of experimenting with alternative ways to resolve consumer controversies. We need a better understanding of the effective alternatives for handling individual consumer grievances. No one process will necessarily be the best way to resolve all consumer disputes. The key is to provide consumers with a wider range of alternatives than now exists. Because of its experience generally with consumer disputes and specifically with implementation of the Magnuson-Moss Warranty Act, I think that the Commission would be the appropriate agency for developing standards for federally-funded consumer controversy resolution mechanisms.

Despite our strong support for the concept. however, and our existing activities and interest in the area, we suggest that the Federal Trade Commission is an inappropriate place for lodging the grant-making responsibilities created by the bill. The Chairman continued the testimony quoted above by saying:

Although it is very tempting to recommend that the FTC also be responsible for distributing such grants, I conclude that this function would create a potential for impropriety or its appearance. There will be occasions in the future as there have been in the past when the FTC is in conflict with the states over its enforcement policy. Issues such as whether or not state and local laws should be affeted by Federal laws such as the Magnuson-Moss Warranty Act, and the adequacy of specific FTC decisions will continue to arise. I would want to avoid linking these responsibilities with decisions to allocate funds to particular jurisdictions. Therefore, it would be better to assign the grant disbursal function to an agency without substantive enforcement authority and with grant handling expertise.

The Commission is a collegial body that performs quasi-legislative and adjudicative functions. It is not structured or staffed to administer a program requiring detailed cooperation and review of the plans and activities of 50 different states which are in turn interacting with hundreds of cities, counties and private groups. This type of activity does not mesh well with the investigational, prosecutorial, adjudicative and rulemaking responsibilities that presently mark the Commission's role.

Nor does the bill provide any way in which the Commission could meet new responsibilities of this nature with its present resources and resource mix. In terms of dollars alone, for example, the bill would allow $500,000 for administration during fiscal 1978 and $2,500,000 in fiscal 1979. While the latter figure might be reasonable, the former is clearly not. It would purchase approximately 10 professional work years, a number clearly inadequate to the scope of the activity envisioned: working with 50 different states on state plans and their review plus development and funding of demonstration projects.

The amount of money alone is not the only problem. The types of resources and people needed are different from those presently available in the Commission. Commission staff is composed principally of lawyers and economists, plus support staff. A program of this nature requires some lawyers and economists, but it also requires administrators, experts in state and local government, auditors and accountants, consultants and contractors, evaluation experts, and probably some I have failed to mention. The Commission would have to build all these capabilities from the ground up, or divert present staff into tasks for which they are not trained. This would certainly result in the diversion of energy and efficiency from present efforts and would probably result in a program that would be less effective than one operated by an agency with a better fit between its structure and resources and the problem.

There is a role for the Federal Trade Commission in this area, but it should be a role of developing substantive standards and methods for consumer controversy dispute resolution, not administering a large scale grant problem.

There are at least three agencies which might be better suited to perform the functions the Committee has in mind here. First, and most obvious, is the proposed Agency for Consumer Advocacy. The bills which would create that agency already specify that it is to encourage mechanisms for settling consumer controversies, and it would be logical to put some muscle behind that encouragement by giving the agency power, responsibility and resources to carry it out.

Some of the problems of building the capability would also exist if the responsibility were given to the ACA, of course. But it is easier to construct such

a capability when an agency is first created than to graft it onto an existing agency. The program would also help the ACA develop the web of local contacts and information that it will need to carry out its general responsibilities, so responsibility for the dispute settlement program might be a positive benefit to the new agency.

A second possibility would be the Department of Justice. Justice is already concerned with the functioning of state and local law enforcement because of the Law Enforcement Assistance Administration. While it is a large leap from this to responsibility for development of informal dispute settlement mechanisms for civil consumer complaints, the Department would also bring some obvious advantages to the program. It has developed mechanisms and staff for review of state plans, for grantmaking, and for evaluation and auditing. It has a network of contacts and relationships at the state and local level. The Department as a whole is concerned with the administration of justice in all ramifications, as exemplified by its Office for the Improvement of the Administration of Justice, and its expertise would be most useful.

A final option would be the Department of Housing and Urban Development. HUD is also an agency with extensive experience and expertise in development and evaluation of plans grantmaking, and the preparation of demonstration projects. It has wide contracts with state and local officials. While it lacks the history of involvement in systems for administering justice, it now has an assistant secretary for Consumer Affairs and Regulatory Functions who has wide experience with and empathy for the problems of people at the neighborhood level.

None of these agencies would be a perfect choice, but I suggest that any of them would have advantages over the Federal Trade Commission as a vehicle for the major grant program.

Finally, I would like to raise some specific issues about the proposed legislation which should be considered by the Committee in the course of its deliberations.

The bill would provide funds both for demonstration projects and for development and implementation of comprehensive state systems for consumer controversy resolution. As the proposed legislation recognizes in Section 5(e), "State Survey," there is a lack of knowledge about current efforts and available resources, and the first step must be comprehensive surveys of the states' activities.

As I understand Section 5 of the legislation, the appropriated funds would not be available for the state surveys. The funds can be spent only pursuant to a cooperative agreement which could not be entered into until after the state had submitted its survey.

At the same time, under Section 6, only 25% of the funds can be used for discretionary grants.

Realistically, this could mean that the money will not be spent for one year or perhaps two. It will take the states time to review the program, prepare surveys, develop plans and submit them to the funding agency. Yet until this happens no more than 25% of the money can be spent.

I suggest that the bill make the total funds available for demonstration projects during the first years of the program, or make the funds available for conducting state surveys, or both.

There are many different kinds of formal and informal dispute settlement mechanisms in existence. In different parts of the country one finds special procedures for cases brought in the regular civil courts, all kinds of small claims procedures, private arbitration agreements which may or may not be enforceable in a court of law, and mechanisms for mediation and conciliation which are nonbinding.

Is it the Committee intent that all of these types of activities be eligible for inclusion within the state plan and for subsidy under Section 5(f)? If so, is there any limitation on the types of organizations which are eligible? The bill specifically provides that nonprofit groups may receive money, so I assume eligibility is limited to either agencies of state or local government or to nonprofit organizations, and that business groups would not be eligible.

A related point is that the nonprofit clause in Section 5(f) and 6(f) might create one technical problem for the FTC. Some cases have decided that nonprofit organizations are not within our jurisdiction unless they promote the general commercial interests of their members. The staff of the FTC, at least, would take the view that dispute settlement mechanisms supported by trade associations or business interests do indeed further their supporters' commercial interests and are within our jurisdiction. So the question arises whether the bill's use

of the term "nonprofit" is meant to exclude this kind of organization from eligibility for funding, or to exclude only these groups which do not meet Internal Revenue Service criteria. If the latter is the case, it might be advisable to specify that this is not intended to affect the Commission's Section 5 authority.

The proposed legislation does not specifically address the question of the proper source of funding of dispute resolution mechanisms. For example, should a state attempt to make a mechanism self-supporting, paid for by fees charged the parties, or should it take the view that the administration of justice in whatever form should be paid for out of general tax revenues? If the latter, how can the state create incentive structures that will discourage frivolous claims and discourage elaborate and expensive litigation without at the same time undermining the fairness of the process? Elementary economic analysis indicates that if legal help is provided by the mechanism the parties will use as much of it as they can—the gains are all theirs and the costs are not. Unless the state is prepared to fund the maximum demand for such services as a free good, then some other rationing device will have to be invented. On the other hand, if the parties have to pay the full costs then we complete the circle and are back in a position where people have no access to justice because the cost of dispute settlement is greater than the amounts at stake. It might be useful for the Committee to give some guidance on the resolution of this dilemma, or to place some outer boundaries on the range of choices a state might make.

Another issue is the extent to which a state can make an informal dispute settlement mechanism binding. Is any limit intended on the extent to which a state requires that some disputes be settled by binding arbitration, for example, and no other way?

Section 7(b)(6)(D) permits the use of the mechanism by assignees or collection agencies, "but only in a manner consistent with the purposes of this Act." We are uncertain what this means. Clearly, it is important that the consumer as a defendant have access to a dispute settlement mechanism. If this is denied he can be bludgeoned into paying even on unjust claim by the cost of litigation. At the same time, the allegation has been made that some small claims courts have become collection agencies for corporate creditors. It might be wise to establish a system of differential fees, depending on the use of the mechanism.

Is there any limitation on the types of disputes which might be covered in a state system? What about medical malpractice, for example. The American Arbitration Association, for one, has been actively engaged in establishing programs in this area. What about product liability actions where tort and contract claims may be asserted in the same action? Could a state system for dispute settlement include the administration of a no-fault liability fund created by contributions from consumers, businesses or both in connection with a particular product or type of claim?

What about problems raised by diversity of citizenship among the disputants? The application of long-arm jurisdiction statutes to informal dispute settlement is a novel area.

Could a state system for dispute settlement include measures aimed at controversy avoidance as well as controversy resolution? For example, could a group which encouraged plain-English translations of form contracts receive funding as part of the system?

Should the requirements of Section 7(b), which contains the goals for consumer controversy resolution mechanisms, be applied to all mechanisms or are these actually goals for the system as a whole? It may be that an overall system should include many types of mechanisms meeting different types of requirements—the test is not whether each mechanism meets all the criteria but whether the system as a whole does so.

Mr. Chairman, that concludes my prepared testimony, I will be happy to answer any questions you may have.

Senator FORD. Mark Budnitz, executive director, National Consumer Law Center.

STATEMENT OF MARK BUDNITZ, EXECUTIVE DIRECTOR, NATIONAL CONSUMER LAW CENTER, INC.

Mr. BUDNITZ. Good morning, Mr. Chairman.

Senator FORD. Good morning. We will follow the same procedure, if

you don't mind. Your complete statement will be made part of the record. If you would summarize, then we can get into some questions and answers.

Mr. BUDNITZ. Fine.

Senator FORD. Use whatever procedure you choose, but I would like you to hold it to 10 minutes, if you could.

Mr. BUDNITZ. I will do that. I am executive director of the National Consumer Law Center, a legal services office, which represents low-income consumers. We support the objectives of S. 957, but suggest that certain changes be made in the act to assure that the Federal funds released to the States be used in a way which will most effectively benefit consumers. I will be talking mostly this morning about additions I would like to see in the act, but I wanted to make clear at the outset that we strongly support the act.

The nature of my remarks is really in accord with your opening statement where you suggest that specific language may need improvement in order to better effectuate the legislative intent. That is really what I am talking about in the suggestions that I will be making. I have submitted a detailed statement urging the bill be strengthened to provide additional minimum standards for State resolution mechanisms.

Due to the limits of time, I will confine my remarks this morning to briefly discussing our underlying concerns and the types of minimum standards and safeguards we recommend. Over the past several years, Congress and State legislatures have enacted many consumer protection statutes which have been supplemented by regulations promulgated by administrative agencies, law enforcement officials, and lawsuits of consumers.

The Consumer Controversy Resolution Act should fund mechanisms which provide accessible, inexpensive, and effective forums in which consumers can obtain enforcement of these consumer protection laws. However, we believe that the proposed act as presently drafted would allow funding of mechanisms which would not achieve this goal.

S. 957 seems to allow funding mechanisms in which the decisions could be rendered through compulsory mediation or arbitration procedures, where the consumer is not provided with a legal or paralegal advocate and the decisionmaker is not a lawyer and is authorized to decide cases, based not upon substantive law, but upon commonsense or a rough sense of justice.

We propose the act be strengthened to prevent funding mechanisms with procedures like these. Specifically, we urge that the act clearly prohibit funding mechanisms which provide for mandatory arbitration or mediation.

We oppose funding either mandatory arbitration or mediation which would preclude a hearing before a judge altogether, or which would delay a hearing by having a two-tiered procedure where first you would be required to go into mandatory arbitration or mediation, then if you didn't like what happened you could go before a judge.

Our experience and the experience of other people who have testified in various other forums shows that there is a tremendous dropout rate for consumers, especially low-income consumers, if they get as far as the first stage. They just don't have the time or resources to keep pursu-

ing their case until they finally get before a judge. Therefore, we oppose any kind of mandatory arbitration or mediation.

Although the amounts of money involved in consumer controversies are generally characterized as small, the act sets no limit on the amount which could be involved. Small claims courts are now taking cases involving over $1,000.

Low-income consumers have almost no discretionary income. Money involved in their small claim may be essentially for food, rent, and utilities. These people should not be singled out from other litigants and denied a full hearing before a judge, if they want that. We are not against voluntary mediation, or arbitration. If that is what the litigants want to do, then that is fine. All we are saying is, the act should prohibit mandatory procedures.

We also urge that the act require the mechanism's decisions to be based on substantive law.

In the past few years, many consumer protection statutes have been passed. These laws have very little effect unless consumers can go to court and have them enforced, or go before some other alternative consumer controversy resolution mechanism and have them enforced. Yet be based on commonsense rather than these laws. Controversy mechanisms employing such a standard make a mockery of consumer protection laws because that standard allows complete disregard for those laws. The act should specifically require mechanisms to apply substantive law.

However, such a requirement wouldn't help consumers unless they also have available to them skilled advocates who are familiar with consumers' legal rights.

We don't believe it is advisable in Federal legislation to say that the consumer controversy resolution mechanisms must prohibit lawyers, that lawyers would not be allowed into the mechanism to represent the parties. That is an area where probably it would be good to have a variety of different procedures and experimentation to see what works out best, keeping them in or keeping them out.

But if the mechanism does allow lawyers, businesses will be in there with their lawyers. If these mechanisms are to achieve the purposes of the act, the consumer should be provided with legal help as well.

That help might be in the form of law students or legal aid lawyers or private volunteer attorneys. If the mechanism prohibits lawyers altogether, then there should be assistance from paralegal advocates. These advocates should not be people who sit in the clerk's office and can help them fill out forms, but rather people who can really help them prepare their case, because they are going to be up against a skilled employee of the business that is involved in the case.

Consumers are going to be outclassed every time, unless they have that kind of service and assistance. Without standards such as these, there is no assurance that consumers will receive a fair hearing before the mechanisms.

I would like now to very briefly mention a few of the other specifics that are discussed in further detail in my statement. The act should require cases involving gross abuses and patterns of improper business conduct to be reported to appropriate law enforcement agencies,

whether the cases were decided in small claims court or in a private mediation or arbitration proceeding. Mediation and arbitration can be held in a room behind a closed door. I think it is important that when it appears that something really wrong is going on, real gross abuse, this should be reported to the State attorney general's office, consumer protection division, or regional office of the FTC, so they can keep accurate records on just what kind of problems are occurring.

If these abuses continue to be unreported, then we will have the dearth of information which you were inquiring about previously.

Senator FORD. Also in that regard, we could develop an awareness of trends in what is happening. If reports were regularly filed with the attorney general's office, consumers' division, they would be on top of the patterns of gross abuse.

Mr. BUDNITZ. Right.

Senator FORD. And they would have a record. I think that might be wise.

Mr. BUDNITZ. Right, that is the way I think it should be done, rather than having a lot of the cases going forward without any kind of information gathering as to what is going on, what kinds of cases people are really complaining about, and what kinds of patterns and practices there are. The digital clock example is a very good one, a mass scheme taking place nationwide. And if we use this act to fund a lot of mechanisms that do not in any way report what is occurring, then we wouldn't have the information coming forward on mass schemes like this. It can all be buried and taken care of by individual settlements and individual cases; nothing meaningful would be done to prevent this kind of scheme in the future.

Provisions on default judgments should be strengthened to assure the summons was adequately served on the defendant, and that the consumer defendant understood the nature of the claim and the proceedings and what he or she should do to protect himself or herself. Consumers won't bother using small claims courts or any other mechanisms unless they can collect their judgments.

I would like to see stronger language in the act requiring court personnel to take the initiative. As soon as the court, or whatever the mechanism is, renders a decision, then the court personnel should take the initiative and really see to it that efforts are made to collect on this judgment. This is something that some of the judges in Massachusetts small claims courts are doing on their own.

They feel that once the court has made a decision, the integrity of the court is behind that decision. It shouldn't be solely up to the plaintiff, especially in a small claims case where often a consumer has very little time and resources to try to figure out how to collect that claim. The NICJ study showed that consumer plaintiffs just don't know how to collect them. So really, the integrity and effectiveness of the mechanism is going to be severely undermined unless there are specific systems to take care of that problem. That is why I would like to see stronger language in the act, not just to say that it is OK to pay for personnel in the court, who might be available to assist people, but stronger and more definite language in that regard.

Finally, I would like to see further provisions in the act to make sure that consumers, especially low income consumers, have greater input in the planning, development, and review of the State mechanisms.

There is one provision in the act which provides that in developing the state plan you have to show consumers have been consulted. I would like to see other procedures which are suggested in my statement to insure that consumers are involved all the way along and able to have input and have their opinions expressed as to how the mechanisms operate. I would be happy to answer any questions that you have.

Senator FORD. Thank you very much. In your prepared testimony you express your concern that consumers may be unreasonably prevented from appearing before a judge.

I think you also recognize that federal legislation ought not set out detailed requirements dictating the structure of individual mechanisms. Now, I understand that Pennsylvania has adopted a system where countries are allowed to provide by rule of court for compulsory arbitration and that similar programs are being tried elsewhere.

You recommended prohibiting mandatory arbitration. Should we exclude States such as Pennsylvania from eligibility for funding under this program?

Mr. BUDNITZ. I think so, because as the National Institute for Consumer Justice studies indicated, there is no real hard evidence that arbitration mechanisms effectively protect the interest of consumers.

And so I am very wary of compulsory arbitration or mediation.

If there were some further hard evidence that I could be shown to refute the information in the NICJ study, I would want to reconsider that. But I am very wary of it, and it really bothers me that the Federal money would be spent on a system like that.

I am not familiar with the Pennsylvania rule, but I would be very curious to know whether the arbitrators are lawyers, for example, or people who are required to be thoroughly familiar with the laws that are designed to protect consumers in those proceedings.

Senator FORD. The Pennsylvania law make a requirement that they be lawyers.

Mr. BUDNITZ. I think that is very important and an essential requirement. I guess what I am suggesting is that if there were sufficient safeguards built into the arbitration, I might be convinced otherwise.

Is the consumer who is in that arbitration proceeding entitled to some kind of skilled advocate, whether a lawyer or paralegal or whatever, especially if the party on the other side is a business?

That would be another factor that I would want to explore. And so it might be possible in my view to fund those States if they had sufficient safeguards in their mandatory proceedings to assure the goals of the act were going to be achieved. But my initial impression is negative.

Senator FORD. Of course, you suggest that the bill require that mediators and arbitrators should be lawyers. Yet, I know and you know that in many States small claims judges are not lawyers nor are they legally trained.

Many small State claims courts also prohibit lawyers from appearing, except to represent themselves.

Do you have an opinion on what the appropriate qualifications should be for people who adjudicate or settle controversies? Are there other qualifications? You know people may be able to settle a lot of things better without a lawyer.

Sometimes folks can reconcile a dispute much better outside of the legal framework.

Mr. BUDNITZ. As I said earlier, I am not proposing that the act be changed either to require that litigants be allowed to be represented by lawyers or to prohibit lawyers. I think the States should have the freedom to decide what they want to do about that. I think lawyers representing the litigants can be restricted in the role that they play, as they are in many State small claims courts.

They can't go in there and delay proceedings with technical procedural objections or objections concerning rules of evidence.

They can be prohibited from doing that sort of thing.

My concern on the role of lawyers representing litigants and my urging that mediators and arbitrators be lawyers based on the fact that we have worked so hard with the Congress and State legislators to pass a lot of laws to protect consumers and that effort is all going to be undermined if none of that law is applied in these mechanisms, because for most consumers these mechanisms may provide the only means of redress. Furthermore, there are an awful lot of public policy decisions that go into the laws that have been passed.

I observed a case in small claims court a few weeks ago, where the parties were informally discussing the facts of the dispute, whether merchandise was shoddy, and so forth. The judge was a lawyer. Suddenly it occurred to him that there was an important public policy matter here that the legislature had decided to take care of.

He asked the plaintiff how old he was. He was 17. The judge said, well, that decides it. He's a minor under this State's laws and the minor has the right to disaffirm the contract.

My concern is that if you don't have legally-trained mediators and arbitrators, they won't necessarily have any knowledge or perception of even that very basic kind of safeguard we have in our system, that it probably wouldn't even occur to that mediator or arbitrator to inquire into those kinds of things, which lawyers have been trained to be sensitive to in order to provide certain protections.

Then when you get into more complicated areas, the adjudicator must draw the fine line, must accurately strike the delicate balance between having the free market-place unfettered by legal restrictions and having consumer protection; it is a very fine line, and it concernss me that an untrained mediator could just disregard all of the decisionss that have been made and fine line drawing that has been done to try to balance that equitably.

Part of my concern relates to my own personal experiences representing clients and sending clients to small claims courts, not going myself, because you are not supposed to need a lawyer. Then the client comes back and says the judge decided such and such, and I realize that the judge forgot about a statute that applies in this particular case.

My client was just too scared and intimidated being in a courtroom to try to make any kind of legal argument. My point is that even legally trained adjudicators will sometimes fail to apply the law correctly; untrained persons will often fail to do so. Therefore, I included in my statement the assertion that mediators and arbitrators should be lawyers, so we don't lose the benefits of all the consumer protection law that has been enacted.

Senator FORD. Your recommendations on providing support services for consumers, especially low income consumers, are well taken. I am curious about one of your recommendations. You would require the judge to find that the defendant understood the nature of the claim and the proceedings. How does one prove that proposition, when the defendant is not before the court?

Mr. BUDNITZ. That suggestion, as I recall, came from a provision which was in the version of the bill which was last year's act.

I believe in the statement I discuss methods that can be implemented which would much better assure that the defendant knew what was going on.

For example, Sears, Roebuck's policy: When they send a summons to the defendant in a small claims action in California, they also send a booklet that's been prepared by the California Department of Consumer Affairs which explains what the defendant has to do and the kind of proceedings that are going to go on.

If the plaintiff could show that as a matter of regular practice, it sends out a booklet like that to every defendant, that would be a strong indication, I think, to the judge that the defendant knew or should have known what was going on, as opposed to just the very arcane kind of court summons which is usually sent.

In Massachusetts, for example, the summons in a landlord-tenant case used to say: You must appear in court on Monday, September 12. That is what it said, but it didn't mean that at all.

Finally, they amended the statute to require that the summons add clarifying language.

So, if you turned the summons sideways, it said you didn't really have to appear on that Monday, actually you had to appear on some other date.

That is just an example of how confusion and baffling the summons can be and how the defendant can be so confused by what is going on that he or she does not take the actions necessary to protect and defend himself or herself.

If you have a procedure such as a well-written booklet that would be sent to consumer defendants, that would help solve the problem, and for the judge that would be an indication that the defendant was given the proper information as to what was going on.

Another way is if the court forms, like the summons, explained in simplified language just what it is that the plaintiff is complaining about. If the complaint says the store is suing for $300 for goods had and received, that is not going to say anything to the defendant.

If the plaintiff can show that the complaint that was sent says: I am suing you for $300 for that refrigerator I sold you on June 12, that I never received payment for, such a complaint would be a strong indication to the judge that the defendant knew what was going on.

Senator FORD. You cited the Chamber of Commerce's proposed model act several times in your testimony. Do you know how many States have adopted this model act, if any?

Mr. BUDNITZ. I believe it was just proposed in the fall of last year. To my knowledge, it's not been adopted anywhere. It could be that certain sections have been adopted. I don't know if there has been enough time for that sort of action to have taken place.

You may have noted that in some instances, I took objection to various provisions and, in other instances, I strongly support certain provisions.

I think it is a model that should be seriously considered.

In my statement I refer several times to the Model Act because it might very well serve as a model for the mechanisms that would be set up under S. 957.

I want to make sure that the act would not allow funding of mechanisms that had certain kinds of procedures provided for in the U. S. Chamber of Commerce's model, but it would be appropriate to fund mechanisms containing other procedures in the Model Act.

I think it is the only really comprehensive model that's been published recently.

Therefore, I think it is a significant document to be looking at.

I would like to point out that almost all of the suggestions made in my statement are taken from the National Institute for Consumer Justice staff studies and recommendations, from last year's bill, from what Sears, Roebuck says they are doing already, from the Chamber of Commerce's Model Act, etc.

These are not entirely new recommendations I am making out of whole cloth.

These have already been in the public eye for awhile.

Senator FORD. A final question. You mentioned the ABA's demonstration project. Do you have knowledge of what form the experiment will take?

Mr. BUDNITZ. No, I don't. I can give the staff people information on how to get into contact with those who are in charge of that project.

At the present time my information is that they were working it out and talking to a judge in Florida, who was interested, and maybe including some of the proposals in his particular court in Florida.

But I don't know if it has gotten beyond the discussion stages.

It would be an experiment where they would try different kinds of litigation strategies, different kinds of procedures in that small claims court with an eye toward determining what seemed to work out best.

It might be an example of the kind of demonstration project which would be very appropriate for funding under this act. But I can't give you any further details, although I can put your staff in touch with those who do know.

Senator FORD. Fine. Thank you. I appreciate very much your coming today. If you have any additional thoughts, the record will remain open through May 9th.

Mr. BUDNITZ. Thank you.

[The statement follows:]

STATEMENT OF MARK BUDNITZ, EXECUTIVE DIRECTOR, NATIONAL CONSUMER LAW CENTER, INC.

The National Consumer Law Center, Inc. has been providing specialized legal assistance to lawyers for low income consumers since 1969. We currently receive funding from the Legal Services Corporation to render such assistance, from the Community Services Administration to assist lawyers for the poor with energy problems, from the Federal Trade Commission to represent low income consumers in rulemaking proceedings and from the Law Enforcement Assistance Administration to study consumer fraud. We have published two model con-

sumer statutes as well as model utilities regulations. We have published a four volume Consumer Law Handbook as well as numerous articles. In addition to assisting scores of legal services attorneys on hundreds of cases each year, our assistance is frequently requested by Congressional committees, state Attorneys General offices, public counsels, state legislators, etc. An attorney from NCLC was a member of the Board of Directors of the National Institute for Consumer Justice which conducted the most comprehensive study of small claims courts ever done.

As Executive Director of the Center, I am generally in charge of implementing the Center's work program. More importantly for purposes of this statement, I am specifically responsible for the Center's substantive work in the area of small claims courts. In this connection I answer all the requests legal services lawyers make of the Center relating to small claims courts, monitor legislative developments, and so forth.

I am a member of the Steering Committee of the Litigation Section's Committee on Consumer Rights of the American Bar Association. This committee is currently developing a project to experiment with various ways of handling small claims cases. I am also a member of the Small Claims Committee of the Massachusetts Public Interest Group. Finally I have represented many low income clients in small claims courts over a period of several years.

The National Consumer Law Center supports the objectives of the Consumer Controversies Resolution Act. For too long, consumers have been denied access to effective, inexpensive and fair mechanisms for resolution of their disputes with businesses. There are still areas of the country which do not have small claims courts, and those which do exist often have become little more than collection mills for business. The approach of this Act is to encourage states to develop sound dispute mechanisms by supplying federal funds while leaving the details of each state system to the discretion of local jurisdictions.

Because local conditions and resources vary greatly from place to place, we believe it would be inadvisable for federal legislation to condition receipt of funds upon observance of detailed Congressional requirements regarding the exact structure of consumer controversy resolutions mechanisms. In addition, there has not been enough experimentation and study of different strategies and procedures for anyone to be confident that any particular structure is invariably the best.

However, we believe the Act must be strengthened by inserting additional minimum standards and safeguards to insure that federal money is not spent to create or perpetuate systems which do not adequately serve the needs of consumers.

DIVERSION OF CONSUMERS FROM JUDICIAL HEARINGS AND DECISIONS BASED ON LAW

The Act should contain safeguards to prevent funding systems which unfairly deny or delay a consumer's opportunity to appear before a judge. From several quarters, proposals have recently been made to solve the problem of court congestion and of judges being bothered with "small" cases, by directing those cases to others. In regard to the federal courts, the suggestion has been made to refer Truth in Lending cases to magistrates. A bill submitted last month by Senator Garn would provide for federal funding to states which establish controversy mechanisms for dealing with disputes over the collection of debts. S. 1130, Fair Debt Collection Practices Act, 123 Cong. Rec. No. 53, March 25, 1977.

The U.S. Chamber of Commerce has proposed a Model Small Claims Court Act which in several respects is designed to keep cases away from the judge if at all possible. For example, a trial before a judge is recommended "only when an irreconcilable dispute exists." Model Act, Comment to Section 5.1.

A judge may impose mandatory mediation, and arbitration is also encouraged. Mediators and arbitrators are not required to base decisions upon the law. Many low income, poorly educated and timid consumers will be afraid to file suits under the Model Act because they risk being held in contempt of court if the judge finds they didn't try hard enough to settle the case before filing in small claims court. Sections 4.2, 5.2 Comment, 7.3 Comment. The Model Act fails to account for situations in which the consumer has valid reasons for not contacting a merchant to try to resolve a dispute. See Informal Dispute Settlement Mechanisms under the Moss-Magnuson Warranty Act, 40 Fed. Reg. 60200, n. 82 (December 31, 1975) (hereafter referred to as Warranty Mechanisms).

One common result of these proposals will be to deny most consumers the opportunity to have their cases decided by a judge. This is the inevitable effect of forcing the consumer to go through alternative procedures such as business sponsored mechanisms, mediation and arbitration. Low income consumers, single parent heads of household, and the elderly lack the time, patience and resources to persevere through a multi-layered process. Consequently, many drop their claims altogether before getting to a judge. Warranty Mechanisms, 60196, 60200, n. 84. Alternatively, both consumer plaintiffs and defendants are cajoled or pressured into settlements far less favorable than they deserve.

The language of S. 957 should be strengthened to prevent funding to states which, like the Chamber's Model Act, unreasonably exclude potential consumer plaintiffs and which unreasonably deny or delay the consumer's day in court before a judge by requiring arbitration and mediation.

Federal Judge Leon Higginbotham has expressed my concern: . . . By all means let us reform that process, let us make it more swift, more efficient, and less expensive, but above all let us make it more just. . . . Let us not, in our zeal to reform our process, make the powerless into victims who can secure relief neither in the courts nor anywhere else.

Higginbotham, "The Priority of Human Rights in Court Reform," 70 FRD 134, 159.

Mediation and arbitration can be excellent ways to afford consumers fair and swift relief in urban areas with congested small claims courts and a long delay between filing a claim and getting to trial. However, these mechanisms can also be inappropriate in many cases and subject to abuse. For example, most non-lawyer mediators and arbitrators cannot decide cases in accordance with substantive law because present consumer law is far too complex. The best they can do is to base decisions upon "common sense" or a "rough sense of justice."

A consumer complaint based on allegations of a merchant's misrepresentations is probably governed by the state's contract law as well as a fairly new Unfair and Deceptive Acts and Practices Law. The latter often incorporates by reference the regulations, orders and decisions made pursuant to the Federal Trade Commission Act. A complaint in regard to the quality of merchandise often is governed by the terms of the Uniform Commercial Code, and the federal Magnuson-Moss Warranty Act. The former's provisions can in most cases be applied correctly only by reading the interpretations of the Code made by the local jurisdiction's courts. The latter must be read in conjunction with lengthy and complex FTC regulations. Any case involving credit must apply federal Truth in Lending, the arcane FRB Regulation Z, and state Retail Installment Sales Acts. In light of the need to understand and interpret such complicated statutes, court decisions and regulations, non-lawyer mediators and arbitrators are clearly unqualified if cases are to be decided under the law.

The Chamber of Commerce directly meets this problem in its Model Act, concluding that arbitrators (and presumably mediators), even if they are lawyers, cannot "realistically" be expected to be able to decide cases based on the substantive law. Therefore, they are authorized simply to follow "good common sense." Comment to Section 5.2.

S. 957 would permit funding of state plans following the same approach and this will be detrimental to consumers. As Senator Ford stated when introducing his bill, these cases "may be legally complex." Cong. Rec. S3794, March 9, 1977. Common sense does not provide any guidance in striking the delicate balance between the need for a free marketplace which is not unduly tied down by legal constraints, and the need to protect consumers from unfair and abusive practices. We have left it to our legislatures to determine that balance, and the courts are supposed to enforce that balance by applying the law. S. 957 should not provide the occasion for depriving consumers of their opportunity to have the law applied to their controversies. The Act should be amended to prohibit mandatory mediation or arbitration. Arbitrators and mediators should always be lawyers. See "Redress of Consumer Grievances, Report of the National Institute for Consumer Justice, Recommendations 21 and 22 (hereafter referred to as NICJ). Consumer controversies should be resolved in accordance with applicable consumer protection laws.

One other feature of mediation and arbitration deserves mention: both occur in private. This can be beneficial to consumers because it is less formal and formidable than a public courtroom. However, the private nature of the proceedings can also enable unscrupulous businesses to avoid the public and judicial scrutiny which a courtroom hearing necessarily involves. The version of the Con-

sumer Controversies Resolution Act considered by the Senate last year, S.2069, sought partially to avoid this result by declaring that a resolution mechanism is responsive to national goals, *inter alia*, if it provides for the identification and correction of product design problems and patterns of service abuse by (A) maintaining public records on all closed complaints; (B) bringing substantial authority and meaningful influence to bear on compliance to correct patterns of product and service deficiency; or (C) providing information to government agencies responsible for the administration of applicable laws so they can perform their remedial deterrent tasks more effectively. Sec. 8(B)(6). Cong. Rec. S13303. August 4, 1976.

S. 957 should contain a comparable provision to insure that cases involving gross abuses and patterns of improper business conduct are dealt with in a manner which will deter their reoccurrence rather than being hidden in private arbitration or mediation proceedings.

CONSUMERS NEED SUPPORT SERVICES

Consumers, particularly those of low socio-economic status, will not use consumer controversy resolution mechanisms unless a great deal of support is provided. Studies have shown that the small claims court and other mechanisms will continue to be used primarily by business against consumers unless consumer claimants are informed about the use of these mechanisms, assisted in preparing their cases, and assured of an effective procedure for collecting judgments.

The Act should contain additional minimum standards to require an adequate level of these support services for consumer plaintiffs. Moreover, consumer defendants must also be assisted. The Act authorizes funding of mechanisms which allow businesses, including assignees and collection agencies, to use the resolution mechanisms to sue consumer. Unless consumer defendants are guaranteed sufficient support services, the mechanisms cannot be consistent with the Act's purpose of assuring all consumers fair resolution system and of promoting "better representation of consumer interests."

The Act does provide minimum standards for resolution mechanisms in Section 7, but these should be strengthened in the following ways: Subsection (b)(2) provides for paralegal assistance. However, as Professor William Statsky stated in testimony before the 93d Congress on a precursor to the present bill: "The keynote of effective paralegal participation in the delivery of legal services is training." Hearings Before the Subcommittee on Consumers of the Committee on Commerce. 93d Congress, Second Session on S. 2928, March 27, April 17, 18, 1974 (hereafter referred to as 1974 Hearings). If a consumer does not have a lawyer, it is crucial that the consumer have the assistance of a skilled paralegal, not just a former assistant clerk or a clerical person who has been given the title of paralegal in order for the state to receive funding under the Act. Therefore, the Act should require at least a training program in which paralegals would be instructed so they can meaningfully assist consumers.

Section 7(b)(3) provides that the mechanisms beopen during hours and on days that are convenient for consumers. Busy courts should also schedule cases so a person is not instructed to come to court by 9:00 a.m. only to wait until 3:00 p.m. for his or her case to be called. In addition, when introducing the bill, Senator Ford mentioned courts "located miles away from the consumer's residence" as an important deficiency in present systems, and Senator Metzenbaum noted the inaccessibility of these resolution proceedings in rural areas. However, the bill does not require the state plan specifically to address how the state will bring mechanisms within the geographical reach of those now excluded. At a minimum, the recommendation of Charles McKenney of Sears, Roebuck Co., should be followed. He suggested requiring a suit brought by a business to be filed in the district where the consumer resides. 1974 Hearings, p. 114. See also, NICJ, Recommendation 12.

Section 7(b)(4) provides that adequate arrangements for translation be provided. This should be strengthened by requiring in Section 7(a)(2) that the public information program include projects specifically aimed at and in the language of non-English speaking consumers. Section 7(b)(4) should require that translators be available to assist parties in filing papers, preparing their cases, presenting their cases at the hearing and in proceedings to collect judgments. Brochures should be published explaining the use of and procedures employed in the various mechanisms available and these should be published in languages other than English, where a sizable number of the local population speaks other

languages. Finally, court forms, especially the summons, should at least have a warning in languages other than English, that the document is important and a translator is available at the office of the dispute resolution mechanism to explain the document.

Section 7(b)(6)(D) permits assignees or collection agencies to use the mechanism "but only in a manner consistent with the purposes of this Act." The Act leaves to the state's discretion whether or not to permit lawyers to represent parties. However, if the mechanism is to present a fair procedure, provision must be made for consumers to be represented when the opposing party is a business, assignee or collection agency. Many large retail stores, utility companies and collection agencies use small claims courts regularly and employ very experienced, highly skilled non-lawyers to represent them. NICJ Staff Study on Small Claims Courts, p. 204. Consumers, particularly the indigent are at a distinct disadvantage trying to proceed alone against such an adversary. The Act as presently drafted does not require a level of assistance which assures that consumers will be adequately protected under these circumstances.

The Chamber of Commerce's Model Act requires the small claims courts to attempt to retain a lawyer who would serve as court-appointed counsel. This lawyer would be appointed to represent indigent litigants upon request. Persons serving in this counsel role could be full-time salaried court attorneys, legal aid lawyers, upperclass law students, or pro bono attorneys. Section 7.1 of the Model Act, S. 957 should contain a similar provision. If the state allows lawyers to represent parties in the resolution mechanism, the Act should either require a state to have a court appointed counsel, or at least a sound system for referring indigent parties to a panel of pro bono attorneys, to a legal aid office which agrees to take these cases, or to a law school clinic. If the indigent consumer cannot get assistance from any of these sources, the consumer should be permitted to have the case dismissed. Letting lawyers into the mechanism does not automatically defeat the Acts goals of speedy and inexpensive proceedings.

Small claims courts have devised methods of allowing lawyers in but limiting their role so they don't delay the proceedings unnecessarily with formalistic legal technicalities. Denying low income consumers ready access to lawyers when they face skilled business adversaries will often defeat the Act's goals of funding mechanisms which will provide fair and effective resolution of disputes.

If the mechanism adopts a rule banning all lawyers, including law students, then the mechanism should be required to establish a system of paralegal consumer advocates who could assume the role of representing consumers. See NICJ Recommendation No. 18.

Section 7(b)(6)(F) states that consumer controversy mechanisms should provide a procedure to insure that default judgments are ordered only if the defendant was given adequate notice of the claim and the plaintiff had established a prima facie case in open court. We urge that this section be strengthened to provide a standard for judging adequate notice. For example, S. 957's precursor, last year's S. 2069, provided that if a person other than the defendant accepted service, the judge must find a relationship between that person and the defendant sufficient to assure that the defendant in fact received notice. Section 8(c)(6)(A). S. 2069 also required the judge to find that the defendant understood the nature of the claim and the proceedings. This should be included in S. 957 as well, since businesses, assignees and collection agencies are allowed to use the mechanisms. Low income clients are often baffled by court forms such as the summons, and most courts for some reason seem unable to draft such forms in plain English.

One method to ameliorate this problem is to require the business plaintiff to send along with the summons a court-approved explanation of the mechanism's procedure, the defendant's rights, and how the defendant can protect those rights. In California, Sears accomplishes this voluntarily by sending each defendant a copy of the California Department of Consumer Affairs' pamphlet on Consumers and Small Claims Courts. 1974 Hearings, p. 117. This Act should include a provision to assure that any mechanism which receives funds establishes a comparable procedure to assure not only that the defendant receives notice of the claim (see Section 7(b)(6)(E)), but that the defendant is provided an understandable explanation of what is happening. Section 7(b)(1), requiring forms, rules and procedures easy for potential users to understand, is inadequate because it would allow the defendant to receive only a summons, which is inherently intimidating and does not provide the defendant with much of the information he or she needs to protecting his or her rights.

Another method to help insure that the defendant understands the nature of the claim and the proceedings is to require bi-lingual court forms and pamphlets.

Mechanisms funded under this Act should be required to adopt methods such as these to prevent default judgments from occurring. When the consumer defendant is defaulted, the Act should require the mechanism to provide a procedure which will allow the defendant to remove the default judgment easily when this is justified. First, the mechanism should be required to notify the defendant that a default judgment has been rendered, explaining the consequences and what the defendant can do to have the judgment vacated.

Second, the defendant should be entitled to have the judgment vacated upon a showing that plaintiff did not follow required procedures in instituting suit, notifying the defendant, etc. Finally, the judge should vacate the judgment once the defendant makes a minimal showing that he or she has a defense which may require a decision for the defendant or a reduction in damages. Because of the technical nature of removing a default (to be able to show plaintiff did not follow proper procedures requires precise knowledge of those procedures), indigent defendants should be provided counsel for purposes of the hearing to remove the default.

Studies have demonstrated that most consumers do not use small claims courts, and those who use them once, often do not use them again because they are unable to collect their judgments. Section 7(b)(6)(G) fails to provide adequate minimum standards to assure that mechanisms receiving funds will adopt procedures to correct these problems. At the very least, the Act should incorporate the recommendations of the National Institute for Consumer Justice. The NICJ found that many plaintiffs do not understand how to collect judgments. To remedy this, the NICJ suggests that court personnel be available to advise plaintiffs on how to collect judgments and should actually commence the process for the consumer if necessary. Recommendation 26. Although Section 5(f) of the Act authorizes states to use federal funds to compensate personnel who assist consumers to collect judgments, nothing in Section 7 requires the state to have such personnel. Instead, Section 7(b)(2) provides that a mechanism is responsive to national goals if assistance, "including paralegal assistance where appropriate," is available to consumers in collecting judgments. Far more affirmative language is needed. As soon as judgment is entered, the mechanism should take the initiative in contacting and advising the plaintiff on how to collect and how the mechanism's personnel can assist. The Act should require at least this minimal procedure.

Even preferable is the scheme set out in the Chamber of Commerce's Model Act which provides for the court to arrange a judgment satisfaction plan immediately after the judge renders a decision in the case. Section 8.2. (This procedure is followed in some Massachusetts courts.) If necessary, the plaintiff can resort to a salaried court official for enforcement of the judgment. (The NICJ also recommends collection by a salaried collector.) Consumer plaintiffs and defendants need all of the support services described above. Without them there is great danger that the controversy resolution mechanisms funded under this Act will at best serve upper and middle income consumers who have the education, experience and resources to persist without the services, or at worst serve only the interests of business and collection agencies.

INVOLVEMENT OF LOW INCOME CONSUMERS IN PLANNING, EXECUTION AND EVALUATION

Low income consumers need fair, accessible and effective controversy resolution mechanisms more than any other segment of the population. What to others are small claims and judgments, are a month's rent, food and utilities to the poor. In order to assure that the mechanisms funded by this Act are responsive to the needs of the indigent, the Act should provide for greater input from them. In this regard we support Section 5(d)(3) which requires that a state plan include satisfactory assurances that low income consumers have participated in the development of and have commented on such plans. However, Section 5(c)(1) should provide for publication of cooperative agreements in local community newspapers as well as the Federal Register to better assure that those most affected by the grant will be notified.

We also believe each state should be required to establish an Advisory Panel which includes low income consumers to help assure that the plan is properly implemented and to provide an institutional framework for continual input from consumers who wish to support improvements as time goes on.

Last year's S. 2069 contained provisions to assure that consumers, particularly low income consumers, have input during the funding agency's review process.

For example, part of the State Administrator's annual report had to include comments made by low income consumers on the effectiveness of mechanisms funded under this Act. Section 7(c). S. 957 leaves to the FTC full discretion as to what information will be required in the annual report. We recommend some minimum requirement to guarantee input from low income consumers in the review process. In addition, the state should be required to distribute its annual report widely so consumers can read it and respond to it.

Finally, the Act authorizes funding of nonprofit organizations to accomplish any of the provisions of Section 5(f). I assume this would allow funding of business sponsored mechanisms. We believe the Act should contain minimum standards for funding of such mechanisms beyond listing the allowable uses of such funds. Our concerns are related to the appearance of a conflict of interest which is inherent in business sponsored mechanisms, and the absence of data demonstrating that consumers are adequately protected in these proceedings. See NICJ Recommendation 3 and accompanying comment; NICJ Staff Studies on Business Sponsored Mechanisms for Redress, p. 119. Compare the strict requirements imposed by the FTC for Informal Dispute Settlements Mechanisms under the Magnuson-Moss Warranty Act, 40 Fed. Reg. 60190 et seq., December 31, 1975. At a minimum, the Act should include last year's S. 2069, Section 6(c) provision that grants should not be provided to organizations whose mechanism "does not fairly represent the consumers of the services provided."

THE STATE SURVEY

In addition to the provisions of Section 5(e), states should be required to include in their survey an analysis of provisions in their laws which could preclude or hamper a mechanism from achieving the goals of the Act. For example, the state may have statutes, decisions or court rules which exclude or severely limit the participation of paralegals and law students. State law may require a corporation to be represented by an attorney. State laws sometimes make it considerably more difficult to collect judgments from corporations than from individuals or other entities. State law may limit the type of remedy the mechanism can provide so severely that consumers will not be able to obtain meaningful relief. Laws such as these will have a great effect on the state's ability to devise a plan consistent with the goals of the Act. Therefore the Act should specifically require an analysis of state laws which may conflict with the purposes of the Act.

TRANSFER OF INAPPROPRIATE CASES

Some cases are not appropriate for the expedited and more informal procedure of consumer controversy resolution mechanisms. This is particularly true for complicated cases, cases where the consumer needs a lawyer and the mechanism prohibits this, and cases requiring the decisionmaker to have substantial legal knowledge to decide the case and the mechanism does not provide arbitrators, mediators or small claims judges who are lawyers.

A typical example of an inappropriate case is one in which the consumer needs discovery. He or she needs a copy of the contract, the company's payment records, interrogatories, etc. Without discovery, the consumer defendant often cannot successfully assert legitimate defenses. Another illustration is the defense which rests upon an interpretation of an arcane provision in a Federal Reserve Board Regulation upon which numerous court cases and staff opinion letters have been based. The Act should require that a state mechanism provide for transfer of such cases to the appropriate forum if justice requires, unless both parties agree to stay in the mechanism.

CONCLUSION

While the National Consumer Law Center supports the objectives of this legislation, we urge careful consideration of our recommendations. Adoption of our suggestions would not result in the federal government requiring the states to conform to a rigid nationally imposed blueprint for consumer controversy mechanisms. Rather our proposals are designed to assure that the goals of this Act are carried out.

Senator FORD. Thank you.

The next witness will be Mark Green, director of Public Citizen's Congress Watch.

STATEMENT OF MARK GREEN, DIRECTOR OF PUBLIC CITIZEN'S CONGRESS WATCH; ACCOMPANIED BY FRANK WARNER, STAFF MEMBER AND WRITER, RALPH NADER'S CORPORATE ACCOUNTABILITY AND RESEARCH GROUP

Mr. GREEN. Good morning.

Senator FORD. Mark, we hope to use the same procedure with you, if you want to go ahead and make some comments your entire statement will be included in the record.

Mr. GREEN. I will speak very briefly.

Thank you for your invitation, Senator Ford; and I would like to thank the committee for its persistence over three Congresses in pursuing this very important piece of legislation.

With me today is Mr. Frank Warner, who is a staff member and writer with Ralph Nader's Corporate Accountability and Research Group, who will be answering any of the questions that may come up as well.

Can we imagine a society which said it couldn't service the $25 burn because it is not economically feasible for doctors or wouldn't handle a $50 cavity because it is just too time-consuming, given the high cost of education of dentists?

Effectively that is what lawyers and the legal profession say to many Americans. One well-known legal anthropologist wrote: "Lawyers are probably the only profession that repudiates the majority of its potential customers and refuses to entrust them to anyone else."

A large part of the reason for this is the accelerating high cost of lawyers and their incomes. In 1955 the gross legal product, that is all that lawyers earned, was $2 billion. By 1972, according to IRS statistics, it was $9.7 billion. It is easy to see how it can get up that high when legal fees now customarily are $75 to $100 a hour, and up to $200 an hour in large New York law firms, I found out recently.

This is a terribly old problem.

One of the origins of the small claims court concept, according to our research, was the Norwegian Court of Conciliation, which was created in 1797. The monarch then said they were created and established to avoid what he called, the gluttony of lawyers, which Judge Breitel in yesterday's *New York Times* also denounced. So the more things change the more they stay the same, it seems.

Therefore, small claims courts are terribly essential as a vehicle for justice because according to the ABA's most recent survey of unmet legal needs, two thirds of Americans lack easy access to courts. Small claims courts are needed not merely because many Americans can't get into regular courts, but because of the prevalence of consumer bilk itself.

There are many studies that document this. Among them are Chairman Magnuson's book, "The Dark Side of the Marketplace." Phil Schrag's study, "Counsel for the Deceived," many studies coming out of the late Senator Philip Hart's Antitrust Subcommittee, and the book by David Capovitz called, "The Poor Pay More." They all document the extreme prevalence of consumer fraud, especially in urban areas, especially in ghetto areas, which was why the Kerner

Commission in the late 1960s itself said that consumer fraud was one of the triggers for urban riots in that decade.

Therefore, Public Citizens very strongly supports S. 957 and I would like to make just a few brief points in commenting on the specifics of the legislation.

First, I think the act permits the interpretation that the State surveys, which can lead to matching Federal grants, would have to be funded entirely out of State revenues. That survey could be expensive and burdensome to small States, especially if the survey is quite thorough. The committee might want to consider being explicit in the legislation that Federal moneys could fund what you could call trigger surveys up to a certain amount, dollar amount or percentage of the study.

Second, based on the lamentable LEAA experience, I think the legislation should be quite careful to avoid a huge percentage of the money going not to small claims courts. It is easy in grant programs for money to be wasted, as we now well know. For LEAA 95 percent never ended up in any court related function: it went toward a variety of experimentation with weaponery. I think the legislation should be careful or the committee report should be careful in avoiding that problem.

Third, I would like to make a point that was made by the prior witness. I understand the thrust of the legislation and its desire to inspire experimentation at the State level. That is necessary because we, none of us, has a monopoly of wisdom of exactly how to correct the system that has failed. I think we know that it's failed. But there are a variety of avenues to correct that.

At the same time we have enough experience to know certain ways why it's failed and we may want to, I would suggest, establish a certain percentage of the moneys appropriated go only to those small claims courts which fulfill certain standards.

Right now standards are called goals in the act.

I understand the sensitivity, especially in today's climate, of the Federal Government mandating or imposing standards on States and localities. But, of course, the Federal Government grants moneys with conditions where we have clearly established public policy.

Federal aid to education is not going to go to a segregated school in Detroit, for example, and we will agree to that.

I would then suggest the committee consider perhaps 50 percent of the moneys go to small claims courts, if and only if the courts are run along certain standards. For example, we know that courts have to be open a certain amount of time on weekends and evenings to facilitate the flow of people who work during the day. We know that when process servers do not serve process, then an enormous percentage of consumer defendants will default because they never knew about the proceeding. You may want to require the mailing of a registered letter to be received as a condition of receiving an award. There are a variety of other standards that early witnesses have documented, as well as the National Consumer Justice Study.

At the same time you should allow a large bulk of the appropriated moneys, perhaps 50 percent, to go to what you could call experimentation programs, demonstration programs.

A fourth point involves some of the comments of the FTC witness. I think he was far too modest. He emphasized that the FTC has little or no experience at grantsmanship. Nor did they in antitrust law enforcement in 1915, the year after the Clayton Act was passed.

I have full confidence in the Commission and its very consumer-minded new chairman to pursue excellently this program, if it is indeed assigned to them.

In addition, the FTC obviously has an enormous wealth of experience in consumer fraud and consumer remedies universe, which it could profitably tap if it housed this program. It has far more experience in this area than any other Federal agency I can think of.

Yes; it is in part of an adjudicative agency, as is the Justice Department, which is another possibility to house this program. I don't think that because it occasionally adjudicates and also investigates and issues rules that in any way would prohibit or tie its hands from having this program. There is a great compelling logic to having the FTC contain this program.

I would also suggest—I hope not to insultingly—that the Commerce Department and OMB are precisely the wrong place to have this program because they have not historically demonstrated concern with consumer matters that would justify its intimate involvement with the program that S. 957 would create.

Finally, I emphasized before the huge unmet legal needs on the part of the public, because of the difference between their needs and the price they have to pay to afford lawyers. This country has been addressing that problem very diligently in the last decade. From greatly expanding legal services corporations, pro bono work by often young lawyers in law firms, the imminent creation of an agency for consumer protection, the movement toward delawyering, that is, the taking of lawyers out of processes where they are not necessary, like uncontested divorces.

But none of these in any combination can help consumers solve local consumer problems. Those claims are simply too abundant and too small for any combination of these reforms to succeed in correcting them. And any who would maintain, as I understand some have that an agency for consumer protection is enough, that it solves the problem, doesnt understand the problem and probably can themselves afford lawyers and not appreciate what it is like to have a grievance without a remedy.

So, I would finally again underscore our support for the concept behind and the overwhelming content of the legislation before us today.

Thank you.

Senator FORD. Thank you very much, Mark.

The witness that preceded you would expand the legal and paralegal assistance available to consumers.

You indicate that lawyers are a major part of the problem and should be banned from the consumer controversy mechanisms. Is there a middle ground?

Mr. GREEN. I think there is.

If you permit lawyers at all in the proceeding, you have to permit it, I think, for both sides. The uninformed indigent, the consumer, as well as the business corporation.

They may not need it the same but the law would treat them the same.

Therefore, I don't think lawyers should be involved. They would needlessly delay and make more complex and more expensive the proceeding.

I think at the same time, you could have an office attached to every small claims court, staffed by paralegals or law students providing counsel and advice to any participant in a proceeding.

Presumably the experienced business employee or lawyer representing himself or herself *pro se* wouldn't avail themselves of that benefit.

But consumers would, I think, who don't understand the proceeding well enough, which, I think, would be a distinct advantage. As I am talking the only standard I can think of to justify a lawyer in the proceeding itself is if a participant can demonstrate objectively that they are so uninformed about the process that they need one, they should get one.

Now, how do you do that objectively?

The only criterion I can think of is a demonstration that they don't have a high school education.

Senator FORD. You have also recommended to the committee that the bill contain additional and exacting Federal standards some of which would require the States to change specific statutes relating to the subject matter jurisdiction, venue, evidence, pleading rules, and so forth.

Do you think the Congress ought to be involved in setting such detailed standards or ought we let the FTC and the States work that out when the cooperative agreements are negotiated?

Mr. GREEN. Some of this would be appropriated for subsequent rulemaking by the Federal agency, that is true. I think, though, that for the areas where this committee is confident there have been abuses that the remedy is obvious, you should establish the standard. I would maintain that is true for prohibiting lawyers from the proceeding as I have described. I would maintain that is true for more diligent notification of defendants in the proceeding.

So for those few major areas, I would urge mandatory standards. That doesn't mean the Federal Government is telling the State to change its law. The State doesn't have to; it then doesn't get Federal moneys.

Senator FORD. But that is the Federal carrot and stick, again. If you don't do this, we will take 10 percent of your Federal highway money away from you, or if you don't do that we are not going to give you this.

I think States are getting to the point where they are going to tell the Federal Government to keep its money.

I have heard in State legislatures, representatives and State senators say, "well, I'm voting for this legislation because it is the minimum we can do to comply."

That's not the attitude we want to encourage with this bill. We ought to encourage progressive experimentation at the State level for a while rather than be so rigid.

Basically, what we're trying to do is to eliminate the burden on the consumer out there when he's trying to assert a claim because of some harm he incurred. That is what we want to do.

Mr. GREEN. I agree if it were very rigid and all the money were considered on Federal standards, it would offend and deter some States from participating. What I'm suggesting is that perhaps half the program, the number is admittedly arbitrary, but some percentage go to experimentation, where the States would receive money to pursue their own remedies as they see fit.

I also want to urge that to the extent that you add costs on or processes on these courts you're automatically complicating them—and pushing them outside the market of individual consumers who can no longer understand.

So I want to keep them as simple as possible. The only complicating ingredient I would urge today is an office of paralegal or law student help to counsel individuals who seek it. Other than that, I think consumers may be deterred and frightened away because, to them, the law is often an enemy or certainly complex.

Senator FORD. Let me ask you a question. What exactly do you mean by the term paralegal?

In my community there is no law school. The closest law school is 150 miles away. This type of help to the consumer is not available.

Mr. GREEN. A paralegal is not someone who has gone to law school. Usually it's someone who is a college graduate, who is trained or has worked in a law office. He or she is trained in a law school or institute or more frequently is trained in a law office to understand legal procedures and counseling. So that there is no law school in your community would not make it prohibitive.

Senator FORD. A lot of secretaries in a law office know more than lawyers.

Mr. GREEN. I agree.

Senator FORD. Could a secretary in a law office be a paralegal?

Mr. GREEN. That's correct.

Senator FORD. Would she or he have to have a college degree?

Mr. GREEN. I don't think a standard like that is meaningful.

Mr. WARNER. Senator Ford, I might make the comment that I think the proposals that Mark has put forward here are not exactly wild or wildly expensive proposals for mandatory Federal standards. I think that the basic benefit we get out of these mandatory standards is to the consumer, not against the consumer in that he would not have to be worried about how long is his small claims court supposed to be staying open at nights or what does this law mean or where can I find a copy of this law?

If each small claims court knows that according to the statute they have to be open X amount of hours and if they have the standards already set down, the consumer is not going to be able to go looking at the act and interpreting it and wouldn't be able to afford any lawyer to try to interpret for him.

Senator FORD. Mark, what do you think of providing for training seminars for small claims courts judges or the people who actually are involved in mediation or conciliation, in order to ensure that they would be knowledgeable of the procedures that they must follow in order to see that the consumer is at least given a fair shake?

Mr. GREEN. Is this for the judges in the court to do or the paralegals?

Senator FORD. The judges in the court.

What I am saying is that in order for the State to obtain funding, individuals serving as a judge or mediator should have at least a 3-day seminar covering X, Y, and Z.

Mr. GREEN. Yes. Minimally, I would think that is a good idea. I have often desired sentencing seminars for Federal district court judges so that there is not this incompatibility which seems so offensive. I can see in States there being wildly varying procedures and habits built up that a seminar statewide for these judges or magistrates could iron out. You could discuss models of excellence that all could then imitate. I think that would be a fine standard.

Senator FORD. The model I had in mind is based on the model of the National College of State Trial Judges. You mentioned LEAA a while ago stating that 95 percent of those funds did not reach the proper place, in your opinion, the courts.

What portion of LEAA funds are you talking about? Were they a certain budgeted amount for consumer protection? What were you referring to?

Mr. GREEN. Well, the 5-percent figure I mentioned is that amount which ended up in court-related functions. The others went elsewhere. This doesn't mean all the elsewhere was bad. But the 5-percent number struck me as too low. Inadequate LEAA money went to, for example, local studies of white collar crime enforcement, mechanisms to resolve consumer complaints, and I think many studies in the last several years and within the last year have shown how much went into the kind of armament that made local law enforcers secure, which was a waste of resources.

Senator FORD. Well, let's take this into consideration, I don't want to take issue with you, but many of those dollars went into supplying local law enforcement officials with equipment enabling them to respond and to do a better job.

I can see where there may be some disagreement, and your point of view depends on whether you're in a metropolitan area or whether you're in a rural area as to what you need. There are two sides to that coin.

Mr. GREEN. I can understand that. I can also see how in many urban areas, where studies have shown that 70 percent of supermarkets will short-weigh meat, where television appliance repair shops will, up to 70 percent of the time, charge more than the service rendered, I can see in those communities that LEAA funds could have been well invested toward studying the prevalency of this problem and creating institutions—perhaps like this bill aims to create—to solve them.

Senator FORD. One final question. I have been called to make a quorum for a vote to report a bill out. You were talking about an agency like the FTC and you said they could handle it and you thought they were being very modest about their position. What about an agency for consumer advocacy and HEW?

Mr. GREEN. I'm sorry, did you say the agency for consumer advocacy in HEW?

Senator FORD. The proposed agency or HEW. Let's put it that way.

Mr. GREEN. The HEW agency I think has been demonstrated to be fairly ineffective, which is one of the reasons why a centralized ACP

is necessary rather than having the separate agencies in each department. I think right now I would be against it because the agency for consumer protection, 7 years later, has a very delicate balance in it. The Senate version right now for example prohibits it from intervening in state proceedings.

If you loaded this new responsibility onto this yet unborn agency, I think it may disrupt its delicate balance. I can see, however, if the agency is a year or two underway and if it's working the way the Senate and the House hope it will work, that it may then want to administer this program.

But initially I would be very hesitant to staple onto a very small and new program such an additional important mission.

Senator FORD. One final question. Mr. DeLong indicated that the 10 percent of the $5 million that was authorized the first year under the bill was not sufficient for administrative expenses. I suggested to him that we have 20 percent the first year, which would be $1 million and then drop it to 10 percent the second year, which would amount to $2½ million. Would you think that would be an appropriate percentage, too much, too little?

Mr. GREEN. When you say $1 million, is that the entire amount appropriated for the first year?

Senator FORD. No, $5 million total but $1 million for the agency to use for administrative expenses.

Mr. GREEN. It would be entirely a guesstimate on my part to say if the number is correct.

Senator FORD. I think we are all in a guesstimate area.

Mr. GREEN. I understand. I would urge that I think it doable and efficient for the staff of the committee to tally up how many small claims courts could benefit from the program and what would be the cost of the kind of surveys that bill intends to be conducted, and make some projection. It wouldn't be difficult, if you called 50 small claims court officials and see how many might want to participate, to project downstream what the cost might be the first or second year.

I see your staff shaking their heads, wary of having more work being imposed on them, but I think they are better equipped than any of the witnesses appearing before you to make that assessment.

Senator FORD. We do have a study coming from the National Center of State Courts. Perhaps we can use that study in our deliberations, too.

[The statement follows:]

STATEMENT OF MARK GREEN, DIRECTOR OF PUBLIC CITIZEN'S CONGRESS WATCH

When John Wilson of Cleveland, Ohio heard in early 1913 that the new Conciliation Branch Court might do something about his $10 worth of two rugs and piece of carpet lost by a storage company, he was curious. When he found this court offered him a quick, simple, and fair settlement without the need of a lawyer, he was startled, as it seemed long ago that attorneys and their price tags had made justice and the courts luxuries only the rich could afford. On March 18, 1913, Wilson became one of the first consumers to win a case against a business in small claims court.

To Roscoe Pound, then Dean of Harvard Law School, it appeared the Cleveland small claims court would be the first of many similar "people's courts" to sweep the nation. Pound, who had called it "a denial of justice" to drive anyone to hire a lawyer for a small claim, observed that the fact lawyers were not taking up many small cases was no reason to conclude the cases were unworthy of

adjudication. "May it not be that we have been assuming too lightly that what is unprofitable for the lawyer is unprofitable for the law?" he said.

Sixty-four years later, unfortunately, we can still ask that question. According to former Attorney General Ramsey Clark, "Ninety percent of the lawyers represent just ten percent of the people." The lawyer monopoly is defended by the American Bar Association, which, under the rubric of professional ethics, works diligently to keep the supply of attorneys low, the demand for them high, and competition between them non-existent. Thus, the Association's earlier defense of "minimum fee schedules," now declared to be illegal price-fixing by the Supreme Court, and its prohibition of attorney fee advertising and "unauthorized practice of law" committees are examples of its self-serving protectionism. So were the ABA's desperate struggles against no-fault car insurance, when it seemed the demand of auto negligence litigation might dry up, and against group legal services, when it seemed lawyers were actually prepared to compete in serving members of organizations such as labor union, churches, or fraternal associations.

The result: high fees which operate to price most Americans out of the market for justice in this country. By the mid 1970's, according to law firm consultant Daniel J. Cantor, the average practicing lawyer was earning $40,100 and the average partner in one of the largest 50 Washington, D.C. law firms over $100,000—which is easy to understand as legal fees based on an expensive fee-for-service basis increases to $70, $80, $100 an hour for many attorneys.

Most Americans can't pay this entry fee. Surveys of unmet legal needs from the early 1940's through the ABA's most recent effort in 1976 indicate that fully two-thirds of all Americans do not have ready access to lawyers; when the survey asked respondants whether most lawyers charged more than they were worth, 62% agreed.

All of which makes understandable George Bernard Shaw's lament that "all professions are conspiracies against the laity"—and which underscores the *New Yorker* cartoon of a distingiushed looking attorney and an anxious prospective client, which carried the caption, "You have a pretty good case, Mr. Pitkin. How much justice can you afford?"

If some Americans want to buy Cadillacs, they are free to do so. But if others want Toyotas the choice should be theirs. So too with the legal justice system. The alternative of low-cost, quick remedies must exist for those who can't afford the Cadillacs and Covington & Burlings. A mass society must make available forms of mass justice.

One vehicle to accomplish this result is the small claims court, which hears cases involving small amounts of commerce in relatively informal settings. But these forms are not available to all consumers. While every state today provides for small claims courts by state statute or local court rules, in the states (Arizona, Delaware, Louisiana, Mississippi, Montana, South Carolina, Tennessee, Virginia, and West Virginia) there are, in fact, no small claims courts, and in several other states, the courts serve only a few urban areas. An estimated 41 million Americans lack access to small claims courts.

This should change if this committee's Consumer Controversies Resolution Act becomes law. The bill is intended to encourage the States to establish or improve mechanisms, such as small claims court, which can settle ordinary consumer disputes in a simple, inexpensive, quick, convenient, and fair way. Provided the "State Plan" of a state meets Federal guidelines, S. 957 would allow the Federal Trade Commission to administer matching funds for up to 70 percent of the State's new effort in this area.

The bill seeks to address the known deficiencies of existing small claims courts—such as unnecessary complexity and formality. Of course, simplicity and informality do not mean there are not rules. And what might seem the loosest procedure to someone accustomed to jury trials in superior courts might be utterly intimidating to a first-time plaintiff in a small claims court. One court with a reputation for reassuring the overawed consumer is the Harlem Small Claims Court. There bilingual translators are on duty at all times, and "community advocates" and paralegals are ready to help consumers prepare the right sort of evidence (a photo of that table damaged by the movers, or a bill indicating the dry cleaner did have those shirts) and provide the correct names of the businesses they sue (Benny Smith's Shoe Stores, Inc., not Benny's Shoes).

The Harlem court and every other New York small claims court, do not hear cases brought by corporations, partnerships, and associations. In this way, these courts are not distracted from the individual consumer they should be

serving and they avoid another of the problems plaguing the courts: the problem of collection agency abuse. Often corporations and their collection agencies have turned small claims courts against consumers. For example, one survey discovered that corporations had brought 2200 of the 2900 Washington, D.C. small claims cases filed in June, 1972. (The ratio is about the same today.)

To prevent businesses from bogging down small claims courts with their debt collections, Kansas, Nebraska, and Ohio already limit mass filings to five, ten and 73 claims, respectively, per year. But if barring businesses merely places the consumer defendant in a more expensive court, it might be better to keep the small claims of businesses in the small claims court where a consumer might more easily defend himself or herself. The staff of the National Institute for Consumer Justice admitted it did not know whether or how many business creditors would go to another court if they were deprived of small claims courts. It suggested in addition to mass filing limits that corporations be alloted certain days of the week for their cases. One great advantage: "if corporation brought a flood of cases . . . they would only be jamming up their own calendar."

Just as an end must come to the dominance of business creditors, so should an end come to the role of lawyers themselves in the small claims court process. Perhaps the best way to avoid the complexity, and cost inspired by lawyers is to avoid lawyers altogther in this system of settling small grievances. In the Cambridge, Massachusetts small claims court, the NICJ staff found that business defendants were represented about 20 percent of the time, while consumer defendants were represented only three precent of the time. Business plaintiffs had lawyers in about 64 percent of their cases against consumers, and consumer plaintiffs had them in 17 percent of their cases against businesses.

Because the presence of lawyers does not make for a simple, informal atmosphere in which an average consumer can expect equal consideration, eight states (California, Colorado, Idaho, Kansas, Michigan, Nebraska, Oregon, and Washington) have banned lawyers from their small claims courts. In Hawaii, attorneys are not allowed in landlord security deposit cases. In Illinois, they appear only in the Cook County Pro Se Court. In Massachusetts, unless both sides have a lawyer, a lawyer may not take an active part beyond offering information. In Minnesota, lawyers are permitted only in the Minneapolis-St. Paul courts. And in Montana, where there are no small claims yet, the law says there will be no lawyers unless both sides want them.

Another debilitation for many small claims courts is the way they tolerate process servers, those people authorized to take summonses to consumer defendants, who can dump the summonses in a figurative sewer, and then file false affidavits swearing the summonses have been served. For the process servers, the "sewer service" saves time, money, and perhaps the aggravation of traveling into high crime areas of a city. For defenseless consumers, however, it means not having an opportunity to appear in court, defaulting, and finding that a small claims court is ordering them to pay bills they were unable to contest.

Judge Peter Katsufrakis of the Los Angeles small claims court, for example, told this Subcommittee in 1974 that in the 55,000 cases filed from 1972 through the first three months of 1974, 27,000 defendants defaulted, and between 85 and 90 percent of those defendants were consumers. Since absentee judgments have been high, and since sewer service has been recognized as a fact of life behind many of these defaults, California, Wisconsin, and other states require, before any default judgment is entered, that the plaintiff present at least some evidence to prove the claim.

Whatever the reason, consumers—perhaps discouraged by needless complexity, harassing lawyers, non-serving process servers—are not exploiting the full potential of small claims courts as a grievances mechanism. By any measure, the number of cases brought by consumers is small. An 18-month 1970–1971 study of the Roxbury, Massachusetts small claims court found that only 173, or 12 percent, of the total 1,431 small claims cases were filed by consumers. And a two and a half month 1972 study of the Los Angeles small claims court reported consumer actions amounting to only 624, or 14 percent, of a total 4,435 cases. "Recent research into dispute resolution among the Zapotec Indians of Southern Mexico," wrote anthropologist Laura Nader and attorney Linda Singer last year, "revealed that they have far greater access to and general use to dispute resolving mechanisms than do citizens of the United States."

Not that there isn't need for it. In a study of 2500 urban households, conducted by Arthur Best for the Center for Study of Responsive Law, one purchase

in five, or 20 percent, generated dissatifaction—although only one-third of these problems were reported to anyone. Studies of local consumer fraud—including the *Dark Side of the Marketplace*, David Caplovitz's *The Poor Pay More*, Sen. Philip Hart's many studies, and Professor Philip Schrag's *Counsel for the Defense*—document the prevalence of every-day ripoffs that altogether can destroy the quality of life for many urban residents. Indeed, the Kerner Commission in the late 1960's asserted that local consumer fraud was a significant cause of urban riots.

Increased information and visibility can make a difference in the utilization of small claims courts. In 1971, when radio station WLWC in Columbus, Ohio began playing spot announcements about small claims courts, the court's caseload doubled in two weeks. Convenience and scope make a difference too. When small claims courts are not open on Saturdays or after work hours on weekdays, or when the courts are not close by, many small claims cases are not worth the time and effort. When dollar jurisdictional limits (they range from $150 in Texas to $3000 in Indiana) are not high enough to include at least those cases that are not worth pursuing in regular court proceedings, large numbers of cases involving faulty products, poor service, and misrepresentation are shut out.

Finally, some consumers may be discouraged from participating in a small claims system if they see that even when they win, they may lose. *Winning Isn't Everything*, a study released by the New York Public Interest Research Group in September 1976, revealed that 31 (41 percent) of 76 successful plaintiffs in a 1974–1975 two-week sample, and 32 (44 percent) of 73 successful plaintiffs in an early 1976 one-week sample had yet to collect any of the judgments awarded by the Queens County, New York small claims court. Not only was there difficulty finding the assets of losing defendants and getting a sheriff to collect the judgments, several defendants escaped payment because they had been sued under their trade names rather than their legal names. The problem extends beyond New York to include most small claims courts, and only slowly are states applying proposals which might efficiently deal with it.

Given this tension between unmet legal needs and the cost of lawyers, and given the gap between the potential and the performance of small claims courts to date, S. 957 can make a signal contribution to justice in America today. Its intent, and the persistence of its sponsers through three Congresses, is laudable. In the view of Congress Watch, certain approaches and mechanisms can help insure that the Consumer Controversies Resolution Act fulfills its mission. With this in mind, we offer the following observations on particular points of S. 957.

1. Like the National Center for State Courts, we are concerned that funding state plans through state executive agencies might result in a repetition of the LEAA distribution pattern which gave less than five percent of that agency's money to state court systems. It is unacceptable to have 95 percent of this consumer redress money going to small claims courts. Demonstration grants can of course prove valuable seeds, but it is essential to support of forums like small claims courts which have demonstrated their potential impact, whatever their current imperfections.[1]

Small claims courts do not monopolize the small grievance remedy field. Other mechanisms, such as mediation, are and will continue to be important instruments of consumer redress. The very successful Boston Consumer Council, for example, takes consumer complaints over the phone, mediates 70 percent of them, and arranges voluntary settlements in 75 percent (53 percent of the total) of those cases it mediates. Most of this mediation is conducted over the phone or through the mail, and costs consumers little time.

2. The requirement in Section 5(e), that each state conduct a comprehensive state survey before it can get any federal money, is appropriate. But for smaller states the cost of this survey might prove a substantial hurdle to the rest of the program. Congress should consider matching funds of up to 50 perecnt, and a dollar limit, for these surveys.

3. Instead of its current general guidelines, the Act should establish mandatory standards for resolution mechanisms in order for them to obtain federal funds—excluding demonstration programs where you would desire experimentation. Since we know from substantial experience what has not worked and what is minimally necessary for an inexpensive consumer complaint mechanism to succeed, why not mandate standards (as the National Highway Traffic Safety

[1] Consideration could therefore be given to a requirement that states use at least half of the money to establish or improve small claims courts.

Act does) rather than create a large amount of discretionary authority (as the FCC has). For example, perhaps half of the appropriated money could go to demonstration programs which: Offer equitable remedies, as well as money awards; Waive adherence to rules of evidence; Allow suits against businesses or corporations under the names they use in transactions with the public as well as under their exact legal names; Permit the individual plaintiff to choose the small claims court, within a single judicial district, in which to bring suit; and Require that business and corporate plaintiffs sue any individual defendants a certified first class letter containing a business reply post card on which the defendant can agree to settle or demand a trial; Require defendants to tell the courts, immediately preceding trial, the location of the bulk of their assets and their place of employment; Provide plaintiffs information on the location of assets and the place of employment of the appropriate defendants, when plaintiffs are unable to collect judgments; Require penalties, three times the judgment amount, for nonpayment of judgments by businesse and corporations; Require that claims collectors (sheriffs, marshalls, etc.) serve as a salary; and Have available a fund to advance amounts necessary to cover the expenses of claims collectors. The fund could be reimbursed when the collector collects.

And all federally-funded consumer redress mechanisms, including small claims courts, ought to: Provide that at least half their operating hours be on weekends or in evenings of weekdays. Provide for translators for each non-English speaking group that represents some established percent of the population in the areas served.

4. The two federal bodies who would be the best home for this program are the Justice Department and the Federal Trade Commission—the former because the program is largely an adjudicative one and the latter because small claims courts largely resolve consumer grievances. In addition, the newly selected heads of both agencies have expressed their strong interest in improving the system of justice to service those now shunted out of it—a viewpoint essential to the success of this pioneer effort. The Committee, in my view, should oppose any efforts to locate the fund in an OMB or Commerce Department, since such departments have not historically demonstrated a concern or experience in the kind of dispute resolution that S. 957 focuses on.

The evidence is overwhelming that for most Americans legal justice is a glittering illusion, that the phrase "everyone is entitled to a lawyer" must be amended to include " . . . if you can afford them." A growing Legal Services Corporation, increased *pro bono* work by lawyers and an Agency for Consumer Protection at the federal level are all better equipping unrepresented groups to defend themselves. But no combination of them can resolve the thousands of small, local consumer grievances that continue to go unattended. To argue that an ACP moots the need for an S. 957 is rather like saying that since we have a fourteenth amendment we don't need any Civil Rights Act. Only those who can now afford to buy justice could be so callous as to be blind to the need for your legislation.

Senator FORD. I appreciate your coming today and thank you for your helpful testimony. The hearing is adjourned.

(Whereupon, at 11:30 a.m., the hearing was adjourned.)

ADDITIONAL ARTICLES, LETTERS, AND STATEMENTS

STATEMENT OF CONSUMER FEDERATION OF AMERICA

Consumer Federation of America is a federation of 220 national, state and local non-profit organizations that have joined together to espouse the consumer viewpoint. CFA and its member organizations represent over 30 million consumers throughout the United States. Among our members are Consumers Union, publisher of *Consumer Reports*, 17 cooperatives and credit union leagues; 45 state and local consumer organizations; 66 rural electric cooperatives; 27 national and regional organizations ranging from the National Board of the YWCA to the National Education Association; and 16 national labor organizations.

CFA enthusiastically endorses legislation to improve the manner in which consumer controversies are resolved. Legislation protecting consumers is of little value without effective mechanisms for enforcing the rights of consumers under such legislation. Too often consumers, particularly low-income consumers, do not know where to turn when their rights have been infringed upon, particularly if the economic loss involved is not substantial enough to warrant the hiring of a lawyer. If consumers do attempt to use small claims courts they often find that either the courts are not available at hours when as a practical matter they are able to appear or that the jurisdictional limit is so unreasonably low to allow their claims to be brought. Even once in a small claims court, consumers unduly intimidated by or disadvantaged when pitted against the small claims "pro's" who regularly haunt the courts on behalf of their business clients may be treated unfairly. Too often successful consumers in small claims experience the extreme frustration of not being able to collect their judgment because of inequitable or nonsensical procedural hurdles.

Concerning the specific provisions of S. 957, we would like to make the following observations:

1. *Execution of Judgment.*—Subsection 5(a) specifies the criteria against which States must assess existing mechanisms for resolving consumer controversies in order to qualify for grants. Conspiciously absent is a requirement that the State determine if consumers are able to collect on their judgments. Small claims courts are notorious for the inadequacy with which judgments are executed on behalf of consumers. Typically a consumer bringing suit against a corporation will find that the defendant does not show up until it is in danger of default. This subjects the consumer to wasted time and frustration. Once the judgment is entered, businesses are often lax in their payment. As a result, many consumers simply abandon their claims. Those who pursue their right to collect on a judgment must hire a sheriff or a constable to execute the judgment in most states. A determination of the ease of collection for consumers is vital to an evaluation of a system of consumer controversy resolution mechanisms. Provisions should be included which instruct the States to make this concern a priority in devising their state plans.

CFA would like to present two specific suggestions for improvements in small claim court procedure:

CFA endorses the implementation of a procedure whereby the defendant, when served with process, would be given a card to fill out and mail to the plaintiff to indicate an intention to appear in court. If such notice is not provided by the defendant, he/she would automatically be declared in default.

Specifically addressing the problems encountered by consumers in collecting judgments, CFA passed a resolution, at its most current annual meeting, that: CFA urges that consumers who obtain civil judgment be allowed immediately following the rendering of that judgment (at the discretion of the trial judge) to question the defendants as to their assets.

2. *Use of Funds.*—Paragraph 5(e)(7) authorizes the commission to allow states to use part of their funding to sponsor programs of non-profit organizations. The significance of this avenue of implementing programs for improving consumer controversy resolution mechanisms should be given more emphasis in light of the history of non-profit organizations in this field and the goals of the legislation. Non-profit organizations have shown themselves to be both interested in and competent at providing education to consumers about the nature and use of small claims courts. Further, it makes sense to have an outside group evaluate the effectiveness of the state plans.

We would like to emphasize the advantage of channeling funding directly to non-profit organizations, rather than through the states. Such funding would assume a greater liklihood that the citizens of all states are benefited. The inadequate concern with small claims courts, characteristic of many of those states which need the most improvement will tend to mean that these states with the greatest need will be the last to take advantage of this legislation. In such areas the work of non-profit organizations is impressive, but obviously increased funding is sorely needed. For example, Northern Arkansas consumers are enjoying a new and important service, thanks to the joint efforts of Arkansas Consumer Research, a private citizen action group located in Little Rock, and Municipal Judge Joel C. Cole. Until this year, Arkansas consumers have not had the benefit of a small claims court.

ACR has published a booklet to serve as a guide for consumers using the small claims court. In addition, because the pilot project has met with such success in Pulaski County, ACR is working to set up a small claims court for Southern Arkansas. The new court is receiving about 20 inquires a day, and legal aids attorneys have told ACR Director Glenn Nishimura that it is alleviating their workload because people are using the court without lawyers.

Similarly, in Massachusetts, Massachusetts PIRG has taken the initiative over the years to offer advisory services, print booklets, and press for legislation to improve the courts.

Consumer groups such as the Consumers League of New Jersey have compiled leaflets to help people in filing claims in small claims courts and proposed legislative improvements of the system, but are limited in activity and effectiveness by a lack of funds.

3. *Jurisdictional Limit.*—Section 7(b)(5) sets as a goal of the Act that the amount in controversy limitations is adequate to permit most consumer disputes with the district to be resolved. We feel that this standard is not explicit enough. It is very important that consumers be able to bring any claims in small claims courts which are too small to make it worthwhile to hire a lawyer to bring the case in a civil court.

The cost of attorney services therefore might be an appropriate yardstick by which to measure the proper size of a jurisdictional limitation. The States and the Federal Trade Commission should be given some further guidance than the vague standards provided in the Act to assure that the jurisdictional limitation is in fact high enough to allow small claims courts to serve consumers as intended.

Creating a viable efficient small claims court system in the states will increase public confidence in the courts and help prevent consumers from being exploited in many instances. CFA supports this legislation and hopes that the points raised in this statement will be addressed before the bill is considered by the Senate.

STATEMENT OF NATIONAL CONSUMERS LEAGUE

The National Consumers League urges the prompt enactment of S. 957. Founded in 1899 to defend and promote the safety, health and economic well being of workers and consumers, the National Consumers League is the country's oldest consumer organization. Since its inception, the National Consumers League has fought against abusive and unsafe conditions in the workplace and unscrupulous practices in the marketplace. Leaders such as Louis Brandeis, Felix Frankfurter and Eleanor Roosevelt enabled the League to represent the American worker and consumer most effectively. On the basis of its history of helping to meet consumer and worker needs, the League supports the Consumer Controversies Resolution Act.

Today the business community—including the United States Chamber of Commerce—and consumer groups find themselves in almost unanimous agreement that our judicial system has failed to provide accessible and effective consumer justice. Agreement is also widespread on the absolute necessity to supplement our judicial system with fair, effective, inexpensive mechanisms for the expeditious resolution of consumer disputes.

The deficiencies in our legal system of handling consumer grievances have serious consequences which must be addressed if our society is to meet the basic needs of its citizenry. Equality before the law in our society is not only a constitutional right. It is an essential prerequisite for a just and effective legal system—and ultimately for a stable and responsible society. If one segment of our population is effectively barred from the legal system, the confidence of our citizenry in the fairness and viability of our entire democratic system is seriously shaken. The unavailability of our legal system to a great majority of our citizens contributes to the feeling of alienation, substantially increasing the consumer sense of powerlessness. Because effective deterrents to deceptive, unfair or fraudulent practices by merchants are lacking, the inaccessibility of our legal system also perpetuates injustices in the marketplace.

The Consumer Controversies Resolution Act is designed to promote the development and proliferation of effective complaint resolution mechanisms by both the public and private sectors. It authorizes the Federal Trade Commission to establish an Office of Consumer Redress. S. 957 further authorizes the Commission through this office to enter into cooperative agreements with states and to provide states with financial assistance of up to 70 percent of the total estimated cost for the development or improvement of complaint handling mechanisms. The Bill provides that the Commission shall review the operation and effectiveness of the state plans and may withdraw assistance if these plans do not serve the purposes of the Act. States receiving assistance must make surveys of the existing state and private consumer controversy resolution mechanisms. The Commission may also make discretionary grants of up to one an one-quarter million dollars in 1978, not to exceed five million in 1979, to local governments or to non-profit organizations for research and demonstration projects. The Commission is empowered to issue regulations detailing criteria which must be met in order to qualify for the assistance provided by the Act, in addition to the standards specified in the Act itself.

The type of consumer controversy resolution mechanism contemplated by the Act encompasses small claims courts, arbitration, mediation and similar procedures. S. 957 outlines principles to which the state mechanisms must conform in order to qualify for assistance, including adequate publicity, participation of consumers in the development of the plans, availability of paralegal assistance to the parties, expeditious non-technical procedures, and easy accessibility of the mechanism (Section 7).

The need for an informal grievance-solving mechanism has long been recognized. Indeed, a substantial amount of empirical data exists on specific features which are essential if the mechanisms are to succeed in providing effective, expeditious and responsible dispute resolution. For example, the National Institute for Consumer Justice in its study of small claims courts recommended ways of strengthening that particular mechanism, including the use of federal funds.

Because we are familiar with the problems and much of the relevant data, the National Consumers League believes certain sections of S. 957 should be strengthened.

We recommend that Sections 6 and 7 of S. 957 be more specific in order to ensure that monies appropriated under the Act will be used to provide the types of effective grievance resolution systems which will, in fact, meet the needs of consumers.

The League supports the objectives of Section 6 which are to provide funding for demonstration projects by local governments or non-profit organizations. However, the League is of the considered opinion that the Congress should provide some guarantee on which types of demonstration projects are entitled to federal assistance. Guidance is needed to ensure that this Act will, in fact, achieve its essential goal of providing realistic operational hearing mechanisms for consumer disputes. The League suggests that Section 6(b) be amended to indicate

which types of demonstration projects should be funded, including those which would raise the following issues:

1. The costs, ability and willingness of the respective parties to pay, related to different types of consumer disputes.

2. Relative level of consumer and business confidence in the mechanism in terms of whether the:

(a) mechanism is a single or multi-membered panel;

(b) members have professional or lay, including consumer, qualifications;

(c) mechanism is empowered to render a decision based on the statements of the parties and papers submitted without hearing witnesses, conducting cross examinations, and the like; and

(d) right to appeal exists, or does not exist.

3. Extent to which consumers prefer a prompt hearing and are willing to travel reasonable distances to an appropriate location or are willing to defer the hearing pending the scheduling of a travelling hearing mechanism.

4. Impact of the type of claim or amount in suit on consumer or business parties' preferences for small claims courts, arbitration or other grievance-solving mechanisms.

5. Extent to which electronic communications technology, such as video-conferencing and closed circuit TV, can provide effective hearing mechanisms for parties geographically separated.

The League believes that Section 7 of S. 957 should be amended by adding the following conditions to which a consumer controversy resolution mechanism must conform in order to qualify for federal support:

1. The mechanism must provide not only for the hearing and resolution of disputes, but also for mediation and conciliation services. It is not clear from the wording of Section 7 that concilation and mediation services *must* be provided. Experience has shown that a substantial number of consumers' grievances can be satisfactorily resolved through mediation and conciliation, provided both parties to the dispute know that the claimant has the opportunity and ability to submit the dispute to a hearing body which has power to decide the dispute. Hence, an effective grievance-solving system must offer all these features as part of a single system if it is to meet the needs of both the consumer and business parties to the dispute.

2. Where a state plan contemplates that fees and costs will be paid by the parties, the plan should also provide for waivers of these fees and costs, in whole or in part, if a party is indigent or has insufficient financial resources to invoke a hearing body.

3. The hearing body must be impartial and independent in regard to funding and job security. Its member, or members, must be drawn from unimpeachable sources. Consumers and business must participate in their selection, either at the time of the dispute or when the basic panel is being created.

4. The resolution mechanism must have an adequate administrative infrastructure capable of (a) assisting consumers to file or defend their claims, and prepare their cases or defense; (b) acting as spokesperson for the consumer during the hearing if so requested by the consumer party; (c) helping the implementation or collection of any award made; and (d) providing expert witnesses when necessary to the resolution of the issues. Section 7(b)(2) appears to apply solely to consumers' use of these mechanisms as party plaintiffs which will not always be the case.

5. The decision of the mechanism must be in writing and must contain a statement of its rationale in sufficient detail to inform the parties of the reasons and bases for the decision. All decisions must be capable of enforcement.

The League urges that these conditions be written directly into Section 7.

In conclusion, the National Consumers League believes that a Bill providing federal funding for the establishment of consumer controversy resolution mechanisms is essential and long overdue. However, the League also believes that acting on the basis of current experience. Congress must ensure that funding will not be dissipated on mechanisms which will not meet the established needs of the parties. Similarly, Congress must ensure that the proposed demonstration projects will focus on realistic problems and will not be wasteful of precious resources directed to research and study without operational significance. The League's proposed amendments to the Bill are not in any way designed to detract from the objectives of S. 957 to promote innovation and exprimentation. They are designed, we believe to ensure that S. 957 will achieve its goals to establish effective, fair and inexpensive consumer controversy resolution.

STATEMENT OF CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA

The Chamber of Commerce of the United States recognizes that consumers as well as business have a right to the protection of their interests by government. Businessmen at all levels should work constantly to anticipate and preclude government involvement by assuring that consumer problems are addressed voluntarily, effectively and expeditiously to maximize consumer satisfaction. However, we realize that, in some instances, government involvement is necessary. Promotion of effective consumer redress, as mentioned in Section 2(a)(6) of S. 957, through a cooperative functioning of both public and privately-sponsored mechanisms, will make available to consumers more avenues of redress and therefore, increase the speed with which satisfaction can be obtained.

Through its limited complaint handling mechanism, the National Chamber has found that consumers are very concerned about products and services which were paid for but never received. In particular, automotive services and mail order purchases seem to be popular areas of complaint. Recently, another practice has surfaced—that of sending invoices for advertising that was never ordered.

In many instances, the complaints we receive involve companies that are not located in the same state as the complaining consumer. In these situations, consumers go directly to national government, business and consumer groups. They are uninformed as to the availability of redress mechanisms within their communities or their states.

In view of this, the state surveys provided for in Section 5(e) would be vital to the improvement of consumer redress mechanisms. Many consumers are even unaware that state consumer protection agencies are available to assist them. Therefore, provision should be made that the findings of the survey, particularly "the nature, number, and location of consumer controversy resolution mechanisms within the State" (Section 5(e)(1)) be made available to consumers. Such public information is the core of the success of any consumer program.

The National Chamber is unable to comment on the funding provided for in the bill. As with other witnesses, we would only be guessing as to how much is actually needed. However, we hope that only a limited amount will be spent on administrative activities. It is imperative that the funds be spent on assuring adequate personnel to provide assistance to consumers in the preparation and resolution of their claims and collection of judgments (Section 5(f)(1)), public education and publicity on available mechanisms (Section 5(f)(3)), and continued research and development of better mechanisms (Section 5(f)(6)).

It is a well known fact that, while the amount of money involved in consumer controversies each year is considerable, the amount in any one controversy is often not large. But, what must be kept in mind is that a small amount to one consumer may be a large amount to another. Therefore, no claim is necessarily a "small" claim. For this reason, the National Chamber has developed a "Model Consumer Justice Act", a plan for revision of the small claims courts. Our model could very well serve as the mechanism model for state systems as provided in Section 7 of S. 957.

Based on research done by the National Institute for Consumer Justice, the Chamber's model Act provides for a small claims court system that is truly consumer-oriented. Our Act is somewhat more specific than many of the provisions of S. 957, and thus might be considered by the Committee as a guideline to be written into the bill. (A copy of our model Act is attached to this statement.)

Section 7(b)(1) provides that the court supply legal and collection assistance to consumers. Not only does our Act provide for clerks and ombudsmen to assist consumers in the filing of their claims, but it also provides that the court act as the collection mechanism after a judgment has been rendered. As is obvious to all concerned with consumer redress, collection of a court judgment is often extremely difficult. Winning a decision but not collecting that judgment, in many cases, amounts to no victory at all. Therefore, we are proposing that after a decision is reached by the court, the court would fashion a payment plan between the parties. Any plan arranged by the court would be adopted by the judgment loser under oath. While the parties are still present, the court would enter a writ of execution in accordance with the payment plan which would be executed upon failure to satisfy the judgment.

If the defendant failed to begin payment on the judgment, the plaintiff would make a good faith effort to collect. However, should he fail, he would inform the court, which would serve as the collection mechanism.

Section 7(b)(3) provides for greater accessibility of the courts on weekends and evenings. Our model recommends that courts be open at least one evening a week and one Saturday morning a month. In this way, those who wish to use the court would not be asked to lose time and money by taking off from work. However, it should be noted that this provision is subject to the demands on the court by the community, and such extra sessions may be eliminated if the court finds them unnecessary.

We also suggest that the court be located within the community it serves. A formal courtroom is not necessary; any public building would serve the purpose. In this way, potential litigants would not be discouraged from using the court because of having to travel to a downtown or distant location.

We suggest that Section 7(b)(5) of S. 957 be made more specific by stating that the jurisdictional limitation of the small claims courts be $1000. This amount would allow consumers to obtain redress on most major goods and services.

We concur with Section 7(b), that early resolution of controversies is important and that informal means should be provided to achieve this goal. Our model Act provides for mandatory pre-trial meetings between the parties—either in private or before a mediator so that an attempt can be made to avoid a court proceeding. Arbitration would also be available as an alternative to a court hearing.

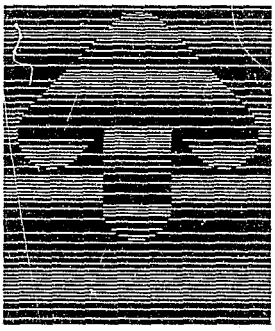
The use of small claims courts by collection agencies and assignees has long plagued the system. Therefore, we suggest that Section 7(D) be strengthened by imposing a mass filing limitation on these groups, as well as upon individuals, to prevent the court from being monopolized by any one party. Depending upon the caseload, the amount of time allotted to one group would be decided by the judge. However, no more than 50% of that time should be allotted to non-individual claimants.

We also recommend that a provision be inserted in S. 957 prohibiting lawyers from representing litigants in the court. Neither businesses nor consumers would have representation, but lawyers would be allowed in the court for consultation purposes, and, if a party wished legal assistance, such assistance would be provided. Procedures in the small claims courts should be so informal that attorneys are unnecessary. This prohibition would place all litigants on equal footing.

We commend the framers of S. 957 for its repeated emphasis on public information relating to available redress mechanisms. While the Magnuson-Moss Warranty/Federal Trade Commission Improvements Act provides that mechanisms be mentioned in all warranties, too often consumers are lax in their responsibilities and do not read far enough into the information provided. Or, they just assume that their only recourse is to go to court, which is simply too expensive for many. This bill would eliminate that expense, as well as provide the necessary publicity. Flyers in supermarkets, libraries and post offices, and any other means of communication, such as "public service" spots on radio and television, would provide an invaluable information service to consumers.

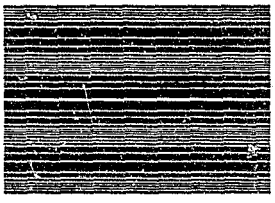
S. 957 would provide the incentive for states to study existing consumer resolution mechanisms, to add new mechanisms and to change old methods that are no longer serving the public as they should.

The Chamber of Commerce of the United States supports the concepts contained in S. 957 and recommends its passage with the changes outlined above.



MODEL CONSUMER JUSTICE ACT

A Proposed Model
Small Claims Court Act
for State Legislatures



Up with Consumers

Proposed by
THE CHAMBER OF COMMERCE
OF THE UNITED STATES

CONTENTS

Preface

MODEL CONSUMER JUSTICE ACT

When a consumer has exhausted every available avenue of informal redress of a complaint, his last resort is the small claims court. However, the small claims court system, for the most part, has acquired a "collection agency" image that does not serve the consumer's interest.

The Chamber of Commerce of the United States has drafted a Model Small Claims Court Act which we feel can make the small claims court system more responsive to the needs of the community it serves; one that will meet company and consumer needs—has branch courts out in the community offering easy access to all citizens; is open evenings and Saturdays to meet the needs of the workingman; takes cases up to $1,000; does not allow collection agencies to sue; schedules hearings within one month of filing; and has follow-through procedures and authority to assure that its judgements are paid.

The following pages contain the text of the Chamber's Model Act with Drafter's Comments. Attached as Appendices I and II are case studies of the small claims court systems in New York City and Los Angeles. These are working models, indicating revision of a small claims court system is possible and that it can be successful.

A synopsis of the Act is provided for reference in Appendix III.

A copy of the Act without Drafter's Comments is available upon request. The Act without Drafter's Comments is reproduced in a format suitable for use by state legislatures.

TITLE, CONSTRUCTION, PURPOSES

Section 1.1 (Title)

This Act shall be known as the Model Small Claims Court Act.

Section 1.2 (Rules of Construction; Purposes)

(a) This Act shall be liberally construed and applied to promote its underlying purposes and policies.

(b) The underlying purposes and policies of this Act are to—

(1) establish an accessible, convenient, and informal forum in the small claims court in which the small claims of all complainants can be resolved and redressed inexpensively, expeditiously, fairly and effectively, and

(2) maximize the use of the small claims court by publicizing its availability and removing those deterrents confronting prospective litigants from prosecuting or defending a claim therein.

COMMENT

Many Americans are unable to resolve their grievances inexpensively, fairly, quickly and effectively. Small claims courts have not been established nationwide and thus remain inaccessible to many complainants. Where extant, small claims courts have failed to fulfill their intended purpose of providing an inexpensive and convenient forum in which disputes are effectively and swiftly resolved. Jurisdictional limits remain too low and available remedies too restricted to permit redress of major and common grievances; court hours remain too inflexible, court locations too inaccessible and court availability too unpublicized to permit convenient and regular court use; court procedures remain too complex and cases too protracted to facilitate the expeditious resolution of grievances; unequal representation of counsel remains too common and the granting of default judgements too frequent to permit fairness to the litigants; litigation expenses remain too high to permit the inexpensive resolution of disputes; abusive court practices and use by collection agencies remain too widespread to secure the trust and attract the claims of individual complainants; and finally, too many judgements remain unsatisfied to permit the effective resolution of disputes.

To effectuate Section 1.2 (b) (1) of this Act, community courthouses, evening and Saturday hearing sessions, a public relations program, curbs on abusive court practices, a high jurisdictional limitation, equitable and monetary relief, nominal filing and service fees, quick hearing dates, short continuances, simple filing and service procedures, curbs on the role of counsel, immediate judgements, court responsibility in collecting judgements, informality and flexibility are prescribed.

So designed, this Act, by establishing a court so structured, has a concomitant purpose in Section 1.2 (b) (2) to attract as many disputants to the small claims court as possible, thereby resolving disputes in this informal forum without the delay and expense that attend their resolution in regular civil courts. To maximize the use of the small claims court, the Act prescribes continuing and widespread publicity of the court on an organized basis; additionally, the Act removes any deterrents confronting prospective litigants from prosecuting or defending a claim in the small claims court by delaying, rather than abolishing, any advantages they would obtain by suing or defending in the regular civil court in the first instance. Accordingly, a claimant does not lose his right to appeal a decision of the small claims court, as the right to appeal that decision is afforded both parties (see Section 8.3); further, while the right to full representation by counsel is denied the litigants in the small claims court (see Section 7.1), it is fully available to both on appeal; and finally, while jury trials are unavailable in the small claims court (see Section 7.2), as incompatible with the essential informality of the court, they are available, where the right exists, in a trial de novo on appeal.

The Model Small Claims Court is designed so that litigants want to use it and can use it because the court is fast, fair, economical, effective and accessible and because the litigants do not irretrievably lose any rights or safeguards by litigating therein. The Act is intended to achieve the heretofore unrealized promise of the small claims court by maximizing the use of a forum in which grievances can be swiftly, inexpensively, fairly and effectively resolved and redressed.

Part II

COURT ESTABLISHMENT, GENERAL ADMINISTRATION

Section 2.1 (Court Establishment)

(a) There is hereby established in each county a small claims court as a separate division of either the county civil court of general jurisdiction or a civil municipal court situated within the county.

(b) The administrative judge of the civil court of which the small claims court is part shall implement the establishment of the small claims court and shall appoint a judge from such court to serve as the administrative judge of the small claims court.

(c) The administrative judge of the small claims court shall administer the court as provided by the provisions of this Act, including the assignment of civil court judges to the small claims court on any reasonable basis he deems appropriate.

COMMENT

Section 2.1(a). As the instrument by which a statewide system of small claims courts is established, this Act, and in particular this provision of this section, is intended to avoid the delay and dissimilar results which might eventuate were the counties themselves empowered and required by statutory authority to take the initiative in establishing such courts. Accordingly, this provision serves as the statutory mandate creating small claims courts throughout the state, leaving to the counties (see Comment to Section 2.1(b)) the responsibility to implement their establishment.

The success and effectiveness of the small claims court depend in no small part on the trust of the public in it and the ease and economy with which it is established. As a division of the regular county or municipal court, rather than as a distinct entity, the small claims court will enjoy legitimacy in the eyes of the public and will become operational both swiftly and economically by utilizing the facilities and personnel of a functioning system.

In view of the varying characteristics of local court systems, this provision is flexible in establishing small claims courts in either county courts or in municipal courts within counties. Pursuant to Section 2.2(a), the state body established by the governor to oversee the establishment of the small claims court shall determine whether the small claims court in each county should be a division of the county court or a municipal court. The small claims court should be placed in the court system which can most efficiently administer it in light of the particular characteristics and needs of the community which the county encompasses. In counties containing large metropolitan areas served by large municipal courts, small claims courts might best fulfill their purposes as divisions of those courts. Where a rural community contains few, if any, sizable municipal courts, the small claims court should be a division of the county court system.

Section 2.1(b). In order to secure the local judicial supervision necessary to achieve the orderly implementation of this Act and the orderly administration of the small claims court, the administrative judge of the civil court wherein the small claims court is situated is mandated by this provision to implement the establishment of the small claims court and appoint an administrative judge of the small claims court to administer it. In implementing the establishment of the small claims court, the administrative judge of the civil court would work with the administrative judge of the small claims court in providing court space, personnel and funds for the small claims court and, where deemed appropriate, in providing for branch courts of the small claims court in those counties that maintain branch county courts throughout the county or in those cities that maintain branch city courts throughout the city.

Section 2.1(c). It is envisaged that the administrative judge of the small claims court would be a member of the civil court of which the small claims court is part and would be appointed to that post in any manner and for whatever duration deemed appropriate by the administrative judge of the civil court. This provision does not foreclose the possibility that the administrative judge of the civil court shall likewise serve as the administrative judge of the small claims court.

The administrative judge of the small claims court shall administer the court pursuant to the provisions of this Act. Included in his duties is the assignment of regular court judges to the small claims court in any manner he deems appropriate. The use of regular court judges in the small claims court further enhances the legitimacy of the small claims court; it also provides an experienced diversified pool of part-time small claims court judges. It is contemplated that the administrative judge of the small claims court will assign these judges to the small claims court on a rotating basis with each judge serving on the court for two weeks to a month at a time. A full-time small claims court judge would not have the varied judicial experiences and the same aura of authority as regular civil court judges. Additionally, the volume of small claim cases in certain courts might not warrant a full-time small claims court judge.

Section 2.2 (State Supervisory Agencies; Community Advisory Panels)

(a) The governor shall name or establish an appropriate state body to—

(1) insure and oversee the implementation of the establishment of small claims courts throughout the state pursuant to Section 2.1, and

(2) oversee the operation of small claims courts once established.

(b) Pursuant to Section 2.2(a)(2), the state body shall establish community advisory panels in each county or municipality in which a small claims court is located.

(1) The community advisory panel shall be comprised of representative segments of the community.

(2) The duties of the community advisory panel shall include, but shall not be limited to—

(a) assisting the small claims court in the selection of arbitrators and mediators;

(b) promoting the use of the courts;

(c) serving as a liaison between the court and the community and the community and the state body establishing it; and

(d) maintaining a continuing review of small claims court operations and filing an annual report relating thereto with the state body establishing it.

COMMENT

Section 2.2(a). This provision provides for a supervisory state agency which would insure and oversee the implementation of such courts throughout the state and would oversee their operations once established. An effective statewide system of small claims courts can best be achieved by coordination of the small claims court by a central state agency. By overseeing the implementation of small claims courts throughout the state, the agency would insure that the courts are established statewide and contemporaneously with one another, as intended by the Act. By monitoring the operations of the court once established, the agency would ascertain the success with which the courts were satisfying their mandate to provide inexpensive, fast, fair and effective justice; the agency, by a comparative analysis of the courts, could correct the deficiencies of one court by applying therein the successful practices of another. Finally, the agency would thereby develop a statewide network of small claims courts of equal quality, each benefiting from the experience of the other and all in unison providing swift and effective justice for small claims throughout the state.

While the exact structure of the state agency is not described by this provision, the Act contemplates that the agency would be established as a division of an extant state body, such as the attorney general's office, or, where funds permit, as a separate independent state agency. It is imagined that the governor would appoint a director or co-directors to head the agency, who would in turn appoint a staff to carry the mandate of the agency into effect.

Section 2.2(b). To obtain the continuing perspective of community based groups in observing the conduct of the small claims court, this provision provides that the state agency established pursuant to Section 2.2(a) itself establish community advisory panels to represent the interests of the community in which the small claims courts are located by assisting the agency in fulfilling its purpose of overseeing the small claims court system and encouraging the utilization of the court by publicizing its availability. The community advisory panel so imagined would serve as an important informational link both between the court and the state agency and the court and the community it serves, and would thereby enhance the effectiveness of the court.

Chosen by the state agency in whatever manner and for whatever duration it deems appropriate, the members of the panel would be volunteer community residents who would assist the court in matters involving community relations and affairs; the panel could aid in the selection of arbitrators, mediators and court ombudsmen and could promote the use of the court by whatever methods it deemed appropriate. At the same time, the panel would closely observe the operations of the court and its impact on the community, reporting the same to the state agency establishing it. So designed, community advisory panels would involve the court and the community with one another and would apprise the state agency of the effectiveness and success of the court in attracting and resolving the grievances of community residents.

Section 2.3 (Courthouse Hours; Location)

(a) The administrative judge of the small claims court shall provide that the court be open for the filing of claims and the adjudication of controversies during its regular working hours and during at least one evening a week and one Saturday morning a month.

(b) Alternatively, the court shall insure that the court remain open for such purposes at such hours and days as will enable litigants to conveniently utilize it.

(c) As prescribed by the administrative judge of the small claims court, claims shall be filed and/or heard in the courthouse of the municipal or county court of which the small claims court is part or in a suitable and convenient community facility.

COMMENT

Section 2.3(a). A familiar lament of the users and critics of the small claims court is its unavailability for filing claims and hearing cases at times when litigants can most conveniently utilize it. Many potential claimants forego the small claims court and leave their grievances unredressed because they cannot afford to lose work time to prosecute claims involving relatively small amounts. To facilitate the accessibility of the court and the convenience of its litigants, the small claims court shall remain open, therefore, during some regular non-working hours so that those who would not otherwise leave work to prosecute their claims will be able to use the court without leaving work. There is no ideal court hour scheme that best effectuates this proposal. This provision prescribes minimum filing and hearing sessions during evenings or Saturdays. The exact number of evening sessions a week or Saturday sessions a month hinges on the peculiar needs of every community. Some communities, with a large labor force, might need many evening and/or Saturday small claims court sessions to effectively handle the many claims at convenient hours; at the other extreme, communities composed largely of retired persons would have little need for evening or Saturday sessions. Responsive to the normal necessity of evening and/or Saturday hearing sessions, the primary provision of this section prescribes that the courts be open for the filing of claims and the adjudication of controversies during at least one evening a week and one Saturday morning a month, in addition to the court's regular working hours. More evening and/or Saturday sessions should be scheduled if the demand warrants it.

Section 2.3(b). The court hour scheme of Section 2.3(a) remains flexible by 2.3(b), which qualifies the previous provision by permitting the court to remain open for filing claims and hearing cases at such times as will enable litigants to conveniently utilize it, as determined by the administrative judge of the small claims court; this provision thus contemplates that the court will schedule hearings only during regular working hours when the volume of cases and/or the convenience of litigants does not warrant evening or Saturday sessions. While considerable latitude is thereby invested in the administrative judge of the small claims court, such latitude is the only feasible method by which this feature of the small claims court can be effectuated. It is assumed that the administrative judge will, in most instances, especially in small claims courts in sizable metropolitan areas, schedule at least one evening session a week and/or Saturday session a month, if not more, whatever operational difficulties the court thereby encounters; the court can, however, in the exercise of its good judgement, depart from the requirement of Section 2.3(a) via Section 2.3(b).

Section 2.3(c). In addition to conducting hearing sessions in the courthouse utilized by the regular court of which the small claims court is a division, a small claims court may, as prescribed by the administrative judge of the small claims court, conduct hearings in appropriate places in the community. This latter alternative is motivated by the inherently informal nature of such hearings. If the rules of the hearings are informal, the atmosphere of the hearings should be kept informal as well. Litigants will feel more at ease and less intimidated by such informality. This atmosphere can be created by conducting hearings in small rooms with only the essential actors in attendance, either within the courthouse or community facility. Legitimacy and judicial authority, however, would attend such relaxed and informal courthouse or community hearings by the presence of the judge in his robes.

A suitable community facility would be one well-known to the community and well adaptive to such hearings. An office or room in a library, church, school or post office would all be suitable places to conduct hearings. Another room would perhaps be necessary to seat the waiting litigants and the court's administrative personnel.

A convenient community facility would be one that is not unreasonably distant from the community that would utilize it. A facility centrally located within the community would best serve this purpose.

Community hearings as an alternative to courthouse hearings have much to commend themselves. Hearings con-

ducted in the community would become commonplace and discernable occurrances and would become much less intimidating than hearings conducted in the downtown courthouse. Litigants would generally reside in close proximity to the situs of community hearings, and would thus be spared the trip to a distant courthouse. Litigants would be more likely to avail themselves of such accessible hearings. Default judgements might decrease due to the ease with which a defendant could attend a hearing. In short, the community hearings would facilitate, to an extent probably unrealized in most downtown small claims court hearings, the visibility and accessibility of the court and the speedy, informal and just resolution of disputes.

Section 2.4 (Court Personnel)

The administrative judge of the small claims court shall staff the court with the personnel necessary to effectively operate the court, including a court ombudsman, whose duties, prescribed by the administrative judge and consonant with the provisions of this Act, may include, but shall not be limited to—

(1) apprising litigants of hearing dates;
(2) assisting litigants in the preparation of their cases;
(3) serving as court appointed mediators and judgement collectors;
(4) identifying abuses of the court by litigants, soliciting community response to the efficiency and effectiveness of the small claims court and relaying all findings to the court; and
(5) publicizing the availability of the court to the community.

COMMENT

In overseeing the small claims court, the administrative judge of the small claims court shall staff the court with the personnel necessary to insure its effective operation. The clerk and judgement collector (see Section 8.2) of the small claims courts are two such court officials.

The diverse needs of a court and the litigants who use it cannot be adequately served by a court clerk, whose duties are primarily administrative in nature. This provision provides for the engagement of a court official, denominated a court ombudsman, who shall function, in short, as a court jack-of-all-trades; he shall serve the courts in many areas which have been heretofore largely neglected by the courts. His duties would be as wide ranging as the needs of the court. The court ombudsman could supplement the service of process machinery by attempting to contact the defendant by phone after service by mail has failed and/or informing the parties, once served, of approaching hearing dates; he could assist the parties in the preparation of their cases by telling them what they should bring to court (in greater detail than the information supplied the claimant and the defendant when the claim was filed and the notice served) and what they can expect in the way of courtroom proceeding in the hearing (or arbitration), and aiding them in the procurement of necessary evidence; he could serve, pursuant to Sections 5.1 and 8.2, as a court-appointed mediator and/or judgement collector; he could serve as a liaison officer between the small claims court and the regular court of which the small claims court is a division, keeping the regular court apprised of developments and problems in the small claims court; he could serve as a watch-dog over the court's practice, procedures, administration, use and impact on the community, spotting abuses and relaying all findings and recommended corrective action to the court; and finally, in addition to whatever other duties he might perform to the benefit of the administration of the small claims court, he could serve as a public relations officer of the court, publicizing and encouraging its use to the community.

It is contemplated that the court ombudsman would be a full-time, salaried court official and a resident of the community in which the court is situated. The requirements and funds of some courts might warrant more than one court ombudsman. When properly utilized, as they are in Harlem's community court (there called community advocates), the court ombudsman would be an invaluable asset to the small claims court in facilitating the effective administration of the court and in maximizing its use.

Section 2.5 (Rules of Court)

To the extent that they are not inconsistent with the provisions of this Act, rules of practice prescribed in the civil court of which the small claims court is part and rules adopted by the administrative judge of the small claims court to implement this Act shall apply to all claims litigated in the small claims court.

COMMENT

Many minor procedural rules must be adopted to implement the provisions of this Act. Rules fashioned by the administrative judge of the small claims court or those prevailing in the regular civil court can be applied to small claims court proceedings provided they are not inconsistent with the provisions of this Act. While reposing considerable latitude in the administrative judge of the small claims court, this section contemplates that the administrative judge shall always be guided by the spirit of the provisions of this Act, in addition to the provisions themselves, whether he is exercising his discretion thereunder or applying additional rules thereto, in developing a court in which disputes are resolved efficiently, effectively, fairly, inexpensively and swiftly.

Part III

JURISDICTION, VENUE

Section 3.1 (Subject Matter Jurisdiction)

(a) The small claims court shall exercise concurrent jurisdiction with the civil courts over tort and contract actions wherein the amount in controversy does not exceed $1000.

(b) The small claims court may grant monetary and equitable relief, except that—

(1) monetary relief shall not include punitive damages, and

(2) equitable relief shall be granted only as between the parties and shall be limited to orders to repair, replace, refund, reform and rescind.

(c) Class actions are prohibited in the small claims court.

COMMENT

Section 3.1(a). The small claims court shall exercise concurrent rather than exclusive jurisdiction over tort and contract actions. While exclusive jurisdiction over such actions would naturally maximize the court's use by litigants, an express purpose of this Act (see Section 1.2(b)(2)), there are more drawbacks than advantages in granting exclusive jurisdiction to the small claims court. While the exercise of such jurisdiction by the court would relieve the congested civil court docket and would, to effect due process fairness, permit appeals therefrom for both parties, it is not so clear that the congestion of the regular court's docket is attributable to suits involving an amount in controversy less than $1000; few such suits are actually filed in the regular court. Furthermore, unfairness inheres in requiring parties who wish, for whatever reason, to litigate their claims before a regular court, with the formal rules of pleading, practice and evidence found therein, to initially submit themselves to a court proceeding without those formalities. Additionally, as few litigants appeal adverse decisions, however available a trial de novo or a regular appeal may be, the requirement that disputants litigate their disputes in a small claims court might effectively terminate the case completely when either party or both might have preferred to litigate the case in the regular court in the first instance; and more formal rules of practice might invade the small claims court, thereby defeating its purpose, if the exclusive jurisdiction of the court, despite its de novo trial provisions, effectively terminated cases therein. Finally, the court's exclusive jurisdiction would require that all claims under the monetary jurisdictional amount of the court be heard in the small claims court, thereby precluding the limitation on the court appearance of non-individual plaintiffs when such limitation might be necessary to insure the availability of the court to individual plaintiffs (see Section 4.1(c)).

In exercising concurrent jurisdiction, the small claims court relieves, to an extent not appreciably incommensurate with the exercise of exclusive jurisdiction, the docket of a regular civil court, enables a plaintiff to litigate his action in the forum of his choice and permits the imposition of limitations on the appearance of non-individual claimants who can always sue in the regular courts if barred from the small claims court.

To maximize the use of the small claims court by all claimants asserting claims under the monetary jurisdictional limit of the court, a small claims court has jurisdiction over all tort and contract actions, including those intentional tort actions—defamation, false imprisonment and malicious prosecution—which are traditionally excluded from the subject matter jurisdiction of the small claims court, and can grant the panoply of remedies available in a regular civil court, subject to the limitations noted hereinbelow in Section 2.3(b) (1) and (2). As regular court judges preside over small claims court actions, they are equipped to handle the same type of cases in a small claims court as they regularly handle in the regular court, and they are likewise capable of awarding the same type of relief in the small claims court as they award in the regular court, including both monetary and equitable relief.

As prescribed in Section 2.3(b) (1), however, the court cannot grant punitive damages. Punitive damages are generally awarded upon the commission of an intentional tort with an accompanying malicious intent, and proof of such intent is considered beyond the evidentiary informality of the small claims court (even if the award would fall within the monetary jurisdictional limit of the court); additionally, greater due process safeguards than are available in the small claims court are felt necessary to protect a tort-feaser when punitive damages are leveled against him. Those torts peculiarly susceptible to the imposition of punitive damages, i.e., intentional torts, where compensatory damages would be minimal but where the wrong is

egregious, would thus be most appropriately litigated in the regular civil court where effective redress could be granted.

As an additional limitation on the relief available from a small claims court, the court, as prescribed in Section 2.3(b) (2), can grant equitable relief, as it can do in a regular civil court and as it cannot do in many small claims courts throughout the nation, but the equitable jurisdiction of the court is limited to relief as between the parties and includes only orders to repair, replace, refund, reform and rescind. Equitable relief must be available in the small claims court if the common grievances of many claimants are to be adequately redressed. An equitable order may, in many instances, more effectively and economically redress the grievance of a claimant than a monetary award. Injunctions and temporary restraining orders, however, having a widespread impact on those affected, should issue only upon a formal procedure, and are hence inappropriate remedies in a small claims court; additionally, an equitable order of the small claims court should pertain only to the parties appearing in that informal forum.

Another qualification on the jurisdiction of the small claims court over tort and contract actions is prescribed in Section 7.5 of this Act. Cases posing intricate questions of fact and/or law, such as complex questions of proof in personal injury cases, or complicated issues of law in contractual disputes, which would be most effectively disclosed, presented and/or resolved through the adversarial process prevailing in the regular civil courts, may be transferred to the regular court on the initiative of the small claims court or upon the motion of either party for good cause shown. A personal injury action, as an example, may present such detailed medical evidentiary questions, or such involved issues of pain and suffering or lingering injuries, as to warrant its transfer to a regular court.

The jurisdictional limit of the small claims court is $1000; the court cannot grant monetary relief in excess of that sum, nor can it grant equitable relief the monetary value of which exceeds such sum. There has been a marked recent trend to increase the monetary jurisdictional limitation of small claims courts. The trend reflects the ever-increasing cost of goods and services over which many grievances arise. To further maximize the use of the small claims court, its monetary jurisdiction should be high enough to cover common disputes over common consumer items and services. Hospital expenses and appliance and automobile repairs are becoming costly and commonplace. While higher jurisdictional limits place more at stake and thus necessitate increased attentiveness to the fairness of the informal adjudication of claims, a properly conducted small claims court proceeding by an experienced regular court judge will insure that fairness and will accommodate the increasingly frequent complaints arising from today's costly marketplace. The $1000 limit is not the optimum limit for the court in years hence when inflation will have decreased the value of today's dollar, but it presently serves the purpose of the small claims court and the litigants the court serves.

Finally, class actions, which invariably entail complicated procedural issues and impose sizeable judgements against the defendant, should never be litigated in the absence of strict rules of evidence, practice and substantive law, and hence should never be litigated in the informal forum of the small claims court.

Section 3.2 (Personal Jurisdiction)

The personal jurisdiction of the small claims court shall be coextensive with that of the civil court of which the small claims court is part.

COMMENT

The personal jurisdictional reach of the small claims court should be as wide as that of the regular civil court of which the small claims court is part. If properly staffed and operated, a small claims court should be able to handle whatever complexities of procedure, jurisdiction and collection that arise in effecting personal service and collection of judgements, even if the state confers long-arm jurisdiction on state courts. A $100 claim may well be as important to one litigant as a $10,000 claim is to another, and the small claims courts and the regular courts should exercise the same personal jurisdiction in redressing the grievances of both claimants.

Section 3.3 (Venue)

(a) The venue of the small claims court shall be coextensive with that of the civil court of which the small claims court is part.

(b) Actions commenced in the small claims court may be transferred to any other small claims court wherein the action might have been brought on the initiative of the court or upon the motion of either party for good cause shown.

COMMENT

Section 3.3(a). The venue of the small claims court shall be the same as that prescribed for the civil court of which the small claims court is part. While unique in handling only small claims, the small claims court should not as a result be subject to a venue provision any more restrictive than that prevailing in a regular court; the monetary jurisdictional limit of a court system should not determine the venue governing the cases litigated therein. At the same time, as a division of the regular court, the small claims court should not enjoy a venue prescription any wider than that of the regular court. As with the rationale in providing the small claims court with the same personal jurisdiction exercisable by the regular civil court, a small claims court can best fulfill its purpose and at the same time remain compatible with the court system of which it is a division by possessing a venue provision that is coextensive with that in the regular court.

Section 3.3(b). As much flexibility as is consistent with obtaining the purposes of the small claims court governs the application of the provisions of this Act. This provision provides flexibility in the venue requirements of the small claims court by permitting any action commenced in the small claims court to be transferred by the court, when the interests of justice warrant it, to any other small claims court where the action might have been brought. If undue hardship would fall upon a defendant in defending a suit in a certain small claims court, despite proper venue therein, as where the court's venue lies where the defendant resides or where the claim arose, and a corporation sues an individual tort-feaser from Ohio in the small claims court in California where the tort arose, although the nationwide corporation could just as conveniently sue in Ohio, proper circumstances exist for the transfer of the case to a small claims court in Ohio where the defendant resides and where the action might have been brought in the first place. Similarly, if the plaintiff should realize subsequent to filing suit in one small claims court that his witnesses could more conveniently appear in another small claims court, wherein the action might also have been brought, without any loss in convenience to either party by the change in venue, good cause might well exist for the transfer of the case to the more convenient forum. A transfer under this provision may be prompted by the motion of either party or by the initiative of the court; in either case, the transfer should be effected when necessary to serve the effective, efficient and fair administration of justice.

PARTIES, COMMENCEMENT OF ACTION, SERVICE

Section 4.1 (Who May Sue)

(a) Any natural person or legal entity may sue in the small claims court.

(b) The court shall impose mass filing limitations on all claimants filing claims in the small claims court in the manner prescribed by the administrative judge of the court.

(c) The court shall not allocate more than 50% of the time allotted for hearings to hearings of claims filed by non-individual claimants, except that the court may waive this provision if the use of the court by individual claimants is not sufficiently high to warrant the limitation.

(d) The court shall reserve Saturday and evening hearing sessions, conducted pursuant to Section 2.3(a), for claims filed by individuals, except that the court may waive this provision upon a motion by a non-individual claimant for good cause shown.

COMMENT

Originally envisioned as a court of the people, the small claims courts have too often become dominated by organizations, including corporations, associations, businesses and especially assignees. So transformed into glorified collection agencies, many small claims courts have grown to alienate the people they were designed to serve. To correct what is widely regarded as a shortcoming of the small claims court system, many small claims courts ban corporations, associations, assignees or businesses, or a combination of them, or all of them.

Recognizing the negative effect of small claims court monopolization by non-individual claimants, this section likewise recognizes the equally harmful consequences of completely barring all such plaintiffs from the small claims court. If an organization is prohibited from using the small claims court, it most likely will pursue its grievances in another fashion—either in the costly civil court litigation if it possesses the resolve and wherewithall to do so or by unconscionable coercive tactics if it possesses the unscrupulous disposition to do so. In either case, the best interests of a defendant are served if he can defend himself against such grievances in the small claims court; he can rarely afford to defend himself in the regular court and he is oftentimes vulnerable to out-of-court intimidation by organizational claimants. The ban on organizations in the small claims court ignores the many honest organizations that have legitimate claims. They too should have access to an informal forum where claims are swiftly and inexpensively resolved. Many such organizations are small family or individual businesses which could ill-afford to utilize the regular court. Many organizations, denied use of the small claims court, are likewise denied satisfaction in the regular court where many small claims are prohibited, discouraged or effectively lost in the thicket of docketed cases. And those organizations employing unconscionable methods of practice are best brought under the scrutiny of the court rather than left to extra-judicial devious enforcement devices.

Accordingly, Section 4.1(a) permits any natural person or legal entity—including corporations, businesses, collection agencies and associations—to sue in the small claims court. Sections 4.1(b), (c) and (d) present limitations on the ability of non-individual claimants to appear as plaintiffs in the small claims court, and thus curbs the potential abuse which might result from their blanket, unrestrained right to use the court.

Section 4.1(b) limits both individual and non-individual plaintiffs in the number of claims they may file at any one time or over any given period of time. Mass filing limitations are imposed in most small claims court systems to prevent the monopolization of the court by the claims of any one claimant. An exact numerical limitation on the number of claims that can be filed by one claimant at any given time or over any given period is not prescribed by this provision. The administrative judge of the small claims court shall impose whatever such numerical limitation he deems appropriate given the peculiar characteristics of the court. This provision contemplates that the judge shall impose whatever mass filing limitation is necessary to prevent the court from becoming the domain of one or a handful of litigants. The limitation should be such that all claimants seeking to pursue their grievances in the small claims court shall have ready access to the court without waiting prolonged periods of time while a few claimants dominate the court's time by the mass filing of claims. A rule proscribing the filing of more than ten claims per claimant per month is an exam-

ple of a limitation the administrative judge could impose to effectuate this provision.

Another method to insure the availability of the court to all claimants, and thereby further curb the monopolization of the court by non-individual claimants, is to establish a bifurcated court wherein separate individual and non-individual plaintiff divisions function to accommodate the claims of litigants. As prescribed by Section 4.1(c), the court would devise a hearing session scheme by which the amount of time allotted by the court to small claims court hearings would be equally divided between claims filed by individual plaintiffs and claims filed by non-individual plaintiffs. Claims filed by non-individual claimants might be heard on Mondays and Tuesdays while claims by individual claimants might be adjudicated on Wednesdays and Thursdays.

Hearing sessions so structured would prevent the deprivation of the free use of the small claims court to individual claimants, as a deluge of claims by non-individual claimants would not infringe on the time allotted to the individual plaintiff hearing sessions. While the court would have considerable latitude in effectuating this provision in the manner it considers most effective, it would be guided by the requirement that non-individual claimants would not be allocated more than 50% of the time that the court allocates to hearing sessions; such claimants, consequently, would never monopolize more than 50% of the court's time.

Section 4.1(c) is prescribed in the presumption that the use of the court by individuals will justify the restrictions on its use by non-individual claimants. With proper publicity, as the Act mandates by Sections 2.2(b) (2) (b) and 2.4(5), the small claims court will become visible and will be widely used by individual claimants, thus justifying the reservation of hearing sessions to them, via Section 4.1(c), in order to accommodate their many claims.

Section 4.1(c) remains flexible, however, in permitting the court to waive the hearing session limitations on non-individual claimants when the use of the court by individual claimants does not warrant the reservation of hearing sessions to adjudicate their claims. If the court is little used by individual claimants, there is little need to deny non-individual claimants the use of the court when it would not be utilized by others. Yet, individual plaintiffs oftentimes do not use the small claims court because of the court's disreputable image as a collection agency; and only by erasing that image and limiting the use of the court by organizational claimants will individuals use the court to an extent justifying restrictions on non-individual claimants. In other words, the justification for limiting the use of the small claims court to organizational claimants might post-date and not predate the actual imposition of the limitations. The hearing session limitation on non-individual claimants is initially imposed not because the present demand of court use by individual claimants warrants it, but because the removal of the court's image as the province of non-individual claimants by such limitations will encourage and prompt the subsequent court use by individual claimants and thus justify the reservation of hearing sessions to them.

Cognizant of this fact, small claims courts should implement these provisions accordingly. It may well develop, however, that the volume of cases filed by individuals, after the hearing session limitation has been imposed for a reasonable period of time, does not warrant a numerical limitation as so prescribed in Section 4.1(c). In that case, in the discretion of the administrative judge of the small claims court, less stringent limitations on the use of the court may be applied, but never to the extent that individual plaintiffs are unwilling to use the court due to the overwhelming presence of organizational plaintiffs, or are unable to use the court due to a crowded docket of claims by non-individual plaintiffs.

Sound judgement should guide the discretion of the administrative judge in implementing 4.1(c) in order to most efficiently and effectively accomplish the underlying policy and purposes which motivate this provision.

Section 4.1(d). This provision further limits the unrestrained use of the court by non-individual complainants and facilitates the uninhibited and convenient use of the small claims court by individual claimants by reserving Saturday and evening hearing sessions, mandated pursuant to Section 2.3(a), to the claims filed by individuals. The court's image as the people's court is enhanced and its use thereby increased by reserving the court to individuals at such times as they can most conveniently utilize the court. As noted in the Comment to Section 2.3(a), individual claimants can most conveniently prosecute their claims during evening and/or Saturday sessions; they do not lose work time and money by appearing for hearings at night or on Saturdays. Non-individual claimants, on the other hand, can generally spare an official to represent their interests during a daytime hearing session without great inconvenience or loss of income, and without jeopardizing the employment status of their representative. Circumstances might warrant a waiver of this provision by the court for good cause shown, however, as where the prosecution of a claim by a small family business during a daytime session would impose upon it the same burdens confronting an individual in prosecuting a claim during regular working hours. The court's good judgement and the interests of justice should govern the waiver clause of Section 4.1(d).

Section 4.2 (Commencement of Action)

(a) Actions shall commence in the small claims court whenever a qualified claimant appears before the clerk and requests that his case be heard.

(b) A qualified claimant is one who—

(1) supplies the court with a full statement of the claim and the correct name and address of the defendant, and

(2) signs a sworn statement that he has made a good faith effort to resolve the dispute with the defendant.

(c) The clerk shall—

(1) prepare the claim on a standard form upon the information provided by the claimant;

(2) secure the claimant's signature to the claim,

(3) schedule the claim for a hearing at a time as convenient to the claim as possible, but not less than 15 days nor more than 45 days from the date of the filing, and

(4) prepare and present to the claimant a memorandum stating

(a) the time and place set for the hearing;

(b) the necessity that the claimant produce all supporting documents, receipts and witnesses at the hearing;

(c) the availability, upon request, of court-ordered subpoenas of witnesses; and

(d) the right to counsel as prescribed by Section 7.1 of this Act.

COMMENT

Prescribing procedures designed to simplify the filing of claims and gather all relevant claim information, this Section is intended to further encourage the use of the court by a simple and effective filing mechanism.

Section 4.2(a) stipulates that an action is commenced when a qualified claimant appears in person before the clerk of the small claims court. The claimant cannot commence the action by telephone or representative, as he must pay the filing and service fees (Section 4.3), and sign a claim form and a sworn statement that he has made a bona fide effort to resolve the dispute (Section 4.2(b) (2)), at the time the claim is filed. Further, a full statement of the claim, with appropriate facts and figures, must be presented to the clerk by the claimant (Section 4.2(b) (1)) in order to provide the defendant with accurate and adequate notice of the claim against him; this information is best known, and can therefore be best supplied, by the claimant himself.

Pursuant to Section 4.2(b) (1), the claimant must also provide the clerk with the proper name and address of the defendant; otherwise, the claimant is not qualified to file the claim and his claim cannot be processed by the court. This fundamental requirement is necessitated by the court's inability to serve a defendant whose proper name and address is unknown. This provision contemplates that the court shall assist the claimant in ascertaining the accurate name and address of the defendant, although the ultimate burden is on the plaintiff to provide this information.

Section 4.2(b)(2) is prompted by the consideration that it is a waste of court time and money to file and hear claims that would have been resolved out-of-court had the parties simply discussed it. It is not unreasonable to require a claimant to attempt to settle his dispute before he invokes the judicial process. Consequently, a claimant is not qualified to file a claim with the small claims court unless he has signed a sworn statement that he has made a good faith attempt to contact the defendant and resolve the dispute. This provision is intended to obviate the adjudication of claims susceptible to out-of-court resolution by minimal settlement efforts. The provision is not intended to deter or unreasonably burden the filing of claims in the small claims court.

Section 4.2(c). The court enhances its image and increases its use by adopting

93-736 O - 77 - 6

simplified and effective filing procedures and being as accommodating to the plaintiff as possible. To effectuate the former objective, Section 4.2(c)(1) mandates that the clerk of the small claims court shall take an active role in assisting the plaintiff in filing his claim. Simplified claim forms shall be executed by the clerk upon the information supplied by the claimant, but shall be signed by the claimant after he verifies its accuracy (Section 4.2(c)(2)). The clerk, therefore, can ascertain the essential facts of the claim and gather relevant names and addresses; at the same time the claimant, who might fail to include pertinent information necessary to properly process the claim if he was required to prepare his own claim, is spared the inconvenience and confusion that oftentimes attends the self-preparation of a grievance form.

In effectuating the latter objective and accommodating the desires of a plaintiff, the clerk, pursuant to Section 4.2(c)(3), shall schedule the hearing at a time and date as convenient to the plaintiff as possible. If the claimant is an individual and if evening and/or Saturday hearing sessions are available, pursuant to Section 2.3(a), the clerk should so inform the claimant and schedule a hearing at such time if desired by the claimant. If a hearing three weeks from the date the claim is filed would be more convenient to the claimant than a hearing four weeks from that date, the clerk should attempt to schedule the hearing at the convenience of the claimant.

Section 4.2(c)(3) prescribes the scheduling of a hearing no sooner than 15 days and not more than 45 days from the date the claim is filed. At least 15 days are required in order to serve the defendant and afford him sufficient time to prepare his defense. At the other extreme, a maximum time period of 45 days is sufficiently long to effect repeated attempts at service if earlier service fails. To insure a speedy hearing, however, claims should be scheduled for hearing within 45 days from the filing date of the claim. Longer periods might discourage the use of the court by claimants, especially when the claimant or his witnesses will be unavailable at a later time.

Section 4.2(c)(4) is designed to further assist the claimant in utilizing the small claims court by apprising him both of his rights in the small claims court proceeding and the evidentiary requirements necessary to effectively prosecute his claim. To effectuate this provision, the clerk shall give the claimant a memorandum informing him of the time and place set for the hearing, the necessity of producing supporting evidence at the hearing, the right to court ordered subpoenas for witnesses and the right to counsel, pursuant to Section 7.1.

Section 4.3 (Fees)

(a) The clerk shall, subject to Section 4.3(b), collect the following fees from the claimant at the time the claim is filed at the court:

(1) a small filing fee, established by the administrative judge of the small claims court, but never to exceed $10, and

(2) a service fee equal to the then prevailing postal rate for registered mail, return receipt requested.

(b) The clerk shall, upon an assertion of indigence and request by the claimant at the time the claim is filed, waive all or part of the filing and service fees and other fees required to obtain necessary process or other remedies provided in this Act.

(c) The court shall assess the fee required by this section to the judgement loser, except that the court may, in the interests of justice, or upon sufficient showing of inability to pay, disallow such assessment or allocate the same between the parties.

COMMENT

This section is intended to further encourage and maximize the use of the small claims court by establishing a fee schedule that burdens the use of the court by claimants to the minimum extent possible; nominal filing and service fees, and waiver of such fees when the interests of justice so require, are prescribed to effectuate this intention.

Section 4.3(a). The filing fee collected by the clerk from the claimant when the claim is filed is necessary to defray part of the operating expenses of the court and deter claimants from filing frivolous claims; the filing fee envisioned by this provision, while small, will accomplish these ends to some extent. The fee should be one that entails more expense for the claimant than he would incur by simply contracting the defendant on his own. The provision does not prescribe an exact minimum figure, as no figure is an ideal one, but instead prescribes that such fees will be established by the administrative judge of the small claims court. Section 4.3(a)(1) places a maximum limit on the filing fee, however, as a filing fee should not be so high as to deter litigants from filing those legitimate claims which do not involve an amount of money well in excess of the filing fee. A filing fee in excess of $10, while an unavoidably arbitrary figure, is one which would in many instances be prohibitive to potential small claims court claimants.

In determining the filing fee to collect from claimants, the administrative judge, constrained by the $10 limit, might consider the support requirements of the court, the amount of the claim, the financial status of the claimant, the filing fees exacted in a regular court and the number of claims filed in any instance by the claimant. Accordingly, the filing fee might be firmly established and applicably uniform to all, or may vary with the claim.

As a fee for service, the court will also collect a sum equivalent to the then existing postal rates for registered mail. Such fee amounts to the exact cost of mailing by registered mail and is accordingly reasonable.

Section 4.3(b) recognizes both the inability of impoverished claimants to pay even the nominal filing and service fees mandated by this section and the unfairness in effectively barring their claims by enforcing the requirement that such fees be exacted. In prescribing the waiver of such fees in such circumstances, this provision further recognizes the technicality, formality and delay which would result if a waiver of such fees could issue only upon a formal in pauperis proceeding; such formality would be inconsistent with the informal nature of the small claims court. Additionally, as the fees involved, even including collection fees (Section 8.2), are minimal, the formal in pauperis proceeding is not warranted. The claimant can obtain a court waiver of filing and service fees, and any other procedural fees prescribed by the administrative judge, by asserting poverty at the time the claim is filed. It is contemplated that claimants voicing bad faith assertions would be subject to the contempt power of the court. The court can waive all or part of the fees, as the financial status of the claimant requires.

Pursuant to Section 4.3(c), the judgement loser shall in most instances pay the fees required by this section. If the plaintiff lost the case and had obtained a waiver of the fees when he filed the suit, the court should conduct a quick hearing to ascertain the financial status of the claimant and uphold the waiver, and absorb the cost of the fees, if the claimant is found unable to pay the fees. If the plaintiff loses the case after paying the fees when he filed the claim, or if the defendant loses the case, the losing party will ordinarily be required to absorb the cost of the fees. The court may, however, in the interests of justice, waive such assessment to the defendant as judgement loser in suitable circumstances, as where the defendant lacks the wherewithall to pay the fees, or where the defendant, while losing the judgement, was the victim of bad faith dealings. Additionally, the fees may be allocated between the claimant and the defendant, whomever is the judgement loser, when the interests of justice as determined by the court so require, as where the case was very closely decided and the judgement loser lacks the means to pay all the fees. This provision is motivated by the consideration that fairness is a cornerstone of the small claims court.

Section 4.4 (Service of Process)

(a) Service of process shall be primarily effected by the court by registered mail, return receipt requested.

(b) If the registered letter is returned undelivered, the court shall notify the plaintiff and shall permit another attempt at service by mail or personal service, at the option of the plaintiff.

(1) Personal service shall be effected by a county or city sheriff, or his designee, at a minimum fee to the plaintiff.

(2) A sworn affidavit attesting to the fact that the summons has been personally served shall be signed by the process server and presented to the court.

(c) Refusal to accept delivery of the summons served personally or by registered mail constitutes good service and may lead to a default judgement.

(d) Failure to effect service within 45 days from the date the action was filed shall result in a dismissal of the suit without prejudice.

COMMENT

With the continued emphasis on simplified and effective small claims court procedures, this section is intended to prescribe a fast, efficient and inexpensive method of service of process.

Section 4.4(a). The easiest, most effective and most economical way to apprise a defendant of a suit against him, other than by telephone, is by mail. Consequently, service by registered mail, return receipt requested, the predominate method of service in small claims courts throughout the country, is prescribed as the primary method of service in the Model Small Claims Court. Service by certified mail, as an alternative to service by registered mail, is rejected by this provision as fraught with many difficulties; too often the person signing the receipt is someone other than the defendant, and it becomes extremely difficult to determine and prove whether or not the defendant actually received notice of the claim from the subscriber. Only the addressee is authorized to sign the receipt for a registered letter, however, and hence a defendant could hardly deny a notice of a claim against him when the court has received a subscribed receipt for the letter.

Section 4.4(b). As one unsuccessful effort at service by registered mail falls somewhat short of a bona fide attempt to establish contact with the defendant, the court may send another registered letter to the defendant when the first letter is returned undelivered; alternatively, the court, only after the first attempt by registered mail has proved unsuccessful, may at the option of the plaintiff, permit personal service by a sheriff or his designate.

Personal service is not a primary method of service because it entails more expense than service by mail; more importantly, it is susceptible to abuse. "Sewer Service" all too often has replaced actual personal service when the latter is an acceptable method of service. If process servers are not carefully controlled, personal service creates more obstacles to service than it avoids. Nevertheless, personal service is oftentimes an effective method of serving a defendant when he cannot be contacted by mail. The abuses attending personal service are curtailed to a considerable extent by limiting those officials who can serve as process servers to sheriffs or their designees who, as salaried city or county officials, would be motivated to pursue their assignments in serving all defendants with equal alacrity, diligence and responsibility. As personal service would unavoidably entail greater expense than service by mail, the plaintiff, who must initially bear the burden of such expense, has the option to request the court to assign the claim to a process server. To avoid possible altercations between claimants and possible self-serving fabrications of personal service, a claimant may not personally serve the defendant.

Additional protection against abuse of personal service is provided by the requirement that the process server support his claim that he has served the defendant with a sworn affidavit attesting to that fact. The court can accordingly cite the process server in contempt of court if he falsely swears that personal service has been effected.

Section 4.4(c). To expedite the judicial process and to insure fairness to a claimant, refusal by a defendant to accept service by either mail or personal service shall be regarded as effective service and may lead to a default judgement. Alleged ignorance of the contents of an unaccepted registered letter or the nature of a process server's business shall not be a defense by the defendant to effective service, except when extenuating circumstances exist as discussed in the Comment to Section 6.2.

Section 4.4(d). To further expedite the processing of a claim in the small claims court, this provision prevents a claim from sitting in the court for an endless period of time by prescribing the dismissal without prejudice of those claims which have not been served within 45 days from the date the claim was filed. Failure to effect service within 45 days indicates that the defendant is unavailable and that little purpose is served by attempting further service. A claim would remain on file in the small claims court and the claimant, incurring only another service fee, could always bring his claim again.

Section 4.5 (Notification to Defendant)

(a) The clerk shall, as soon as possible, but no later than three working days after the claim is filed, attempt to serve the defendant, as prescribed in Section 4.4, with a notice which shall state—

(1) the claimant's name;

(2) a description of the claim and the relief sought;

(3) the time, date and location of the hearing;

(4) the necessity that any set-off or counterclaim be filed with the court by the defendant before or on the date of the hearing;

(5) the necessity that the claimant produce all supporting documents, receipts and witnesses at the hearing;

(6) the availability, upon request, of court-ordered subpoenas of witnesses, and

(7) the right to counsel as prescribed by Section 7.1 of this Act.

(b) If the defendant is served with notice within 5 days of the date of the scheduled hearing, the clerk shall

(1) continue the case 10 to 15 days, unless the defendant waives the continuance, and

(2) inform the parties of rescheduled hearing dates if the case is so continued.

COMMENT

To effectuate the mandate of the small claims court to expeditiously resolve small claims, this section prescribes a simple and efficient procedure to apprise litigants of the particulars of the claim and the litigation confronting them.

Section 4.5(a). Fairness dictates that the court attempt to serve the defendant with adequate notice of the claim against him as soon after the filing of the claim as possible in order to provide the defendant a reasonable opportunity before the hearing to prepare his defense. To insure such fairness, the attempt at service, prescribed in Section 4.4, should never be made later than 3 working days after the claim is filed. The imposition of such time constraints would not unduly burden the operation of the court, and an attempted service within such time is sufficiently fast to set the judicial wheels in motion in order to give the defendant as much time as possible to prepare his case.

To give the defendant the benefit of the same information provided the claimant pursuant to Section 4.2(c)(4) to effectively utilize the court and protect his interests, the notice to the defendant shall include all the information that is included in the memorandum given by the clerk to the claimant; additionally, the notice shall include a reasonably detailed statement of the plaintiff's claim so that the defendant will understand the nature and scope of the claim against him and will thereby gather whatever evidence is necessary and available in defense thereto.

The claimant's name and address are provided not only to effectively apprise the defendant of the claim against him, but to enable the defendant to contact the claimant in an attempt to resolve their differences. The defendant is also informed by the notice to file any counterclaim he has against the claimant with the court either before or during the hearing. The provision governing counterclaims in the small claims court is presented in Section 4.6.

Section 4.5(b). This provision is prescribed by the further consideration of fairness in giving the defendant a reasonable time in which to prepare his defense. The procurement of witnesses, either by court issued subpoena or otherwise, is oftentimes a time consuming process; further, the defendant might have made plans for the day on which the hearing is scheduled prior to receiving notice, and hence may be unavoidably unable to appear for a hearing on the scheduled hearing date. Consequently, a hearing shall be automatically continued 10 to 15 days from the original date of the hearing whenever a defendant is served within 5 days of the date of the hearing. To meet those instances where the defendant does not desire a continuance of the hearing, despite being served with short notice, he may waive the continuance by so informing the court. Barring waiver by the defendant when he receives short notice of the claim against him, the clerk shall reschedule the hearing and apprise the parties of the new hearing date.

Section 4.6 (Counterclaims)

(a) The defendant shall claim any compulsory counterclaim, and may claim any permissive counterclaim, he may have against the plaintiff before or at the hearing.

(b) The counterclaim shall be entered by the clerk and subscribed by the defendant in the space designated for same on the standard claim form prepared by the clerk and subscribed by the claimant.

(c) The court shall hear compulsory counterclaims, and may hear permissive counterclaims, at the same hearing in which the plaintiff's claim is heard, except that the court shall—

(1) transfer any case in which the defendant has filed a colorable compulsory counterclaim in excess of $1000 to the civil court of which the small claims court is part, and

(2) transfer any permissive counterclaim in excess of $1000 to such civil court and proceed to a hearing on the plaintiff's claim.

(d) Subject to Section 4.6(c)(1) and (2), the defendant's counterclaim may be answered by the claimant at the hearing, or the court may, upon the claimant's motion, continue the hearing to a later date.

COMMENT

This section is intended to facilitate the expeditious resolution of all claims existing between disputants in one fast judicial proceeding and thereby expedite the administration of justice.

Section 4.6(a). This provision insures that all claims between the parties, subject to Section 4.6(c)(1), which arise from the transaction or occurrence that is the subject matter of the opposing party's claim, shall be claimed by the parties and litigated in one proceeding in a small claims court. Hence, this provision prescribes that any compulsory counterclaims held by a defendant against a claimant shall be claimed by the defendant before or during the hearing. Although judicial economy and convenience would be facilitated if all claims between disputants were litigated at one hearing in the small claims court, a permissive counterclaim, unrelated to the facts and circumstances of the plaintiff's claim, should not be subject to the jurisdiction of the small claims court without the consent of the defendant. Accordingly, a defendant may, but is not required to, claim any permissive counterclaim he may have against the claimant before or at the hearing.

This provision does not contemplate a preferred time for the filing of counterclaims; counterclaims filed during hearings are equally satisfactory with those filed before hearings. The plaintiff would not be served with notice of a counterclaim even if it was filed before the hearing commenced, as adequate time is generally unavailable between the filing and the hearing to permit effective service of process; consequently, especially in view of the continuance provision of Section 4.6(d), no advantages inure to the court or the parties by the requirement that counterclaims be filed at one time over another.

Section 4.6(b). The procedure in filing a counterclaim is simple and, as with a plaintiff's claim, prepared with the assistance of the clerk. The specifics of the counterclaim are entered by the clerk, upon the information of the defendant, in the designated space on the claim form already prepared by the clerk to record the plaintiff's claim; the clerk shall also secure the defendant's signature to the claim form. As the counterclaim is recorded on a claim form already filed with the court, and as a counterclaim, while an affirmative pleading, is prompted by a plaintiff's commencement of an action and hence is somewhat involuntary in nature, a filing fee is not exacted from the defendant; furthermore, as the counterclaim, if compulsory, is waived if not claimed, the defendant has little unfettered free choice in the matter and files his claim because circumstances beyond his control compel him to do so. A service fee is not collected because the plaintiff, as noted hereinabove, is not served with notice of the counterclaim.

The defendant need not inform the court that he has made a bona fide attempt to contact the plaintiff to resolve the dispute, because the defendant generally would not have enough time between the date he was served and the date the counterclaim was filed to contact the plaintiff in an effort to resolve their differences. Where a permissive counterclaim is filed, the case will go to a hearing anyway, at least on the plaintiff's claim, so that a hearing cannot be avoided even if the defendant is required to attempt to resolve his claim against the plaintiff and does in fact resolve it. Further, if the defendant's counterclaim against the plaintiff arises out of the facts and circumstances of the plaintiff's claim, thus a compulsory counterclaim, the plaintiff's failure to resolve his claim against the defendant, an attempt he is required to make in order to be qualified to file his claim in accordance with Section 4.2(b)(2), is thus an indication that the defendant's claim against the plaintiff, part and parcel of the plaintiff's claim against the defendant, is likewise irresolvable by the parties.

Section 4.6(c). The small claims court should resolve all claims between the parties while they are before the court; splin-

tering of claims to different actions is wasteful of everyone's time and money. Consequently, the small claims court shall hear counterclaims, subject to the exceptions prescribed by this provision, to effect judicial economy.

As the jurisdictional limit of the small claims court is $1000, the court cannot hear those compulsory counterclaims in which the amount in controversy exceeds that figure; the court simply lacks jurisdiction over those claims. Rather than splinter the counterclaim and the plaintiff's claim, both of which arise from a common nucleus of operative facts, by transferring the counterclaim to the regular court and hearing the plaintiff's claim, the small claims court, to facilitate the economy and convenience of the courts and litigants, shall transfer the entire case to the regular court.

An abusive practice inheres in such transfer cases and requires court protection. Some defendants, anxious to avoid litigation altogether, and confident that a plaintiff would not incur the expenses necessary to pursue the case in a regular court, file meritless compulsory counterclaims in excess of $1000, thereby effecting both the transfer of the case to the regular court and the effective termination of the suit. Consequently, to avoid such abuse, to the extent feasible without a prolonged proceeding, the court shall transfer such compulsory counterclaims in excess of $1000 to the regular courts only if it is satisfied that the compulsory counterclaim has merit. Hence, the court should not summarily transfer all such counterclaims in excess of $1000, but must insure that the counterclaim is colorable on its face. If the court finds that the counterclaim is meritless, either because it is totally without foundation or because it does not state a colorable claim over $1000, the counterclaim shall be heard along with the plaintiff's claim in the small claims court hearing. If the compulsory counterclaim is colorable, however, the entire case shall be transferred to the regular court.

Permissive counterclaims shall be heard at the discretion of the court; a permissive counterclaim is not waived if it is not claimed by the defendant and hence it need not even be brought to the attention of the court. It is presumed, however, that the court shall, in the interests of judicial expediency, hear most permissive counterclaims. The court cannot hear a permissive counterclaim, however, in excess of the monetary jurisdictional limit of the court; and, unlike the rule governing compulsory counterclaims, the court need not determine whether the permissive counterclaim involving an amount in controversy in excess of the jurisdictional limit is colorable because the entire case is not transferred to the regular court even if the permissive counterclaim is in excess of $1000. The permissive counterclaim in such instances is simply splintered from the claimant's claim and transferred to the regular civil court. As permissive counterclaims involve facts and circumstances unrelated to the facts and circumstances of the plaintiff's claim, the plaintiff should not be denied the economical use of the small claims court because his party opponent has an unrelated claim in excess of the jurisdictional amount of the small claims court. Where the defendant does make a permissive counterclaim in excess of $1000, the court shall transfer that claim to the regular court but shall hear the plaintiff's claim.

Section 4.6(d). A plaintiff hearing the defendant's counterclaim for the first time at the hearing may be ill-prepared to meet the claim on such short notice, especially if the defendant has filed a counterclaim which is unrelated to the plaintiff's claim. Oftentimes, however, the plaintiff, in preparing his case, will possess sufficient evidence at the hearing to meet the defendant's claim, especially if the defendant has filed a counterclaim which arises out of the same facts as the claimant's claim. This provision enables the plaintiff to either answer the counterclaim at the hearing or move for continuance. In most instances the court should grant the continuance when so requested, unless the circumstances indicate that the plaintiff's request for a continuance is a delaying and harassing tactic and/or that the plaintiff is sufficiently prepared to meet all the evidence offered against him in the defendant's presentation of the counterclaim. Where the continuance is granted, the rule prescribed in Section 7.4 governing continuances shall apply, except that the new hearing shall be rescheduled at a time as convenient for the moving party as possible since the continuance was prompted by the non-moving party's action in filing the counterclaim.

Part V

PRE-TRIAL PROCEEDINGS

Section 5.1 (Settlement; Mediation)

(a) Prior to the commencement of a hearing with the parties present, the court shall determine what efforts have been made by the parties to settle their dispute.

(1) If unsatisfied that previous good faith settlement efforts have been made, the court shall require the parties to meet in the courthouse, in private or before a mediator, at their election, to attempt to settle their dispute.

(2) If satisfied that such efforts have been made, the court shall proceed to the hearing without delay.

(b) Alternatively, the court may establish a mandatory mediation mechanism conducted prior to all hearings by mediators selected and assigned to mediation in the manner prescribed by the administrative judge of the small claims court.

(c) If settlement efforts pursuant to Section 5.1(a)(1) or Section 5.1(b) have failed to produce a settlement, the court shall proceed to the hearing without delay.

(d) Every settlement reached by the parties acting either alone or through mediation shall be submitted to the court for approval.

(e) Every reasonable settlement shall be—

(1) approved by the court;

(2) regarded as a judgement entered by the court; and

(3) processed for collection as prescribed by Section 8.2.

COMMENT

This section is intended to maximize the efficiency of the small claims court by avoiding unnecessary litigation. The court's adjudicatory process should be invoked only when an irreconcilable dispute exists. Many disputants, unwilling to meet one another on their own volition in an attempt to settle or resolve their differences, are at odds with one another over disputes susceptible to compromise if aired at a meeting between them. The court should not be used to resolve reconcilable disputes when the parties have never met together in an attempt to find a satisfactory solution thereto. Settlements, when fairly reached by arms-length negotiating, are oftentimes more satisfactory to the parties than court judgements, and save the courts as well as the litigants needlessly expended time and money. Consequently, the small claims court shall not proceed to a hearing until it is satisfied that settlement efforts have been unsuccessfully attempted either within or outside the court. The court shall so satisfy itself by adopting one of two procedures. First, pursuant to Section 5.1(a), the court shall question the parties before the hearing to determine whether they have made good faith efforts to settle their dispute. Second, pursuant to Section 5.1(b), the court shall establish a mandatory mediation mechanism.

Section 5.1(a). This provision prescribes one settlement tool available to the court. The parties are required to meet in private or before a mediator, if available, to attempt to resolve their disputes if the court is unsatisfied, upon proper questioning, that the parties have not made previous good faith settlement efforts. Claimants, pursuant to Section 4.2(b)(2), are not qualified to file a claim in a small claims court unless they sign a sworn statement that good faith settlement efforts have been assayed. The defendant, however, may not have expended similar efforts to resolve the dispute. If the court's inquiry reveals that previous settlement efforts have not been made by both parties, the court shall require the parties, as a condition precedent to proceeding to a hearing, to meet in private, or before a mediator (perhaps a court ombudsman, see Section 2.4(3)), at their option, in a suitable courthouse room in an attempt to resolve their dispute. It is contemplated that the court's inquiry and any subsequent settlement conference would be swiftly conducted, thereby precluding inordinate delay in the small claims court process.

If the court determines subsequent to the commencement of the suit, after conducting the prescribed inquiry, that either or both parties had dishonestly asserted that bona fide efforts had been made to resolve their dispute, the court shall take whatever action it deems appropriate under the circumstances, including, but not limited to, mid-hearing adjournment for a settlement conference, partial assessment of filing and service fees to the offending party, or contempt proceedings.

Pursuant to Section 5.1(a)(2), the hearing shall commence without delay if the court concludes upon its inquiry that settlement efforts have been attempted by both parties.

Section 5.1(b). An alternative mediation mechanism is prescribed by this provision. The court may encourage the attempted settlement of disputes by imposing a mandatory mediation requirement on all parties prior to a court hearing. The administrative judge of the small claims court would prescribe the manner in which mediation would be conducted and by which mediators would be selected and assigned to mediation. Mediators could include volunteer attorneys or lay people and could thus be selected and assigned to cases on the same basis by which arbitrators are selected and assigned to arbitration (see Comment to Section 5.2(f)). The court could use arbitrators as mediators as

long as the same person does not arbitrate a case he mediated. The court ombudsman could likewise serve as a mediator (see Section 2.4(3)). As contemplated by this provision, mediation would be fast and fair and would not result, as further discussed hereinbelow, in coerced settlements. However, as mediation would add another layer to the small claims court process and would require additional personnel, this settlement alternative may prove impractical in some instances; mediation would, however, serve as an effective method of conciliation and should be adopted where feasible.

Section 5.1(c). If either settlement alternative mandated by this section fails to result in a resolution of the dispute, the dispute should be promptly heard by the small claims court. Many disputes do present irreconcilable differences between the disputants and can only be resolved through adjudication. Protracted court process and delay in the judicial disposition of their dispute should not be the price exacted of litigants for submitting to a court ordered settlement mechanism. In achieving its mandate to secure swift justice between the litigants, the small claims court should insure that all litigants, especially those subjected to the additional judicial layer of a conciliation mechanism, should enjoy both expeditious settlement or mediation conferences, and, where settlement fails, swift small claims court hearings.

Section 5.1(d). As any settlement under this section occurs within the court and upon its initiative, be it by mediation or party conference, the responsibility for it must be assumed by the court. Consequently, where a settlement is reached by either settlement alternative, it shall be submitted to the court for approval. The terms of a settlement may be patently unfair to one party, evincing the absence of fair dealing in an arms-length negotiation between the parties; such may be the case when a settlement emerges from a party conference wherein one party, through a superior bargaining position (achieved by representation by counsel, intelligence or otherwise) forces his will and unfair terms upon another. Settlements via mediation are less susceptible to such abuse, and need not be as thoroughly scrutinized as settlements by party conferences.

Pursuant to Section 5.1(e)(1), the court shall approve a settlement if it effects substantial justice between the parties; if the court does not approve the settlement, it will explain its reasons to the disputants and proceed to a hearing unless both parties waive the hearing and request to be bound by the settlement. As noted hereinabove, the court must assume responsibility for the settlement efforts it requires as a condition precedent to adjudication by hearing. Consequently, an unfair settlement should not be approved. However, an inequitable settlement should not be disapproved if the parties, fully cognizant of its inequities, as identified and explained to them by the court upon its examination of the settlement, nevertheless agreed to it. Effect should be given to a settlement which, albeit unfair on its face, is fully understood by the parties and is nevertheless agreeable to them.

Encouraged by the court and occurring within the court setting, settlements reached therein should be given the same effect as court judgements (Section 5.1(e)(2) and (3)). Consequently, the procedure prescribed by Section 8.? upon the entry of a judgement should be followed by the court upon approving a settlement. A settlement thus reached under the authority and auspices of the court will be as binding and as enforceable as a regular small claims court judgement.

Precluding court hearings and presenting opportunities for satisfactory compromises, a settlement process, if properly administered, can be extremely advantageous to the litigants and the court. The problems which arise from a settlement mechanism inhere not in the mechanism itself but in those who administer it. Few litigants will feel satisfied with a settlement if it is forced upon them by a court unfavorably disposed towards hearings and litigants who fail to settle. In many cases, nothing satisfies a litigant's sense of justice like a court hearing; other cases are simply not susceptible to settlement. In either case, a litigant should not be discouraged to demand his right to a hearing by a court's perceptible preference for settlement and hostility towards adjudication. The court will insure that the settlement mechanism prescribed by Section 5.1 functions as intended by maintaining its proper role in encouraging, rather than coercing, dispositions by settlement.

Section 5.2 (Arbitration)

(a) The small claims court shall provide an arbitration alternative to the regular courtroom adjudication of controversies.

(b) The clerk shall inform litigants appearing for a hearing that—

(1) they have the right to choose a hearing by binding, non-appealable arbitration or by appealable courtroom adjudication;

(2) arbitration requires the consent of all parties to an action; and

(3) parties cannot withdraw from arbitration subsequent to its commencement without the consent of the court.

(c) The provisions of this Act shall govern the arbitration hearing, except that an arbitrator cannot continue or transfer a case without the approval of the court.

(d) An arbitrator's decision is reviewable by the court upon a sufficient showing by a litigant that the arbitrator exceeded his authority or was biased.

(e) An award granted by an arbitrator shall be regarded as a judgement entered by the court and processed for collection as prescribed by Section 8.2.

(f) Arbitrators shall be selected and assigned to hearings in the manner prescribed by the administrative judge of the small claims court.

COMMENT

Section 5.2(a). This section is intended to provide increased flexibility in the small claims court by establishing an arbitration mechanism as an attractive alternative to the regular courtroom adjudication of cases. Arbitration is fast, like the courtroom process, and flexible, since as many arbitrators can be assigned to a hearing session as necessary. Arbitration unclogs dockets and, as part of the court and occurring within the court ambiance, enjoys legitimacy in the eyes of the public; many litigants, recognizing its legitimacy and feeling more at ease before an arbitrator, prefer arbitration. Additionally, arbitration is final, disposing of the case without further appeal.

The arbitration mechanism provided by this provision is largely patterned after the arbitration tool existing in the small claims courts in New York City. The most notable feature of arbitration in the small claims court is its voluntariness. Compulsory arbitration, like a small claims court with exclusive jurisdiction, denies the litigant the freedom to choose the forum of his choice in the first instance. Compulsory arbitration, despite the availability of appeal therefrom, complicates and prolongs the small claims court process of resolving disputes and would engender discontent with many litigants.

Section 5.2(b). Arbitration will not be utilized and its promise will therefore be unrealized if litigants are unfamiliar with its availability and advantages. Consequently, this provision prescribes that the clerk of the court shall apprise litigants that arbitration is available as an alternative to adjudication before a judge and shall explain the differences between the two. If the litigant's case would be more expeditiously heard if submitted to arbitration, the clerk may so inform the parties. Such practice prevails in the small claims courts in New York City and is not inconsistent with the letter or spirit of this section. However, arbitration should be truly voluntary and not coercive. Litigants should not feel constrained to submit to arbitration because the court favors it.

Arbitration is voluntary as regards both parties and hence it requires the consent of both parties. Once arbitration commences, however, the parties cannot withdraw their consent, either individually or mutually, and thus withdraw from arbitration, except with the consent of the court. The advantages arbitration brings to the small claims court as an alternative dispute resolution mechanism would be largely lost if parties, having voluntarily submitted to arbitration, could withdraw from it if dissatisfied. However, circumstances might exist where impropriety and/or bias (traditional allegations made in seeking review and in obtaining reversal of a decision of an arbitrator) might blatantly attend the arbitration proceedings and militate against its continuance. The small claims court would be counterproductive to its mandate to secure swift justice if obvious situations of bias and impropriety had to await the review of a small claims court judge at the termination of the arbitration proceeding. Consequently, parties may withdraw from arbitration in appropriate circumstances with the consent of the court.

Section 5.2(c). Hearings before arbitrators should be governed by the same rules applicable to hearings before judges, with a few exceptions. As arbitration is a mechanism to resolve disputes with finality, without delay and appeal, arbitrators

can only prolong cases—through continuance or transfer—with the approval of the presiding judge. Since the arbitrator who had granted the continuance would most likely not be the arbitrator who would arbitrate the case on its rescheduled hearing date, such continuances, to achieve cohesiveness and continuity in the resolution of a case, should only be granted upon the approval of the presiding judge.

Section 5.2(d). Traditionally, arbitration has been non-appealable. Arbitrators have been disinclined to have their decisions, admittedly not tendered in strict adherence to the law, submitted to the rigors of analysis on appeal. A stenographic record of arbitration is therefore not kept, thereby precluding an appeal on the record. Similarly, arbitration in the small claims court is not subject to appeal, as few arbitrators would serve in that capacity if their decisions were appealable. The review of an arbitrator's decision by the presiding judge of the small claims court is possible, however, in those traditionally reviewable situations in which the arbitrator is shown to have been biased or to have exceeded his authority (as where he mediated instead of arbitrated, or granted remedies unavailable in the small claims court).

Section 5.2(e). Like a settlement resulting from a court-conducted mechanism (Section 5.1), the disposition of a case by arbitration, itself an alternative to adjudication by hearing and conducted under the auspices of the court, shall be regarded as a judicial disposition and processed for collection pursuant to Section 8.2 like a judgement entered by the court. The court thus assumes responsibility for the decisions of arbitrators and affords the winning party the same access to the collection devices which would be available to him had he won a regular small claims court judgement. The legitimacy of an arbitration proceeding is further enhanced, and its utilization further increased, if its decisions are enforced like regular court judgements.

Section 5.2(f). The administrative judge of the small claims court is responsible for selecting and assigning arbitrators to hearing sessions in the manner he deems appropriate. This rule contemplates that arbitrators in most instances will be lawyers from the community who have volunteered their services to the small claims court. Lay people, particularly those possessing some expertise in any consumer related field, may also be utilized by the court, especially in those communities where a pool of willing and able attorneys is not available. Arbitrators should be paid only when their services are otherwise unavailable. The administrative judge may assign the arbitrators to as many sessions per month as he feels necessary and as is convenient for the arbitrators. The administrative judge may compile his own list of available arbitrators or may use a list of acceptable volunteer attorney-arbitrators compiled by the local American Bar Association. The administrative judge has considerable latitude in effectuating this rule.

Finally, while a judge of the small claims court is mandated to resolve disputes in the manner which will effect substantial justice between the parties according to substantive law (Section 7.3(d)), an arbitrator, be he an attorney or not, cannot be held to this standard in deciding cases. A lawyer-arbitrator should attempt to adhere to substantive law to the extent necessary to do justice between the parties, but in most cases all that can realistically be expected and demanded is that the arbitrator will reach a decision consonant with the dictates of good common sense.

Part VI

COURT APPEARANCE

Section 6.1 (Plaintiff's Non-Appearance)

(a) If the claimant fails to appear for a hearing, or if both parties fail to appear for a hearing, the court shall in its discretion dismiss the case for want of prosecution, continue the case or order whatever disposition thereof justice requires.

(b) Cases dismissed with prejudice pursuant to Section 6.1(a) may be reopened within one month of the date of dismissal upon the motion of the plaintiff for good cause shown.

COMMENT

Section 6.1(a). This section, by investing the court with wide latitude in disposing of cases in which the claimant or both the claimant and the defendant fail to appear for a hearing, is intended to enable the court to order in such instances that disposition which accords with the dictates of justice and the purposes of the small claims court.

A plaintiff's failure to appear for a hearing, constituting want of prosecution, should, in most instances, result in a dismissal of the action with prejudice. Invoking the court's mechanism by filing his claim, the claimant should not be able to abuse the court process and inconvenience the defendant by obtaining a continuance when he fails to appear for the original hearing. Unusual circumstances might exist, however, which warrant a continuance of the case or dismissal without prejudice; sickness, death in the family or unavoidable unavailability for good reason might warrant either such disposition.

The court should thus consider the circumstances surrounding the claimant's failure to appear as well as the inconvenience imposed on the defendant in requiring him to return to the court for a rescheduled hearing on the same claim. Where good reason appears for the claimant's non-appearance, such as sickness, thus justifying a continuance or dismissal without prejudice, but where such disposition would result in an unfair hardship on the defendant, as where crucial defense evidence would be unavailable at a later prosecuted or continued case, the equities in such circuinstances favor the interests of the defendant, who, albeit an involuntary litigant, did appear for the hearing; the court should dispose of the case by hearing the defense to the claim asserted in the claimant's written claim and by ruling thereon (much like an inquest proceeding as discussed in the Comment to Section 6.2).

If both parties fail to appear for a hearing, the court can similarly dismiss the case with or without prejudice, continue the case or order whatever disposition the interests of justice require.

Vested with wide discretion, the court should be guided by the peculiar circumstances and equities of each case and by its mandate to resolve disputes expeditiously and fairly.

Section 6.1(b). As noted hereinabove, unusual circumstances, unbeknownst to the court when it dismissed the case, might have arisen before the hearing which prevented the plaintiff from appearing at the hearing. Debilitating sickness is one such circumstance which warrants the reopening of the case when brought to the attention of the court on motion of the plaintiff after the case was dismissed. Other circumstances, equally beyond the plaintiff's control and similarly preventing him from appearing at the hearing, would justify the reopening of the case in the interests of justice.

As a defendant forced to defend himself in the small claims court against the allegations of another should not be vulnerable to suit on a claim once dismissed for a prolonged period of time, a dismissed case cannot be reopened after 30 days of its dismissal. Thirty days would provide the plaintiff enough time to move for reopening, whatever the reason for his unavoidable unavailability at the originally scheduled hearing, yet would not present an unreasonably long period of time during which the defendant would remain subject to suit on the same claim.

Section 6.2 (Default Judgements)

(a) When the defendant fails to appear for a hearing at which the plaintiff appears, the court shall, in lieu of a hearing, conduct an inquest into—

(1) the circumstances of the defendant's failure to appear;

(2) the circumstances surrounding the incident or transaction from which the claim arose; and

(3) the merits of the case.

(b) The court shall enter a default judgement against the defendant when—

(1) the court is satisfied that the defendant received proper notice of the hearing;

(2) the court is satisfied that unconscionable practices did not attend the plaintiff's conduct in the incident or transaction from which the claim arose; and

(3) the claimant establishes a prima facie case for his claim.

(c) A default judgement may be vacated or reopened within six months of the entering thereof on the initiative of the court or upon the motion of the defendant with good cause shown.

(d) A default judgement can be appealed only upon—

(1) the denial by the court of the defendant's motion to vacate or reopen the case, or

(2) the affirmance by the court of a default judgement in a hearing incident to the granting of a motion to reopen judgement.

COMMENT

To fulfill the purpose of the small claims court to resolve disputes fairly, this section is intended to prevent the unfairness attending the summary-entry of default judgements by providing a fair and meaningful inquest procedure in all cases where the defendant fails to appear for a hearing.

Section 6.2(a). Default judgements are entered with unacceptable regularity in most small claims courts; their high incidence is unacceptable because they are too often entered summarily, upon the defendant's non-appearance, without regard to the circumstances of the plaintiff's case or the defendant's failure to appear. A default judgement is oftentimes entered even though good cause existed for the defendant's non-appearance and/or little merit existed in the plaintiff's claim. Recognizing this fact, and attempting to curb the practice and provide non-appearing defendants with minimal fairness and safeguards, this provision requires that the court, be it the judge or the arbitrator, conduct an inquest when the defendant fails to appear for a hearing in order to determine whether the circumstances warrant the entry of a default judgement.

The court shall first scrutinize the circumstances of the defendant's non-appearance; it should inquire into the manner and date of service upon the defendant; it should peruse a process server's affidavit of service, and possibly question the process server, if the defendant was personally served; the court should inquire if the defendant ever attempted to establish contact with either the court or the plaintiff; and finally, the court could question the plaintiff to determine if he ever communicated with the defendant about the pending appeal (failure by the claimant to make a bona fide effort to contact the defendant and resolve the dispute, a condition precedent to filing a claim in the small claims court (Section 4.2(b)(2)), could result in a continuance or dismissal of the case and/or contempt proceedings, in the discretion of the court) or if the plaintiff knew or suspected why the defendant did not appear.

The court should further scrutinize the circumstances surrounding the incident or transaction from which the claim arose; the court should determine whether the claim, if it relates to a contract or a debt, was based on conscionable arms-length dealings, i.e., the court should ascertain whether the defendant was pressured into signing a contract or assuming a debt by fraudulent tactics.

Finally, the court should scrutinize the merits of the claim itself; it should establish that a meritorious claim exists. The court, for example, should determine as well as it can whether the defendant actually received the goods, if a sales contract was involved, and the condition of the goods when received.

It is not intended that the court's inquest

will entail a long detailed investigation. On the contrary, the inquest would not be any more protracted than a regular small claims court hearing.

Section 6.2(b). The court shall enter a default judgement against a defendant only when the court is satisfied that the defendant received proper notice of the hearing, that the plaintiff's conduct at the time of the alleged wrong-doing was free of unconscionability and that the claim is meritorious. If the court finds that proper notice was not received, or if circumstances clearly indicate that the defendant could not have understood the nature of the claim, as where a foreign-speaking defendant is involved, the case should be continued until the defendant has received proper notice and has thus been made aware of the nature of the claim against him. If self-dealing and fraudulent practices accompany the plaintiff's conduct in the incident from which the claim arose, as where the claimant deceived or misled the defendant in the sales contract, the court should dismiss the case with prejudice. And if the claimant fails to establish a prima facie case for his claim, the court should likewise dismiss the case with prejudice.

Section 6.2(c). A default judgement, while proper when entered, may subsequently become suspect because of facts not known when it was entered. The defendant, unbeknownst to the court and/or the plaintiff, might have been hospitalized or legitimately unavailable during the hearing date. The defendant may discover subsequent to the suit that certain goods, the subject matter in question in the hearing, were defective as he suspected; or the court may find subsequent to the default judgement that the plaintiff had been engaged in widespread fraudulent practices and that the defendant was victimized by the plaintiff's fraud. Consequently, the court on its own initiative, or upon the motion of the defendant for good cause shown, may reopen or vacate the default judgement within six months after the judgement was entered. Six months is a reasonable period in which such order or motion must be made; any facts or developments which would cast suspicion on the default judgement would probably become known to the court or the defendant within that period. At the same time, small court claims should be resolved and finally disposed of as soon as possible. The six month period is suggested as a reasonable time period within which a default judgement could be vacated or reopened and which would not be unduly protracted.

Section 6.2(d). Default judgements, in general, are not appealable; the availability of appeal might encourage some litigants to purposely default, confident that the plaintiff lacked the means and/or the resolve to pursue the matter on appeal to a civil court. A default judgement is thus subject to reversal or reopening on appeal only when the defendant has exhausted the means available to him in the small claims court to reverse such judgement. A denial of a motion to reopen or vacate a default judgement, or an affirmance of a default judgement when reopened by a motion of the defendant, are appealable and thus effectively subject the default judgement to reversal or reopening on appeal.

TRIAL PROCEEDING

Section 7.1 (Lawyers)

(a) Attorneys may accompany and assist parties in the small claims court, but shall not appear in behalf of parties, other than to provide information and suggestions and then only with the permission of the court.

(b) The small claims court shall attempt to obtain the services of counsel who shall serve as court-appointed counsel, and the clerk of the small claims court shall inform litigants if court-appointed counsel is available and shall appoint counsel to indigent litigants upon request.

(c) Personnel serving as court-appointed counsel may be full-time salaried court attorneys, legal aide society lawyers, upper class law students, or pro bono attorneys.

COMMENT

This section is intended to facilitate the expeditious and fair resolution of disputes in the small claims court by limiting the role of attorneys in such courts in such a manner as to both preclude the delay, technicality and the unequal representation oftentimes resulting from their unfettered small claims court appearance, while at the same time providing litigants with the right to assistance of counsel.

Section 7.1(a). Lawyers have traditionally both posed and alleviated problems in the small claims court. Lawyers are criticized as a source of technicality and delay in a small claims court system designed to resolve disputes informally and swiftly; the rigid training and methodology of the legal profession is allegedly ill-suited to the relaxed and informal small claims court hearings. It is further claimed that attorneys transform the hearings into adversarial proceedings, incomprehensible to the overshadowed litigant. Additionally, the presence of attorneys oftentimes has a pronounced effect on the judge, who becomes more formal and less resilient when confronting professionals. Further, the availability of counsel in the small claims court frequently precludes inexpensive relief of claims, a long assumed advantage of the small claims court, as the litigants might consider attorneys necessary to the effective prosecution or defense of their position, or might feel compelled to retain counsel when their adversary is represented so that they are not disadvantaged at the hearing.

A serious problem associated with the presence of attorneys in the small claims court is the resulting unequal representative strength of ligitants when one party is represented without the other. While statistics dispel the notion that lawyers have a significant impact on the outcome of cases in the small claims court, lawyers undoubtedly have a significant psychological and reassuring impact on the litigants they represent; the unrepresented litigants oftentimes feel disadvantaged in not being represented, despite the hereinabove mentioned lack of notable substantive advantage in being represented. Some litigants, if not many, are certainly deterred from prosecuting and defending suits when they know they confront a represented adversary. Furthermore, as noted hereinabove, uneven representation disrupts the hearing process; a judge will oftentimes be prejudicial towards a party who is represented by a fellow professional, or overcompensate the representative inequity by becoming the advocate of the unrepresented party.

In short, the appearance of attorneys in the small claims court is criticized as counter-productive to the court's mandate to secure the speedy, inexpensive, informal, understandable and fair resolution of disputes.

The lawyer in a small claims court is credited, however, with identifying and developing issues, detecting abuses in the court, protecting the interests and rights of litigants, and, significantly, providing litigants, especially inhibited or complacent ones, with the assistance, or at least the

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1 OF 2

reassuring presence, they deem necessary in effectively presenting their case.

This provision proceeds from two basic premises: First, the deleterious effect of attorneys in the small claims court results from the technicality and delay that attend their appearance in *behalf* of litigants and the inequities and disruptions that attend cases in which one party is represented without the other; and second, attorneys do provide a beneficial service to litigants in the small claims court, even if only the emboldening and psychological effect they have on their clients, and litigants should not thus be denied the assistance of counsel. Accordingly, this provision cures the ill-effects of unequal representation and untrammeled representation by counsel, while permitting attorneys in the small claims court, by limiting the representative role of attorney and by effecting representative parity to the maximum extent possible. Attorneys may assist litigants in the presentation of their cases, including assisting in the preparation of the case and accompanying and advising the litigant at the trial, but the attorney may not appear in behalf and as the mouthpiece of the litigant, except for information and suggestion requested of counsel by the court.

In prohibiting the lawyer from appearing in behalf of litigants, this provision prevents the attorney from taking an affirmative role in the conduct of the case and thus prevents counsel from prolonging and/or complicating the case by delaying courtroom tactics and/or technical legalistic arguments. Furthermore, such proscription prevents one party from enjoying full representation without the other, as neither party is entitled to such representation, and thus prevents representative disparity at the most crucial stage of the case—the hearing.

In permitting the lawyer to assist and accompany the litigant in the latter's presentation of the case, the provision allows, to the maximum extent consistent with the mandate of the small claims court, the beneficial use of attorneys in a small claims court. The lawyer can fully assist the litigant in the preparation and presentation of the case, short of being the mouthpiece at the trial. The litigant thus obtains the assistance of counsel, albeit less than full representation. While the litigant must appear in his own behalf at the hearing, the lawyer can accompany and advise the litigant at the hearing and thus provides sufficient emboldening reassurance to all but the most inhibited people. Additionally, the reassurance and encouragement of a patient and understanding judge will create an informal courtroom atmosphere which should place all litigants at ease.

In permitting the lawyer to provide information and suggestion to the court with the latter's permission, this provision relaxes the stringency of the proscription of representation by counsel in small claims court hearings, and further protects a befuddled and diffident litigant, by enabling an attorney to expedite the hearing by providing pertinent information and suggestion. It is contemplated that the court would call upon the attorney to cite facts and identify issues which are unusually involved and beyond the recall or understanding of the litigant; the attorney could not argue the facts or issues. The attorney could make suggestions as to governing law, in difficult cases, but only if the court permits it. While present at the hearing, the attorney could further provide assistance to his client by observing the conduct of the hearing for purposes of possible appeal.

In permitting attorneys to assist and accompany litigants in the latter's presentation of the case, this provision does not prevent the disparity in representative strength which results when a regular user of the court, such as a corporate litigant, which frequently appears in the small claims court proceedings, sends a sophisticated, intelligent corporate official, well versed in courtroom procedure, to court against a less sophisticated litigant, even one enjoying assistance of counsel as prescribed by this provision. Confrontations between litigants of unequal intelligence,

confidence, and court familiarity are inevitable and unavoidable. The less astute and confident litigant is reassured in knowing that he is not confronting an attorney, and he can obtain further reassurance by procuring the assistance of counsel.

Finally, this provision likewise does not prevent the disparity in litigation strength when one party without the other has obtained the assistance of counsel. However, the unassisted litigant is not greatly disadvantaged at the crucial stage of the case, the hearing, because both litigants must then present their own cases without the appearance of attorneys in their behalf; further, as prescribed by Section 2.4(2), the court ombudsman would be available to provide assistance in the preparation of the case of a litigant who was not so assisted by counsel. Additionally, the advantage obtained by a court-assisted litigant is mitigated by the fairness of the small claims court hearing during which the court assists both parties in the development of all relative facts in the case (Section 7.3(d)). Finally, as prescribed in Section 7.1(b), indigent litigants incapable of obtaining the assistance of counsel would enjoy such assistance by court-appointed counsel.

As a final comment on the disparate representative strength of small claims court litigants, it is noted that a lawyer can always appear in the small claims court in his own behalf; his participation as a litigant is not prohibited because he, as an attorney, would be appearing in his own behalf. The lawyer-litigant presents an unavoidably unequal confrontation (unless the other party is himself an attorney) with which the small claims court must live.

While this provision would overturn current law prescribing the legal representation of corporations in all judicial proceedings, the unique character of the small claims court warrants different rules than those prevailing in regular courts; the limitation of the role of attorneys in the small claims court, as prescribed in Section 7.1(a) and discussed in this Comment, is deemed essential to achieve the purpose of the small claims court in resolving disputes fairly and expeditiously.

Section 7.1(b). This provision is designed to further effect fairness in the small claims court by requiring the court to attempt to provide counsel for indigent litigants. While all litigants would have the benefit of the court ombudsman's assistance in the preparation of their cases (Section 2.4(2)), fairness requires that every reasonable attempt be made by the court to insure that rich and poor alike enjoy equal assistance of counsel. The limited role played by attorneys in the small claims court, including both retained and court-appointed counsel, as prescribed in Section 7.1(a), does not warrant a requirement that court-appointed counsel must be available to indigent litigants.

To provide indigent litigants the benefit of court-appointed counsel if available, the clerk of the court should apprise all litigants, both in the court memorandums provided the parties pursuant to Section 4.2(c)(4) and Section 4.5(a) and at the time of the hearing, that counsel may be assigned to assist indigents upon request.

Section 7.1(c). If the finances of the small claims court permit it, the small claims court could hire a full-time salaried court attorney who would serve, in addition to other duties, as court-appointed counsel to indigent litigants. An arrangement might be made with the Legal Aid Society to provide attorneys for indigent litigants. Upper class law students might be utilized to assist litigants; the successful Student-in-Court program in Washington, D.C. enables third-year law students to appear in behalf of indigent litigants in the small claims court. Finally, the court could encourage the involvement and use the services of pro bono attorneys; small claims courts in New York City have a bulging pool of pro bono attorneys serving as arbitrators and many pro bono attorneys would likely surface in large metropolitan areas to serve as court-appointed counsel for indigents.

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Section 7.2 (Jury Trial)

(a) Jury trials are unavailable in the small claims court.

(b) Actions commenced in the small claims court are not transferable to the civil court upon a party's motion for jury trial.

(c) Either party as a judgement loser can secure a jury trial, where the right exists, in a trial de novo on appeal.

COMMENT

This section protects the informal procedure and practice of the small claims court by proscribing jury trials therein.

Section 7.2(a). A jury trial, even where the right exists, is inappropriate in a small claims court. A jury trial requires the time-consuming process of selecting jurors and is best conducted in a formal atmosphere in which the strict rules of practice and evidence apply. In fact, such stringent rules of evidence have evolved largely in response to the impressionability and vulnerability of jurors who are easily misled and prejudiced by incompetent evidence. The small claims court, where claims are resolved expeditiously and without precise procedural and evidentiary rules, is, without altering the informal character of the court, unsuited for jury trials.

Section 7.2(b). Most small claims court statutes, while denying either party a trial by jury in the small claims court, protect that right, where it exists, by enabling either party, or, in many cases, only the defendant, to transfer the case to the regular civil court where a trial by jury is available. While it is argued that the right to transfer a case in order to obtain a jury trial is one commanded by constitutional requirements of due process, an abusive practice inheres in the exercise of the alleged right. Enabled to effect the transfer of a case to a regular court in order to secure the benefit of a jury trial, a moving party sometimes employs the right to transfer as a ruse to avoid litigation altogether. Confident that the other party will not incur the additional expense in pursuing or defending the claim in the regular court, the party requesting and obtaining the transfer thereby assures himself a default judgement if he is the plaintiff, or the dismissal of the case by the plaintiff if he is the defendant. To curb this potential abuse, this provision prohibits the transfer of a case in the small claims court to the regular court upon the motion of either party for a jury trial.

Section 7.2(c). This provision protects the right to a jury trial by permitting either party to secure a jury trial, where the right exists, in a trial de novo on appeal (Section 8.3). If the party who initially desired the jury trial received a favorable judgement in the small claims court, he would not likely be heard to complain that he was treated unfairly in not being able to present his case before a jury; his victory would silence his earlier objections. If that party lost in the small claims court, a trial by jury would

then be available to him in a trial de novo; he would not have lost an inordinate amount of time by appearing before a small claims court before he could obtain the jury trial he desired. While he would be required to pay the filing fees for an appeal (Section 8.3), he is not any more financially disadvantaged in doing so than he would be if he was able to effect the immediate transfer of the case to a regular court upon his motion for a jury trial, as a payment or bond of some sort for the cost of a jury trial is oftentimes demanded of the party demanding such transfer.

This provision assumes the posture that the right to a jury, while denied both the plaintiff and the defendant in the small claims court, is a right merely delayed and not irretrievably lost by either party. The Model Small Claims Court is designed to be utilized to the maximum extent possible (see Section 1.2(b)(2)). The judicial system and everyone operating within it gain when disputes are resolved quickly, fairly and inexpensively. Every inducement should be made to litigants to litigate in the small claims court. Accordingly, litigants should not be required to pay the price of waiving certain rights in order to appear in the small claims courts; fewer litigants would use the court if such was the case. Consequently, a plaintiff, knowingly waiving his right to a jury trial by suing in a small claims court, knows, however, that the right is protected in a trial de novo on appeal (see Section 8.3); and the defendant, while forced to defend the suit in a small claims court without the jury trial he wishes, is accorded that right on appeal.

Many cases, which would otherwise result in costly and time-consuming litigation if the right to transfer a case to obtain a jury trial was available, are resolved by delaying the right to a jury trial de novo appeal. By delaying the right to jury trial, this provision avoids the abusive practice described hereinabove, facilitates judicial economy and saves the litigants, who might have otherwise litigated the case in a regular court upon the request by either one for a jury trial, wasted money and time, in those many instances where the suits are resolved by the small claims court to the satisfaction of all parties.

Section 7.3 (Formal Rules)

(a) Formal rules of pleading, practice and evidence shall not be applied in the small claims court.

(b) The court shall proceed to hear the case when both parties appear for the hearing.

(c) The court shall listen to the testimony of the parties and admit all evidence it deems necessary to an understanding and determination of the dispute.

(d) The court shall assist in the development of all relevant facts in the case and shall decide the claim so as to effect substantial justice between the parties in accordance with substantive law.

(e) The court shall regulate and control abusive court practices, including, but not limited to, unconscionable and harassing claims, by citing the offending party in contempt of court and imposing whatever monetary fine it deems appropriate.

COMMENT

This section adopts rules of procedure and practice governing small claims court proceedings designed to maximize the efficiency of the small claims court.

Section 7.3(a). The essential characteristic of the small claims court is its informality. Claimants sue in the small claims court because their claim will be heard in swift and understandable fashion. Informality, hence, is the most appealing and most fundamental feature of the small claims court. To insure that informality, the rigid rules of practice, pleading and evidence prevailing in a regular civil court are greatly relaxed in the small claims court. Such strict rules are generally enforced in the regular court to protect the litigant from the jury's vulnerability to prejudice. In the small claims court, where jury trials are banned, the rationale for formality vanishes. The presiding judges, versed in law and theoretically above prejudice, can conduct the hearing informally, sifting the relevant evidence from the irrelevant, and reach a just resolution.

Section 7.3(b). The court shall hear the case when the parties to the suit have appeared for the hearing. To satisfy the expectations of the litigants and the mandate of the small claims court, the court should, to the extent possible, promptly begin hearings at scheduled times. Litigants whose cases are not promptly called after they have appeared at the court for the hearing are not receiving expeditious justice as promised by the court and are disinclined to use the court again. When either or both parties fail to appear for a hearing, other sections in this Act apply (Section 6.1 and Section 6.2).

Section 7.3(c). The court should afford each party the opportunity to present his case in sufficient detail to permit a fair resolution of the dispute. As a litigant will question the fairness of any judgement when he has not been able to fully develop and present his case, a court should permit the litigant to speak his piece in full and thus provide him his full day in court. By providing a forum in which litigants receive a fair and full opportunity to state their case, the small claims court will thereby encourage its further use.

As noted hereinabove, loose rules of evidence apply in the small claims court. The judge is theoretically not susceptible to prejudice from incompetent evidence, and should thus admit all evidence deemed material and relevant to the case. The judge, therefore, need not exclude relevant evidence by stringently applying the hearsay rule, best evidence rule and other evidentiary rules. Whatever evidence is necessary to ascertain the facts of the case and effect a just judgement should be admitted and considered by the judge.

Section 7.3(d). As the rules of practice and pleading are so relaxed in the small claims court, and as the litigants must appear in their own behalf in presenting their cases (Section 7.1), the court should take an active role in assisting the litigants in developing all relevant facts in the case. The unrepresented litigant, even if assisted by counsel (Section 7.1), cannot be expected to adequately identify in court all those facts which are essential prerequisites in establishing a sound legal position in support of his allegations or defense. The court must assume the burden of assisting the parties in establishing the relevant facts in the case, including facts which might provide a defense to a defendant. All legitimate and important claims, defenses and facts, unknown to the unaware litigants, but perceived by the court, should not be deemed waived if not voiced by the parties. The court has an affirmative duty to assist in the development of all pertinent facts, claims and defenses and reach a just decision based on all the circumstances surrounding the transaction or incident from which the claim arose.

A small claims court can rarely reach decisions in strict accordance with the dictates of substantive law. The court's goal in reaching speedy and understandable justice between the parties in an informal forum is at odds with the time-consuming process required to develop detailed facts and issues upon which fine points of law derive. The court simply cannot decide cases informally and swiftly and at the same time be required to adhere to the technicalities of the law. The court, must however, reach substantial justice between the parties, in as strict accordance with substantive law as the speedy and informal small claims court process permits.

Section 7.3(e). The court will assist itself in insuring its efficient operation by curbing the abusive practices that occur within it; by preventing and punishing unconscionable practices which taint its image, the small claims court will further maximize its use by demonstrating its preventive and punitive response to such practices to the community it serves.

The small claims court, requiring minimal filing and service fees, is readily available to unscrupulous claimants to file harassing claims; further, such inexpensive access to the court enables claimants to file unconscionable claims against innocent victims of fraud. Abjuration by a claimant of a sworn statement that he has made a good faith effort to contact the defendant and resolve the dispute (Section 4.2(b)(2)) is another abusive court practice which the court should correct pursuant to this provision.

The court should remain attentive to the practices that corrupt the court practice and cite offending parties in contempt of court. The court should impose whatever monetary fines it deems appropriate in the matter, depending on the egregiousness of the offense and the previous history of the offender. It is contemplated that a monetary fine issuing upon such contempt citation would be limited to a percentage of the amount in controversy of the claim in question.

Section 7.4 (Continuance)

(a) A continuance shall be granted by the court before or during a hearing only upon the motion of a party for good cause shown.

(b) Continuances shall be as short-termed as possible and shall not in any case exceed 30 days.

(c) The clerk shall notify the non-moving party of continuances granted prior to scheduled hearings.

(d) The hearing shall be rescheduled at a time and date as convenient to the non-moving party as possible.

COMMENT

This section is intended to fulfill the court's mandate to effect fair and swift justice by permitting short-term continuances only when dictated by fairness.

Section 7.4(a). As a small claims court is designed to adjudicate claims as expeditiously as possible, continuances should be granted only upon good cause shown by the moving party. This provision contemplates that continuances requested during a hearing should be more sparingly granted and thus subject to closer court scrutiny than when requested before trial. A non-moving party should not be further inconvenienced, especially after appearing at the hearing at which the continuance is requested, by being forced to appear at a continued hearing except where an exceedingly good reason exists for the continuance.

Good cause for a continuance could include the present unavoidable unavailability of crucial evidence, sickness or death in the family. As noted in Section 4.5(b)(1), automatic continuances are granted to the defendant when he is served notice of the claim within 5 days of the hearing date.

Section 7.4(b). In order that the small claims court can resolve disputes as quickly as possible, cases should be continued for as short a term as possible. A continuance in excess of 30 days would inordinately frustrate the purpose of this court and should not be granted. Where, for whatever reason, the moving party as plaintiff cannot prosecute the case, or the defendant cannot defend the case, within 30 days, the court shall dispose of the case by either dismissal in the former case or default judgement in the latter situation, either of which may be set aside for good cause shown upon the proper motion by the affected party, as provided for in this Act. (Section 6.1(b), Section 6.2(c)).

Section 7.4(c). Fairness further necessitates that the non-moving party be notified by the clerk of a rescheduled hearing date of a case continued by the court upon a pre-trial motion as soon after the motion was granted as possible. The non-moving party should be given prompt notice that the originally scheduled hearing has been continued to a later date in order that he has adequate advanced warning that his appearance at the original hearing is not necessary and that his appearance at a later date is necessary.

Section 7.4(d). Finally, fairness likewise commands that the convenience of the party not requesting the continuance, especially where the continuance is granted at a hearing which the non-moving party has bothered to attend, should be the primary consideration of the court in scheduling a new hearing date. Whatever the good cause warranting the continuance, the non-moving party, prosecuting or defending a suit in a forum structured to resolve disputes swiftly, is an unwilling party to the delay attending the continuance, and should be as little inconvenienced by the protracted proceeding as possible. As prescribed by this provision, the clerk should accordingly reschedule the hearing at a date and time as convenient to the non-moving party as possible.

Section 7.5 (Transfer)

Actions commenced in the small claims court may be transferred by the court to the regular civil court on the initiative of the court or upon the motion of either party for good cause shown.

COMMENT

This section invests the court with the flexibility necessary to deal with cases that are of unsuitable nature for small claims court determination. As noted in the Comment to Section 3.1(a), cases involving complicated issues of law and/or fact, requiring detailed findings of fact and/or analysis of law, are most effectively litigated in the adversarial and formal atmosphere of the regular court. Multi-party and multi-claim actions should be transferred when complications of practice, procedure, jurisdiction, and/or venue arise.

This section enables the court to transfer a small claims court action to the regular court on its own initiative or upon the motion of either party for good cause shown. It is contemplated that such transfer could occur whenever circumstances indicate it is warranted, either before or during the hearing. Joinder and/or intervention may pose complicated problems of practice and jurisdiction before the hearing has commenced and might justify the transfer of a case to the regular court before the small claims court has proceeded to a hearing; alternatively, intricate questions of evidentiary proof may surface in a personal injury suit during the hearing and justify the immediate transfer of the case to the regular court.

While the experienced civil court judges who preside over small claims court hearings will most often be able to effectively handle whatever claims are filed in the small claims court, some claims, albeit within the jurisdictional limit of the court, present extremely technical or intricate factual patterns or legal issues and are beyond the informality of small claims court procedure. The transfer power of the small claims court insures that such claims are adjudicated in a court system which can most adequately examine them and most effectively resolve them.

Part VIII

DISPOSAL OF CASES

Section 8.1 (Judgement)

(a) The court shall render judgement at the hearing, except that the court may reserve judgement in unusual circumstances, but not for a period to exceed 14 days from the date the hearing was conducted.

(b) The court shall explain its decision in reaching or reserving the judgement to the parties.

(c) The judgement obtained in the small claims court shall be res judicata only as to the amount involved in the particular action and shall not be an adjudication of any fact at issue or found therein in any other action or court.

COMMENT

This section is intended to facilitate the expeditious resolution of disputes by prescribing that judgements should be entered immediately following small claims court hearings.

Section 8.1(a). Charged with dispensing justice fairly and quickly between the litigants, the court should, to the greatest extent possible, render judgement while the parties are still before the court; few small claims court claims present detailed questions of fact or law justifying a delay of judgement. Additionally, as articulated in the Comments to Section 8.2, collection efforts are greatly facilitated when the court can fashion a collection plan between the parties while they are still before the court.

Where unusual circumstances warrant reserving judgement, as where intricate and close questions of law and/or fact do exist and necessitate prolonged court deliberation in order to reach a just resolution, or where an immediate judgement would likely prompt a heated and disruptive exchange between combative litigants, the judgement should be entered as soon as possible and in no case more than 14 days after the date of the hearing. Fourteen days should provide the court with sufficient time to resolve the matter; and small claims court litigants, using the court to secure swift justice, should have their cases decided within that relatively short period of time.

Section 8.1(b). It is of considerable importance to the image and utilization of the small claims courts that litigants, having won or lost, are satisfied that justice was done. Accordingly, the court should in every instance explain its judgement to the litigants or its reasons for reserving judgement, in order that litigants understand the rationale underlying the decision; acceptance of a court's decision and, hence, satisfaction with the court itself, can only flow from an understanding of the decision. An additional reason for rendering an immediate judgement is the opportunity it would provide the court to fully explain its rationale while the litigants are still present.

Section 8.1(c). Any cause of action adjudicated by the small claims court cannot be relitigated by the same parties in another litigation; the action can be appealed, as prescribed in Section 8.3, but a judgement entered in a small claims court is res judicata as to the amount in controversy in the small claims court action. A contrary rule would foster duplication of suits and efforts and would accord little effect or significance to a small claims court adjudication. Having chosen the small claims court to resolve his dispute, the plaintiff submits to its res judicata effect and cannot search for another forum to rehear the case if he is dissatisfied with the results; his only recourse is an appeal, not another hearing, as is the case with litigants in regular civil courts.

As a hearing before a small claims court is not conducted in the formal adversarial atmosphere of the regular court, facts or issues presented, determined and/or decided by the small claims court are not litigated in accordance with the strict requirements of procedural and substantive law. Consequently, any fact found or issue adjudicated in the small claims court will not be deemed found or adjudicated for purposes of any other in any other court. Such findings and adjudications are determinative and final in the cause of action filed by the plaintiff and cannot be reexamined or readjudicated in the same cause of action in another court, but they do not serve as collateral estoppel in a different cause of action in any court. Collateral estoppel effect should not be applied to small claims court determinations bereft of stringent rules of procedure and substantive law.

Section 8.2 (Collection)

Judgements entered by the small claims court shall be processed and collected as follows:

(1) Incident to the entering of the judgement while the parties are still under oath—

(a) the court shall arrange a judgement satisfaction plan and enter a writ of execution, and

(b) the clerk shall secure a listing and description of the defendant's assets from the defendant in case subsequent attachment of property becomes necessary to collect an unsatisfied judgement.

(2) If the defendant fails to satisfy the judgement in accordance with the judgement plan, the plaintiff shall attempt to contact the defendant and collect the same.

(3) If the defendant still fails to satisfy the judgement, the plaintiff shall notify the court of same and the court shall, upon receipt from the plaintiff of a collection fee, subject to reduction or waiver upon good cause shown, in an amount prescribed by the administrative judge, but not to exceed 5% of the judgement—

(a) issue the previously entered writ of execution to a salaried court official who shall be empowered to enforce the judgement in the same manner as civil court judgements;

(b) assess the collection fee to the defendant and refund the same to the plaintiff to the extent that it is collected from the defendant in excess of the judgement, except that the court may reduce or waive such assessment upon good cause shown; and

(c) institute, in its discretion, contempt proceedings, subject to penalties limited to monetary fines not to exceed 50% of the judgement, against the defendant for failure to satisfy the judgement in accordance with the judgement plan arranged while the defendant was under oath.

COMMENT

This section prescribes a simple court collection procedure designed to insure the effective satisfaction of small claims court judgements. Many judgements rendered by the small claims courts are never collected. A judgement without collection is effectively a grievance without a remedy. This section attempts to alleviate the collection problems encountered by many small claims court judgement winners by engaging the resources and influence of the court in assisting in the collection of the judgements it renders. The court can play an extremely significant and oftentimes relatively effortless role in collecting judgements.

Section 8.2(1). Immediately upon entering the judgement, while the parties are still before it (thus the discouragement of reserving judgements, Section 8.1(a) and Comment), the court shall fashion a payment plan between the parties. A lumpsum payment, satisfaction by installment payments or any other suitable plan may be arranged. Any plan so arranged by the court will be adopted by the judgement loser under oath. The defendant, who has sworn under oath to satisfy a judgement according to the terms of the payment plan, will most likely be affected by the solemnity of the occasion and the oath and will undoubtedly be less inclined to fail to pay the judgement than he would be if no oath was made.

While the parties are still present, the court shall enter a writ of execution in accordance with the payment plan in order to further signify the seriousness and reach of the judgement. Pursuant to Section 8.2(3)(a), the writ shall be executed only upon failure to satisfy the judgement, as discussed hereinbelow.

The court shall additionally require the defendant, while still under oath, to describe his assets and location thereof, from which an attachable list will be made by the clerk and used by the judgement collector in case subsequent attachment of assets becomes necessary to satisfy the judgement. Two purposes will be served by the clerk's preparation of the asset list while the defendant is under oath: first, it will again impress upon the defendant the seriousness of the judgement, manifested both by the court's action role in collecting asset data and by the repercussions confronting the defendant should he fail to satisfy the judgement; second, a full description of assets, as provided by the defendant himself, greatly facilitates attachment should it become necessary by relieving the plaintiff of the responsibility to determine and locate the defendant's assets. The court and the clerk are not unduly burdened in performing their functions under this provision because little time is required to fashion a payment plan, enter a writ of execution and secure an asset list.

Section 8.2(2). If the defendant fails to begin payments on the judgement in accordance with the terms of the payment plan, the plaintiff shall make a good faith effort to contact the defendant to secure payments thereon. At the hearing the de-

fendant would have provided the court with an address at which he could be located. Consequently, the claimant should not have difficulty in establishing communication with the defendant. Should the plaintiff fail to contact the defendant or should the defendant, once contacted, still fail to commence payments on the payment plan, the plaintiff shall so inform the court. This provision provides the defendant notice of his delinquency and an opportunity to honor the payment plan without recourse to the court.

Section 8.2(3). The court shall be the collection apparatus. Once informed of the collection impasse and requested to assist in collecting the judgement by the plaintiff, the court shall collect the collection fee from the plaintiff. The exaction of such fees would help pay the salary of the judgement collector, a court official discussed hereinbelow. The plaintiff, invoking the collection mechanism, must initially bear the financial burden of collection. The fee shall be prescribed by the administrative judge of the small claims court and should bear some relation to the court's operational cost in collecting judgements. The collection fee could be a flat rate or a percentage of the judgement, but in no case will the collection fee exceed 5% of the judgement. Hence, as the jurisdictional monetary limit of the small claims court is $1000 (Section 3.1(a)), a plaintiff would never have to pay more than $50 as a collection fee. And, as most judgements in small claims courts do not exceed $200, rarely, employing the percentage of judgement limit, will a plaintiff have to pay over $10 as a collection fee. A collection fee representing a greater percentage of the judgement would greatly deter most plaintiffs, fearful that the judgement would never be collected, from invoking the collection apparatus of the court.

The court may waive the pre-payment of the collection fee by the plaintiff for good cause shown. Thus, if the plaintiff is an indigent, cannot pay the fee and cannot collect the judgement without the aid of the court, the fee may be waived in whole or in part.

Section 8.2(3)(a). The court will issue the previously entered writ of execution to a salaried court collection official when informed by the plaintiff that payments on the judgement have not been forthcoming. Many of the problems arising from the use of sheriffs or marshals in collecting judgements are avoided by the use of a court employee as the judgement collector. The court can closely oversee and regulate the collection of judgements if it is charged with the responsibility of collecting them through a court official. Outside judgement collectors oftentimes use underhanded tactics to collect judgements; they might also charge unfair collection fees and refuse to make exceptions for deserving plaintiffs. Outside judgement collectors oftentimes operate on a percentage fee basis, especially marshals who collect a percentage of the judgement collected; such collectors rarely agree to handle small claims which offer little return, and pursue such judgements without alacrity and diligence when they do agree to handle them. A salaried court collection official, paid the same whatever the size of a judgement, is similarly motivated in collecting all judgements. As a court official, however, his mode of operation would be carefully prescribed and scrutinized by the court, insuring fair and efficient collection of judgements without the abuse that so often attends the collection policies and practices of outside collectors. The administrative judge of the small claims court shall select and employ judgement collectors in any manner he deems appropriate. The collection of small claims court judgements could be an assigned task, in whole or in part, of the court ombudsman (Section 2.4(3)). The salaries of the judgement collectors could be funded in whole or in part from monetary fines

collected pursuant to the court's contempt power (Section 8.2(3)(c)) or from collection fees.

The collection fee will be assessed to the defendant and refunded to the plaintiff to the extent that it is collected beyond that collected to satisfy the judgement. If the defendant only pays the judgement, the court will keep the plaintiff's collection fee but pay him the judgement. If the collection fee is collected from the defendant in addition to the judgement, the court will refund the plaintiff's collection fee in addition to paying him the full judgement that was collected.

If the judgement is collected from the defendant, the assessed collection fee may be reduced or waived for good cause shown. If the defendant's failure to pay the judgement on schedule is caused by circumstances beyond his control, or if the plaintiff failed to attempt to contact the defendant for payment, as Section 8.2(2) requires, or if other equitable considerations emerge, good reason may exist for waiving this fee. Where the assessed fee is waived or reduced, the court can require the plaintiff to assume whatever part of the fee was not collected, in those cases where the plaintiff has not acted in good faith; in other cases, as the court may deem proper, the fee should be refunded to the plaintiff and the collection costs absorbed by the court.

Section 8.2(3)(c). When a defendant has failed to honor the court fashioned payment plan, the court can, simultaneous with the issuance of the writ of execution to the judgement collector, institute a contempt proceeding against the defendant for violating his oath that he would commence payment on a payment plan. The availability of contempt power by the court would deter judgement delinquency and would produce income through fines to fund the court's collection apparatus.

The court would have discretion in exercising its contempt power. Blatant violations of the payment oath would be subject to contempt proceedings, as where the defendant is able but unwilling to honor the agreement. Less egregious violations would not be pursued by a contempt proceeding, as where a defendant cannot for good reason make payments on the collection plan.

Only monetary fines can issue from a contempt proceeding; incarceration is too severe a penalty to impose upon a judgement loser in the small claims court for failing to pay a judgement. Further, a limit is placed on monetary fines. In no case shall a fine exceed 50% of the judgement, with the actual fee in any case determined by the seriousness of the defendant's violation in failing to pay the judgement, ascertained by the defendant's inability to pay and other equitable considerations. A penalty in excess of 50% of the judgement, considering the extremely informal atmosphere in which the judgement was rendered, is excessive.

This section attempts to facilitate the collection of judgements. Contempt proceedings are prescribed to avoid judgement delinquency. The court, with the aid of its resources and its psychological and punitive influence, is employed as the collection agency. It is believed that in establishing a collection apparatus under its watchful eye and control, the small claims court can effectively and efficiently collect the judgements it renders.

Section 8.3 (Appeals)

Subject to Section 6.2(d), either party may appeal a judgement of the small claims court in a trial de novo in an appropriate civil court by—

(1) filing the appeal with the civil court within 30 days from the date of judgement in the small claims court, and

(2) paying an appeal fee to the civil court in an amount not to exceed the filing and service fees required of claimants in commencing actions in the civil court.

COMMENT

This section encourages the use of the small claims court by enabling either party to appeal an adverse judgement to the regular civil court. Some small claims courts assert that a plaintiff waives his right to appeal by suing in the small claims court; plaintiffs in such jurisdictions are bound by small claims court decisions. Designed to encourage and resolve as many small claims as possible, the small claims court only discourages its maximum use by the denial of plaintiff appeals; some plaintiffs will surely be deterred from using the small claims court if they are unable to obtain review of adverse decisions. Many plaintiffs can afford a regular trial and will be strongly tempted to prosecute their claims in the civil court, from which plaintiff appeals are available, if they cannot appeal a small claims court judgement. Furthermore, those defendants lacking the financial resources to adequately defend themselves in a regular civil court would enjoy the benefit of defending in the inexpensive small claims court if plaintiffs were not deterred from suing in such courts.

Little sound basis exists for denying the plaintiff the right to appeal a small claims court decision. He should not be bound by a small claims court judgement just because he invoked the jurisdiction of that court. The benefit of litigating in the small claims court is enjoyed not only by the plaintiff. While the plaintiff avoids the exorbitant expense of litigation in the regular court, so too, as noted hereinabove, does the defendant he sues and the judicial system itself. The plaintiff should not forfeit a right by suing in the small claims court when all parties involved, as well as the administration of justice, benefit by his use of the small claims court.

Little argument need be made to support the defendant's right to appeal a decision of the small claims court. Forced to defend a suit in a court with the relaxed rules of evidence and practice, the defendant must be accorded the right to appeal the decision to a regular court where strict procedural rules will fully safeguard him.

As the small claims court hearing is conducted, purposely so, in an informal atmosphere without strict procedural safeguards, a trial de novo is necessary on appeal to enable the litigant to secure his full due process rights which are not strictly enforced or protected in the small claims court. Further, a trial de novo on appeal permits the small claims court to experiment with informal procedures, assured that experimental errors can be corrected on appeal. Finally, an on the record appeal is impossible as no transcript is made of the small claims court hearing.

Section 8.3(1). An appeal should be filed as soon after the date of judgement as possible so that the evidence in the judgement winner's possession remains at his ready disposal. There is no ideal time period after a date of judgement within which an appealing party should be required to file an appeal. Thirty days, however, while somewhat arbitrary, as any period would be, should give the appealing party adequate time to launch an appeal; any period beyond that might present a hardship to the judgement winner and is thus considered excessive.

Section 8.3(2). An appealing party is required by this provision to pay an appeal fee to the civil court hearing the appeal; the fee should not exceed the filing and service fees required of claimants in commencing actions in the civil court. The appealing party is not required to post a bond in the amount of the small claims court judgement to insure the payment thereof should he lose on appeal. Litigants should not be burdened in protecting their rights when the informal forum of the small claims court has decided adversely to them. The requirement that an appealing party post a bond as a condition precedent to appeal deters litigants, especially impecunious ones, from appealing.

When a judgement has been entered against a plaintiff in an atmosphere of informality, where full representation by counsel is unavailable (Section 7.1(a)), where strict substantive law and procedural rules are not regularly applied (Section 7.3(a), Section 7.3(d)), and where due process rights are not strictly protected, the right to appeal, to secure one's rights in strict accordance with substantive law and due process, should not be encumbered. A judgement bond would burden the exercise of one's right to secure the safeguards of due process on appeal when such safeguards have been denied him in an adverse decision in another judicial forum.

While the plaintiff voluntarily subjected himself to the informality of the small claims court, he has benefitted all parties and the judicial system in doing so and should not be restrained in appealing adverse judgements by the requirement of a judgement bond. The requirement that the appealing party pay necessary appeal fees is the only burden that this provision imposes on the right to appeal.

By proscribing judgement bonds and thereby removing a barrier to appeal, this section undoubtedly makes appeals more available to small claims court litigants. While appeals prolong the resolution of disputes and thus contravene the small claims court's mandate to effect swift justice between disputants, the interests of justice, which guide all small claims court operations, command that the right of appeal be unencumbered and available to plaintiff and defendant alike. The fair resolution of disputes in the small claims court, the financial inability of most litigants to litigate an appeal, however inconsequential the appeal fees, and the natural inclination of people not to pursue adverse decisions on appeal will effectively prevent mass appeals from the small claims courts.

Appendix I

CASE STUDY—SMALL CLAIMS COURTS NEW YORK CITY

The New York City small claims court system is regarded as one of the most efficient and effective small claims court systems in the nation. It has some shortcomings, but provides an excellent case study for states adopting or amending a small claims court act.

The New York system provides an in-court arbitration alternative to the traditional judicial resolution of disputes. It prohibits the use of the court by corporations, businesses and assignees. It even holds evening hearing sessions to accommodate working people. These features help New York City avoid many of the pitfalls of most small claims courts and largely achieve the small claims court objective of providing a convenient forum in which individual complainants can secure prompt resolution of their disputes. The reputation of New York City's small claims courts is further enhanced by its innovative and successful experiment with the Harlem neighborhood court, a local community court serving the community residents who staff it.

There is a branch of the small claims court in each of the city's five boroughs, with two in Manhattan. Like most small claims courts around the country, the small claims courts in New York City—

—grant monetary relief only;
—exercise jurisdiction over both tort and contract cases;
—use simplified rules of practice;
—require only nominal filing and service fees;
—achieve service of process primarily through registered mail;
—enable defendants to demand a jury trial and thus transfer the case to the regular civil court;
—permit defendants to appeal an adverse ruling;
—permit representation by attorneys;
—impose a 21 year age limitation on litigants, with a provision that minors can sue through their parents;
—grant adjournments and continuations sparingly, only upon good cause shown,
—set a hearing date soon after the complaint is filed;
—transfer cases to the regular civil court whenever counter-claims are filed in excess of the jurisdictional amount or whenever the complexity or special nature of the case warrants its transfer;
—discourage multi-claim and multi-party suits;
—are served by rotating judges from the regular civil court; and
—are divisions of the regular civil court.

The monetary limit in the small claims courts in New York City is $500, a figure higher than the national norm of $300. The $500 limit is high enough to cover rent deposits and the cost of most non-vehicular consumer goods and services over which complainants sue, but not so high as to warrant the formalized rules of pleading and practice of the regular civil court.

A defendant may be sued in New York if he resides, maintains an office or works in New York City. The hearing is held, at the plaintiff's choice, in the borough in which he lives or in which the defendant resides or works. Accordingly, a New York City plaintiff could not sue an out-of-state or out-of-city defendant in the New York City small claims court even though the defendant injured the plaintiff in New York City or failed to honor a contractual obligation that was to be performed in New York City.

If a summons cannot be served by mail, e.g., where a registered letter is returned to the court undelivered, the clerk notifies the plaintiff that the summons must be served personally, either by the plaintiff or by a professional process server. If service still proves ineffective, the case is dismissed subject to being refiled. A refusal by the defendant to accept the summons, however, constitutes valid service.

One of the most common criticisms of the small claims court is the ease and frequency with which default judgements are obtained. In New York City, a default judgement cannot be rendered in a pro forma manner because an answer to a summons is not required. Should the plaintiff appear but not the defendant, an inquest, or mini-trial, is conducted at which the plaintiff must supply all necessary substantiating evidence before he can prevail. Upon good cause shown, a defendant suffering a default judgement may have the judgement reopened or vacated within a prescribed time after it has been rendered. Failure of service or fraudulent practice by the plaintiff constitute good cause to vacate a default. The court can do the same on its own motion. Unwarranted default judgements should be minimized by the judge's looking into the circumstances of the service upon the defendant and the transactions or events prompting the suit.

The judges and arbitrators in a New York City small claims court commonly reserve judgement upon a case for a few days. Their decisions are relayed to clerks who in turn relay them to the litigants. The delay in judgement is prompted not so much by the complexity of the cases but by the court's efforts to avoid the resentment that an immediate decision might cause between the parties while they are still together before the court.

Collection difficulties are a problem of the small claims court in New York City. A study of the New York City small claims court undertaken in October, 1973, found that 31% of the judgements or settlements received in the two Manhattan courts over a nine month period were not collected. A more dramatic illustration of the problem is evidenced by a finding by Ellen Beth Siegel and Robert Atwood that only 5,947 of the 20,925 judgements awarded in the small claims courts from July 1, 1969 to June 30, 1970, are listed with the courts as being collected.

The scenario a judgement winner faces in collecting his judgement is as follows: Upon receipt of a judgement, or after a defaulting defendant has been informed of an adverse judgement, the plaintiff is required to give the defendant 10 days to pay the judgement. If the defendant has not paid within the prescribed period, the plaintiff may then try to personally collect the judgement. If those efforts fail, the plaintiff has access to a city sheriff or marshal, who are empowered by law to collect the judgement. The plaintiff pays the marshal or sheriff a $10 collection fee in advance, returnable only if the judgement is collected. The plaintiff must provide enough information about the judgement debtor to enable the sheriff or marshal, who have power to attach non-exempt personal property and to garnish wages, to effect collection. Without such information, the sheriff or marshal is unable to collect the judgement. Of the 31% uncollected judgement figure previously mentioned, most were handled by sheriffs or marshals.

Mention should be made of the different systems under which marshals and sheriffs function. As civil servants, sheriffs receive a set salary and are consequently motivated to pursue small judgements with the same alacrity with which they pursue large judgements. Marshals, on the other hand, are mayoral appointees and receive a fixed percentage over the face value of the judgement they collect; consequently, marshals are not inclined to spend time collecting judgements which, if collected, will earn them insignificant amounts compared to larger judgements.

Commentators proffer a spate of suggestions to cure the collection woes of judgement winners. The court should take a more active role in collecting the judgements they render. Unlike that which happens in New York City, decisions should be handed down in the presence of the parties, so that the court could, firstly, gather collection data from the defendant, i.e., detailed information on the type and location of leviable or garnishable assets, the defendant's work address and the names and addresses of relatives, secondly, establish a payment schedule or plan; and thirdly, secure a sworn statement from the defendant that he would, under threat of contempt of court (monetary fines only), pay the judgement. Funds accumulated from contempt citations would pay the salary of the full-time court judgement collector. Corporations and businesses would have their licenses or charters revoked for repeated refusal to honor judgements. Additionally, denial of the use of the small claims court would be a further price an uncooperative defendant would pay for refusing to pay the plaintiff. New York City's collection problems are not as severe as those plaguing some other major cities, due perhaps to the conscientious efforts of sheriffs and the relatively low incidence of default judgements, notoriously uncollectible, in Harlem's accessible and convenient community court, but the 31% uncollectible judgement figure represents a severe inadequacy in the system and deprives the court of much of its effectiveness.

While attorneys are permitted in the small claims court and must represent corporate defendants, they appear infrequently and have little effect when they do. Defendants were represented by counsel in only 13.7% of the total cases filed in the judicial year 1969-1970. The difference in the judgements awarded plaintiffs from defendants who were represented and those who were not amounted to only a few dollars. Aside from the psychological support they provide timid litigants and the expertise they possess in discerning the issues and the applicable law posed by any law suit, lawyers, in balance, are probably more counterproductive to the court's mandate to secure justice in an informal and swift fashion than they are productive in securing a favorable judgement.

The relative effectiveness and uniqueness of the small claims courts in New York City stem from their convenient hearing sessions, arbitration alternative, prohibition of corporate plaintiffs and community court in Harlem.

A court that is not open simply is not used. And a court that maintains only regular working hours is constructively closed to many potential litigants who can ill afford to lose work time and money to prosecute a relatively small claim. Incredibly, very few small claims courts across the country are open on Saturday or evenings when people could most conveniently use them. Some small claims courts recognize reality and conduct Saturday and/or evening sessions. None are as convenient or open as the New York City small claims courts, which hear cases Monday through Thursday evenings from 6:30 p.m. to conclusion—often as late as 1 a.m. Untold numbers of litigants, who otherwise might not have pursued their grievances, avail themselves of these accommodating courts. A model small claims court, responsive to the needs of the community it serves, would schedule hearings at times consistent with the convenience and demands of the community.

The high volume of cases processed by the small claims courts in New York City is further attributed to the court's utilization of arbitration as a voluntary alternative to adjudication by a judge. While the District of Columbia, Florida, and Minnesota have in-court voluntary arbitration mechanisms, arbitration has been employed most successfully in New York City. The arbitrators are New York City attorneys who volunteer their services to the courts. The administrative judge of the courts assigns arbitrators to hearings—generally an arbitrator will sit in one hearing session per month—from a list of lawyer-arbitrators compiled by the local Bar Association. No shortage of volunteers exists in a city as large as New York City.

Prior to reading the court calendar to the waiting litigants before the evening hearings commence, the court clerk informs them that they have the choice of an arbitrator or the presiding judge to hear their case, that the arbitrator's decisions are final and not appealable, while the judge's decisions are appealable, that the arbitration is conducted in a small room or area without a record of the proceedings, while the judge hears cases in open court with a stenographic record of all that transpires, and that litigants choosing arbitration will be heard more expeditiously than those choosing the regular courtroom process.

Both parties must agree to arbitration. Once they have consented to arbitration, they cannot withdraw before the hearing begins without the consent of the other; once arbitration actually begins, the parties cannot withdraw even with mutual consent.

While an arbitrator's decision is unappealable, it is reviewable by the presiding judge when a party can demonstate that an arbitrator was biased or exceeded his authority.

That cases are more readily heard by arbitrators than by presiding judges is a strong inducement to litigants to choose the former over the latter. While the arbitrators spend as much time on each case as does the judge, only one judge, but numerous arbitrators, conduct hearings every session. Additionally, much of the judge's time is consumed in hearing cases that are reconvening after prior adjournments; the arbitrator handles cases that are before the court for the first time.

The arbitration mechanism poses an extremely appealing alternative to the regular courtroom procedure. Arbitration is fast (like the courtroom process) and flexible (the arbitrators are volunteers, and as many can be assigned to a session as necessary); it unclogs dockets and, as part of the court and occurring within the court ambiance, enjoys legitimacy in the eyes of the public; and finally, it is final, disposing of the case without any appeal. That arbitration too often results in compromised decisions and is too often forced upon litigants are not inherent inadequacies in the system but faults that lie with those who administer it.

Undeniably, few communities can draw on the pool of pro bono attorneys that prevails in New York City. Smaller communities, however, would need fewer arbitrators and could augment the number of lawyer-arbitrators by soliciting the volunteer services of lay experts in the consumer field; where too few arbitrators still exist, a nominal fee could be offered to secure their assistance. Arbitration accounts in no small part for the effectiveness of the small claims courts in New York City; its effectiveness as a dispute resolution alternative, however, is not peculiar to New York City, but would be an effective adjunct, in whatever adaptive form it was used, in any small claims court system.

Perhaps the most common and vitriolic criticism leveled against small claims courts is their failure to serve the individual consumer for whom they were established; instead, the criticism goes, the courts have become glorified collection agencies. In many places, especially in the District of Columbia, collection agents and assignees have come to dominate the court in terms of the percentage of cases filed. Many individual consumers view the courts as oppressors rather than as helpers.

New York City has responded by prohibiting corporations, associations, insurers and assignees from suing in the small claims court. The courts grant de facto recognition to small business plaintiffs, however, and permit them to sue in their individual names. While the small claims courts are consequently the exclusive domain of individual plaintiffs, to the satisfaction of those supporting it as a poor man's court, nagging and unanswered problems remain. Where and how do corporations, assignees, associations and insurers redress their grievances? The New York City small claims courts, in barring corporate plaintiffs, have deflected the problem elsewhere. Corporations possess the resolve and money to prosecute their claims in a regular civil court, where the individual defendant encounters costs far in excess of those he would encounter in defending himself in the small claims court; alternatively, collection agencies oftentimes employ underhanded street tactics to collect their claims. No reliable statistics have surfaced regarding the fate of these claims. In either case, the sued individual is better off resolving the case in the small claims court than elsewhere. More fundamentally, little reason exists for denying corporations a speedy, inexpensive and fair forum in which to voice their grievances.

The answer lies not in creating one problem by resolving another in barring corporations from the small claims courts, but in resolving the problem and avoiding another by permitting but controlling corporations in the small claims courts. By a mass filing limitation or a separate corporate plaintiff division within the small claims courts, corporations would not dominate the court. Additionally, abuse of court procedures would discourage corporations from misusing the court. While the small claims courts in New York City effectively serve individual litigants, the court is unresponsive to the entire community, of which corporations, assignees, associations and insurers are part.

An innovative experiment is underway in the New York City small claims courts system with the community court in Harlem. The cases are heard in an old district courthouse, recently serving as a job-training center, in the Harlem subcommunity. The procedures and rules of the small claims courts in New York City likewise prevail in the Harlem court.

The Harlem court has many advantages to the community it serves; residing in the same community in which the court is located, litigants are less intimidated and less inconvenienced by appearing in the local court than they would be if they had to appear in a court downtown. The court's accessibility increases its use and decreases default judgements.

The Harlem Community Court is further unique in employing paraprofessionals, called Community Advocates, who are trained in consumer affairs and generally reside in the community in which the court is located. The Community Advocates serve the court and the community in many ways, including assisting the litigants in preparing their cases and publicizing the court in the community; consequently, the court becomes more accessible and more understandable to the community.

The success of the community court in Harlem in attracting litigants and disposing of a high volume of cases warrants an increased role of community courts and community advocates in future small claims court systems.

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Appendix II

CASE STUDY—SMALL CLAIMS COURTS LOS ANGELES

The Los Angeles small claims court system provides a forum in which complainants can generally obtain speedy, inexpensive, effective and fair resolution of their complaints. It provides a useful guide for any state wishing to develop a model small claims court.

In Los Angeles the small claims court is a division of the municipal court. The main court is located in the downtown county courthouse, with four branch courts located elsewhere in the city. No attorneys are permitted to appear before the court.

The court exercises jurisdiction over both tort and contract cases where the amount in controversy does not exceed $500. The $500 limit is considerably higher than the national average of $300. This higher limit is sensible considering the greatest percentage of claims fall in the $400 to $500 range.

Suit may be brought where the contract was to be performed, where the injury occurred or where the defendant resides at the time suit is brought. By providing a choice of locations where a claim may be filed, the Los Angeles system does not unreasonably inconvenience either the plaintiff or the defendant. If suit is filed in the wrong court, the action will be dismissed, requiring the plaintiff to refile in the proper court.

Any person or organization can sue in the small claims courts. Corporate plaintiffs must appear via a proper representative (not a lawyer) who has knowledge of the facts of the case. To prohibit excessive use of the small claims courts by collection agencies, assignees of claims are not permitted to sue in the Los Angeles small claims courts. As a result, corporations must collect claims in their own names rather than by assigning overdue accounts to collection agencies. This in turn forces corporations to establish internal collection departments to process and handle collecting problems.

Summonses are served by registered mail or personal delivery, at the option of the plaintiff. Personal service is used most often, with marshals or private process servers doing the service. Corporations can be served only by personal service. The small claims court oversees the service of summonses by marshals to prevent defective and shoddy practices.

The small claims courts in Los Angeles strongly encourage plaintiffs to file their claims in person so that the court can obtain all information necessary to effect service on the defendant. On an average, less than 3% of the claims are filed by mail. Upon receiving the plaintiff's statement of his claim, the clerk of the small claims court prepares an affidavit containing the plaintiff's pleading.

All hearings are scheduled for 30 days from the date the complaint is filed. This insures swift resolution of disputes and provides enough time to permit more than one attempt to serve a summons if attempts prove unsuccessful. If the defendant is served within 5 days of the scheduled hearing, the case is automatically continued 10 to 30 days unless the defendant waives notice. For the convenience of the plaintiff, the court permits him to request a hearing date or request a different date if he is dissatisfied with the scheduled date.

Continuances are automatically granted if requested by the defendant more than 10 days before the trial. They are granted during the trial only if both parties concur. Approximately 15% of the cases that go to trial are continued.

By requiring the accurate identification of defendants, by minimizing the frequency and length of continuances, and by scheduling hearings within a relatively short period of time after the filing of a claim, the Los Angeles small claims court system insures the speedy resolution of disputes.

The expense of filing a claim is minimal. The fee to file a complaint is $2. City marshals charge $6.21 to serve a summons personally, and $1.50 to serve it by mail. A winning plaintiff is generally awarded such court fees as part of his claim.

Simplified pleadings and procedures are followed in all cases. Technical rules of evidence are followed within reason, but the judges admit such evidence and conduct such outside investigations as are necessary to effect substantial justice between the parties.

Counter-claims by a defendant must be filed by affidavit and a summons must be served on the plaintiff at least 48 hours before the hearing. The preparation of counter-claim affidavits are governed by the same procedures that apply to the plaintiff's affidavit. Counter-claims in excess of $500 cannot be tried in the small claims court. They are transferred to the regular civil court by the defendant's filing a complaint against the plaintiff in a regular court and then filing a motion in the small claims court to transfer the entire case to the regular civil court. A defendant cannot transfer a case to the regular civil court by requesting a jury trial.

Default judgements are entered immediately if the defendant fails to appear for a hearing. The statute contains no provision for vacating a default judgement, but in practice a small claims court conducts an inquiry when the defaulting defendant claims he was not served, or was served improperly.

Only a defendant may appeal an adverse decision. The plaintiff is bound by the court's determinations, because he is the one who elected voluntarily to use the small claims court. By appealing a decision, the defendant obtains a new trial in a court of general jurisdiction. He incurs a $14 filing fee and must post a bond in the amount of the judgement.

In rendering judgements, the court occasionally sets up a judgement payment schedule, payable by the defendant on whatever terms or conditions the case requires. The judge assumes the burden of devising a payment schedule only when he finds that installment payments are necessary.

A judgement of the small claims court is enforced in the same way as any civil court judgement in Los Angeles. The loser pays the judgement directly to the winner; the plaintiff contacts the defendant if the judgement is not satisfied in a week or so; if the defendant still refuses or neglects to pay, the plaintiff requests the court to issue a "writ of execution". The writ empowers a marshal to garnish the defendant's wages or seize his property. California law requires prepaid fees for the collection of judgements. The fees range from $5.70 for a garnishment of wages to $400 for a business levy. The winner ordinarily is awarded all costs incurred in collecting the judgement. Little statistical evidence exists on the effectiveness of collection efforts in Los Angeles, but judgement collection presents the same problem in Los Angeles as it does in most small claims courts throughout the country.

Municipal court judges are assigned to hear small claims court cases by the Presiding Judge of the small claims court. The Presiding Judge reviews all motions in contested cases, and assigns remaining matters to a municipal judge who hears the case prior to hearing the non-small claims cases from his regular calendar of cases. This system assures prompt handling of a large volume of cases by experienced civil court judges.

Lawyers may appear for themselves as plaintiffs in the small claims court, but they are barred from appearing as counsel to other persons. Consequently, lawyers cannot participate in filing, prosecuting or defending a claim. The courts of California have held that the ban on attorneys in the small claims court does not constitute a denial of due process. The plaintiff voluntarily chooses the small claims court, knowing it prohibits attorneys. If he had wished to avail himself of counsel, he could have sued in a court of general jurisdiction. The defendant, while denied counsel in the small claims court, can always secure the assistance of a lawyer in a new trial, which he can obtain by appealing the small claims court decision.

The Los Angeles small claims courts have been relatively successful in resolving a large volume of disputes in a swift and effective fashion. One study shows that plaintiffs won 85% of the cases that went to trial.

Whether more people would use the system if attorneys were permitted, or whether the percentage of winning plaintiffs would change, and whether justice would be better served if defendants could be assisted by counsel are issues which must be answered in fashioning a model small claims court. The California experiment indicates that a small claims court system can operate efficiently and successfully without attorneys. What is not clear is whether the small claims court would operate even more effectively and efficiently with attorneys. Limited use of attorneys in the small claims court could prove the best way to exploit their advantages while avoiding their disadvantages to a small claims court system.

Appendix III

MODEL CONSUMER JUSTICE ACT A SYNOPSIS

The Model Consumer Justice Act (hereinafter "the Act") establishes a statewide network of accessible and convenient small claims courts which would be structured to resolve all disputes involving $1000 or less in an expeditious, economical, informal, fair and effective fashion.

The Act provides for at least one small claims court in each county in the state (branch courts would be available in large metropolitan areas), and thus would insure that all disputants would have ready access to the convenient forum of the small claims court. The Act would establish a small claims court with flexible court hours, including evening and Saturday hearing sessions, and flexible court locations, including suitable community facilities, in order to be convenient to those who would use it; the convenience of the court would be further facilitated by providing for the court clerk and court ombudsman to assist litigants in filing their claims and preparing their cases for hearings.

Open to all disputes involving $1000 or less, including contract, personal injury and personal property suits, the court would be able to accommodate all small claims arising in today's increasingly costly marketplace.

One of the main features of the Act is its provision for expeditious handling and resolution of the disputes that would come before it. All claims filed in the court would be quickly brought to the attention of the opposing party and scheduled for hearing within 45 days of the filing date. Delays in hearings would be discouraged and short-termed when granted. Finally, court judgements would generally be rendered at the termination of the hearing session while the parties were still before the court.

The Act would impose little expense on those who use the court. Filing and service fees would be minimal, rarely exceeding $10 in total, and collection fees would amount to only 5% of the judgement entered. Such fees would be assessed against the losing party and would be altogether waivable for indigent parties and for other good cause.

Informal procedures, practices and rules would govern small claims court hearings. Faced with understandable proceedings, the parties could adequately represent themselves without the necessity of attorneys; the resolution of disputes would be further expedited.

The Act is designed to insure the fair disposition of cases for all parties. The court would be open to individual and non-individual claimants alike, but a fair allocation of court time between them would be provided. There would be limits on mass filings, so that the court would remain accessible to all. Parties would be provided with the opportunity to settle their disputes through a pre-hearing court-sponsored mediation process. In-court arbitration before laymen would be available as an alternative to a trial before a judge for those wary about appearing in full court. Neither party would be disadvantaged by lacking the representation of counsel, as lawyers could not appear in behalf of parties in a small claims court. However, both parties could use the assistance of lawyers in preparing their cases, and the court would attempt to provide court-appointed attorneys for indigent parties. The small claims court hearing, with the court available to assist in the development of pertinent facts, would enable the parties to state their claims or defenses in full. Default judgements against non-appearing defendants would be granted only after a full court inquiry into the reasons for the defendant's failure to appear and the merits of the plaintiff's claim. Finally, the court would resolve the dispute in order to accomplish substantial justice between the parties in accordance with law, and would fully explain the decision to the parties.

The Model Consumer Justice Act is designed so that small claims courts would effectively resolve all small claims. The court could resolve all claims between the parties in one hearing, whether related to the claimant's original claim or not. A court could order whatever relief the just resolution of the case would require, including monetary damages and equitable orders to repair, replace, rescind, reform or refund. Finally, the court would administer a court collection apparatus designed to collect the judgements it renders.

The efficiency of the Act would be facilitated and maintained by the local advisory functions of court ombudsmen and community advisory panels and the statewide supervision of a state agency.

Finally, the Model Consumer Justice Act, in order to maximize the use of small claims courts, would provide statewide publicity of the court through the promotional efforts of court ombudsmen, community advisory panels and the state supervisory agency.

STATEMENT OF MASSACHUSETTS PUBLIC INTEREST RESEARCH GROUP, INC.

COMMENTS ON SENATE 957

The Massachusetts Public Interest Research Group (Mass PIRG) is a non-profit student organization, inspired by consumer-advocate Ralph Nader, and devoted to issues of public concern. PIRG was designed to generate research, legislation and social action in areas such as the environment, health and safety, civil rights and consumer protection.

PREFACE

As a preface to comments on Senate 957, the Consumer Controversies Resolution Act, these comments will address the issue of whether the funds provided for in this bill should be applied to the small claims courts exclusively, or to complaint resolution mechanisms in general. It is evident from the drafting of earlier versions of this bill that primary emphasis was placed on aiding in the establishment and reform of small claims courts. The expansion of the bill to include aid to complaint resolution mechanisms in general represents a significant alteration of the bill, and one which Mass PIRG applauds.

Mass PIRG has been involved in issues of small claims court reform since 1972. Mass PIRG has written and published a "how to" guide for use of the Massachusetts small claims courts; established student run counseling centers to advise consumers on the use of small claims courts; filed legislation in the Massachusetts legislature to raise the jurisdictional limit, open the courts at night and on Saturdays and improve the consumers' chances of collecting a judgment once it is issued by the courts; and has been a major advocate for administrative reform of the small claims courts. Our commitment to small claims court reform has been neither small nor passing. And our belief that the small claims courts present a valuable last resort to many consumers who have been injured in the market place is unaltered.

However, our study of the problems and costs associated with unresolved consumer disputes has focused our attention in a second direction: consumer complaint mediation. Complaint mediation, the interjection of a trained third party into a dispute situation, can provide partial solution to the tremendously expensive problems associated with consumer disputes. Mediation can be efficiently delivered at a low cost to consumers. It can also be effective. Mass PIRG studies of the major complaint mediation programs in Massachusetts found that a mediation program staffed by professionals can provide a three or four to one return on tax dollars spent in the form of refunds and repairs for consumers. Other groups relying on volunteer staff can demonstrate as high as a ten to one return on operating expenses. On a budget of $180,000 the Boston program services over 31,000 consumers a year, and saved Boston consumers over half a million dollars in 1975. Mass PIRG's own examination of the files of Boston's complaint mediation program found that nearly three-quarters of the complaints mediated were ultimately resolved to the consumers satisfaction. Other groups have experienced a resolution rate at or near this level.

In addition, mediation programs organized either by government or consumers provide a valuable basis for the low cost expansion of citizen consumer protection activity. In Massachusetts these groups have adopted consumer advocacy roles in addition to their complaint resolution functions. This activity has included cooperation with the Attorney General's office in identifying patterns of fraud, presentation of testimony on legislation and development of a program of consumer education. The potential for involving consumers in a community based and funded mediation program represents a significant spin-off benefit of the program proposed in Senate 957.

Mediation is a new concept. Its ability to resolve as many as 75% of the consumers' complaints mediated, marks it as a valuable mechanism for the resolution of consumer complaints. It also presents the possibility of involving consumers in solving their own problems and of providing a valuable service at a low cost. A seed money program, establishing model programs, could well germinate into state-wide networks of complaint mediation centers, an accomplishment which would have a significant impact on the costly problem of unresolved consumer complaints.

The small claims courts, on the other hand, have been in use in the United States since the early part of this century. As those who have scrutinized the small claims courts know, there have been some major failures of the "people's

courts". In many states the small claims courts remain underused by consumers and overused by businesses who see the small claims court as an inexpensive mechanism for the collection of consumer debts. These problems are real and pressing.

Yet, as anxious as Mass PIRG is to see the implementation of an efficient and effective small claims court program in every state, we do hold certain reservations concerning the appropriateness of addressing limited federal funds to this aspect of the consumer dispute problem. There are three factors which suggest that this kind of a federal money program would have a limited effect if the monies are spent primarily on the small claims courts.

First, even if all reforms are accomplished the small claims courts potential effect on consumer disputes is limited. The small claims courts are and will remain a relatively expensive mechanism for the resolution of consumer disputes. The cost is real both in terms of dollars and the demands on consumers. The dollar costs of bringing a small claims case, although small to the litigant, are subsidized by the state and thus borne by the taxpayers. The cost to the plaintiff in terms of time, travel expenses and lost pay is also significant. In addition, because the small claims courts are a litigation forum requiring the consumer plaintiff's presence, there are significant unavoidable barriers to consumer use of the courts, many of which are reflected in the costs described above. Finally, there are unavoidable psychological barriers to use of the small claims courts. Litigation represents a significant escalation of a consumer/merchant dispute, requiring that the consumer actually confront the merchant in open court. It also requires an ability to organize evidence and articulate a claim. Often these skills are ones which the consumer has not had the opportunity to develop. Unless there is a massive advertising campaign to inform consumers of the courts, a formal pre-trial counseling program and a general education program of consumer self-advocacy the small claims courts are in danger of retaining their reputation as an effective forum only for the articulate and educated consumer.

In addition to these problems, which raise serious questions about the role of the small claims courts in resolving a significant number of consumer disputes, it appears that the nature of the problems faced in most states by advocates of small claims court reform are not particularly susceptible to monetary solutions. The small claims courts themselves are relatively inexpensive to initiate because they are merely an adjunct of the regular civil session of the court. In fact, Mass PIRG's experience indicates that the real barriers to the establishment and reform of small claims courts are political rather than budgetary. Lawyers are opposed to the establishment of small claims courts, judges and lawyers do not want to work on Saturdays or at nights, sheriffs and constables who serve process in ordinary civil cases see expansion of the jurisdiction of the small claims courts as threatening their incomes, etc.

Secondly, the majority of reforms needed by the small claims courts today are, in fact, procedural in nature and require little or no money to implement. Separate consumer and business sessions, filing by mail, improved collection, maintenance of an informal atmosphere, and limiting the role of attorneys, can all be accomplished with a minimum of expense.

These reform problems are, in our opinion, problems which should be addressed by local consumer groups bringing pressure to bear on their state legislature and the administrators of the small claims courts. One of the biggest barriers to small claims court reform is that consumer groups have not made it a priority and have not been able to build a coalition capable of overcoming the parochial objections raised to the adoption of small claims court reforms.

Finally, S. 957, as presently drafted, provides no concrete solutions to the most pressing problems of the small claims courts: defaults and the inability of consumer plaintiffs to collect judgments. In fact, many advocates of small claims court reform are hard put to convincingly describe a solution to the default and collection problems that plague today's small claims courts. It is doubtful that this bill will affect the important small claims court problem areas unless it provides specific requirements such as mandatory jurisdictional increase to $2,000, off-hour sessions or judgment collection programs.

In summary, while a federal program of grants and cost sharing programs may accomplish some reform of the small claims courts and may be effective in prompting the initiation of small claims courts in states where they presently do not exist, Mass PIRG feels that federal money could be most productively

spent on the development of complaint resolution programs which would include both a forum for voluntary resolution of consumer complaints through mediation and a forum providing for binding resolution of consumer disputes incapable of mediation, like the small claims courts.

As presently drafted, Senate 957 will establish such a program.

These comments now turn to specific issues raised by the bill now before the committee.

First, the present draft of S. 957 is notable for its failure to insure that consumers will be in control of the programs established. This point is important for non-judicial mechanisms which are created with the assistance of funds provided by this act. Section 5(d)(3)'s requirement that consumers must "have participated in the development of and have commented on" the state plan represents only a minor assurance of consumer involvement. Special provisions for consumer participation should be included in S. 957 both because it is consumers who will be directly affected by the programs and because their support will be critical to the continuation of these programs once federal funding has been withdrawn.

Another important reason for specifying consumer involvement at all levels of the program including formation, evaluation, direction and operation, is the need to insure that business does not capture this consumer protection effort as it has so effectively captured other state and federal programs. The Better Business Bureau complaint resolution effort has been marked by a concentration of funding on image advertising and a failure to act as anything more than a clearinghouse for consumer complaints; providing post office service to businesses by receiving and relating consumer complaints but rarely, if ever, acting as an effective mediator. With their inherent conflict of interests, there is no point in pretending that programs run by the business community could fulfill the role of a consumer advocate.

The funding provision described in Section 5(i)(2) which would allow some full grants and 70% funding for state programs, fails to provide for a gradual state take over of the program funding. We support a cost sharing arrangement which would require incremental assumption of the program costs by the state. For instance, a declining federal share of costs could provide for the following: a first year grant of 100%, financial aid the second year of 70%, third year aid of 50%, and so on. The ultimate goal should be to phase-out federal funding and establish an independent state program.

This section also fails to provide a time limit on the funding grants under Section 6(b). A time limit of two years for proposed grants should be effective in guaranteeing rapid and conscientious completion of program goals.

Section 5(e) 4 C, D, and F requires what could be a significant state expenditure to gather the information needed to qualify for a state grant. This expenditure could act as a barrier to those very states which would be most attracted by the prospect of federal funds for the improvement of their dispute redress mechanisms. In addition, several of the pieces of information required seem irrelevant to the determination of eligibility. The most onerous appear to (e) (4) (C), (D), and (F).

On the other hand it may be very useful for the federal grant to require that, once funded, each program keep records which collect this information on the complaints falling within its jurisdiction.

Finally, as noted in the preface to these comments, the bill continues to bear the markings of a small claims court reform measure. In several sections requirements are set out which relate only to the small claims courts. The final draft of S. 957 should clarify which requirements apply only to small claims courts and which apply to all methods of complaint resolution. Specific areas of confusion exist in Section 6 (e) (4) (C), and (F); and Section 7 (b) (6) (A), (D), (E), and (F).

NEW YORK COUNTY LAWYERS' ASSOCIATION,
New York, N.Y., April 18, 1977.

Hon. WENDELL FORD,
Committee on Commerce, Science, and Transportation, U.S. Senate, Old Senate Office Building, Washington, D.C.

DEAR SENATOR: Thank you for your request for comment on the proposed Consumer Controversies Resolution Act, S. 957, introduced by Senator Ford on March 9th. The Committee on Federal Legislation of the New York County Lawyers Association has strongly supported legislation along these general lines in

the past (see enclosed report No. F–4 of March, 1972). Consequently, although the Committee has not had time to complete action on this bill, I am enclosing a copy of our prior report and some purely personal additional comments which have not been acted upon by the Committee.

The bill seems to be badly needed because of the large number of unresolved consumer complaints and the difficulties encountered by consumers in obtaining legal assistance. Without counsel, the consumer is at a severe disadvantage in a conventional judicial forum.

One suggestion made by some of our Committee members in our preliminary discussions on the bill would be that consumers should be required to contact the company involved initially to try to settle the dispute, before invoking the aid of the mechanisms set up under the Act. However, it was not suggested that return receipts for mailings or specific time limits be established, as this might tend to disadvantage the very consumers who most need help and would be confused by any technical requirements.

A second suggestion was that any experimental or private programs should not involve pre-commitment of consumers to binding arbitration by means of contracts entered into at the time of sale (when the implications are not likely to be clearly understood). Instead, arbitration should be offered to the consumer as an alternative at the time the dispute arises (see enclosed report by the Special Committee on Consumer Affairs of The Association of the Bar of the City of New York on this subject).

Thirdly, it was suggested that some mechanism be created in this legislation or otherwise to deal with the numerous complaints involving out-of-state firms, touched upon in another enclosed report of the Association of the Bar. If the precise proposal made is not considered workable for any reason, no doubt others could be developed to deal with this most serious problem. At present, local small claims courts are not available for cases involving merchants located in distant states. No more clear situation for the exercise of the Congressional power to regulate interstate commerce could be conjured up in my opinion.

In my own opinion, some form of rulemaking is important to further define the types of procedures responsive to national goals as set forth in section 7 in the light of experience. These goals are necessarily general, and may not be sufficiently precise to ensure effective compliance with their objectives. The Federal Trade Commission might be an appropriate agency to formulate such rules. In that case, the notice-and-comment rulemaking exemplified by Title I of Magnuson—Moss Warranty—Federal Trade Commission Improvement Act might be more expeditious than the procedure for binding rules applicable to private parties under section 5 of the FTC Act as set up by Title II of the same Act.

Of course, the agency administering the grants need not be the same as that formulating the rules, and I believe that in the past the FTC has expressed reluctance to undertake the grant-making function under this legislation. Some other separate agency might, of course, be given such duties even if the FTC were given the rulemaking authority suggested.

Turning to the goals themselves set forth in section 7, it is gratifying to note that the suggestion made in the County Lawyers Committee report of 1972, to permit suits against as well as by consumers in the informal tribunals contemplated, has been adopted in section 7(a)(6)(D). The caveat contained in the 1972 report, however, has not yet been incorporated in the legislation.

"In order to prevent the swapping of small claims courts designed to serve consumers as plaintiffs, there should be separate parts for cases where debt collection cases against consumers are heard, as distinct from consumer-plaintiff cases." Report #F–4 (1972), p. 2.

In addition, consideration might be given to requiring that the fee normally charged for debt collection cases in the otherwise applicable estate court forum should apply. The reason for this is that small claims courts often charge low fees which are subsidized to enable the "little guy" to use the courts. This subsidy should not be carried over to other type of suits. If it were, this could lower the "threshold" of when it is cost/effective for creditors to sue for small debts, and result in an increase in the number of collection suits. In New York, proposals to permit corporations to sue in small claims courts were vetoed by the Governor a few years ago because of this problem; subsequent bills provide for the fee otherwise applicable to be paid in collection suits to be brought in small claims tribunals.

Presumably it was not the intent of section 7(a)(6)(D) to exclude a state system which reserves its small claims system solely for consumer plaintiffs, but

rather to allow collection cases to be included as discussed above if the state so elects. If this is indeed the intent, the language may require revision. As written, states like New York which ban corporate plaintiffs entirely from small claims tribunals might be excluded from the legislation.

Taking these various points into account, section 7(a)(6)(D) might be amended to read:

"(D) permit the use of consumer controversies resolution mechanisms by assignees or collection agencies or plaintiffs in debt collection suits generally only in a manner consistent with the purposes of this Act, including but not limited to (i) requiring collection suits to be heard at a different time or place than cases involving consumer plaintiffs, and (ii) requiring plaintiffs in collection suits to pay the otherwise applicable fee payable in the appropriate court other than the consumer controversies resolution mechanism: *Provided* that a state system shall not be deemed not responsive to national goals because it excludes all debt collection cases or cases involving corporate plaintiffs from a consumer controversies resolution mechanism."

In regard to judicial review, in my opinion such review should be sparingly granted where funding for state plans is involved. First, political restraints are fully applicable to denials of funding to state plans. The state delegation in the Senate and House can be called upon instantly in case of unjust denial of an application, and congressional oversight constitutes a check upon arbitrary denials. Second, the chief risk is not arbitrary denials. Rather, the biggest danger is approval of state plans that do not adequately serve the goals of the Act. This is so because all political subdivisions need money. Wherever fruits of the federal taxing system are offered, the temptation is to pluck them with as little additional expense as possible! Thus efforts are sure to be made in some states in effect to get the money for existing inadequate redress systems without changing them much.

The greater the finality of a denial (the less review is available), the more "clout" the administering agency will have to require upgrading of the system as a condition to a successful re-application for funding.

Judicial relief at the suit of a private individual or organization would in my opinion be inappropriate in case of a denial of this type. Indeed I would doubt that the courts are best equipped to rule on such denials at all. *Massachusetts* v. *Mellon*, 262 U.S. 447 (1923) is still sound in denying where there is no individualized harm and where the plaintiff is challenging decisions on how to spend tax funds. It has been eroded only where individualized harm is present, hardly likely under the Act involved here.

If judicial review is provided, testimony will probably be available at any hearing held by the court, chiefly from state and federal officials and sophisticated consumers, not from those who need the help of effective consumer controversy resolution mechanisms the most. The chance of getting the right answer from such a hearing less than the chances of getting it from the grant-making agency in the first place in my opinion.

If I can be of further assistance, please do not hesitate to call on me.

Respectfully,

RICHARD A. GIVENS,
Chairman, Committee on Federal Legislation.

REPORT NO. F–4—S. 1602

NEW YORK COUNTY LAWYERS' ASSOCIATION,
New York, N.Y. March 1972.

Report on S. 1602, 92nd Cong. 1st Sess. (1971) "to provide assistance to encourage States to establish consumer small claims courts."

RECOMMENDATIONS: APPROVED WITH SUGGESTED AMENDMENTS

Small Claims courts afford citizens the opportunity to obtain adjudication of cases without attorneys' fees or many of the time-consuming technicalities of ordinary litigation. As such, they offer a tremendous asset in seeking to deal with the difficult problem of resolving consumer complaints. The importance such courts could have is emphasized by Caspar W. Weinberger, former Chairman of the Federal Trade Commission and now Deputy Director Office of Management and Budget, Executive Office of the President Weinberger, "Consumers and the Congress" 26 Record of the Association of the Bar of the City of New York 699. 704 (November 1971). S. 1602 92nd Cong., 1st Sess. (1971), introduced by Senator

Pearson, would promote development of small claims courts by granting federal assistance in meeting their expenses. We approve this as a constructive step in a vital direction. However, merely providing a small claims forum for claims *by* consumers while leaving suits *against* consumers where they are would leave the main problem untouched. There are hundreds and indeed thousands of the latter for every one of the former.

We recommend amendment of the bill to provide that claims against consumers should be brought in the forum rather than not being brought there in various cases as contemplated by Section 3(b)(2) of the bill, and pertaining attorneys to appear where they are retained rather than prohibiting them. Individuals should be able to appear either with or without counsel. We believe corporate plaintiffs should be required to be represented by counsel to avoid illegal practice of law by collection agencies which, unlike attorneys, would not be subject to discipline in their professional capacity in the event of improprieties.

One of the chief evils which now exists in the practical difficulty of defending a lawsuit faced by a consumer who refuses to pay because he believes he was cheated. Such suits should be brought in a small claims type forum readily available to the citizen and having the following characteristics:

(1) The court should sit as close as possible to the residence of the consumer, and creditors should be required to sue in consumer credit transactions in the court closest to the consumers' residence or where the consumer physically went to consummate the transaction;

(2) The court should sit at night on specified days to accommodate those who work during the day;

(3) Friends of the consumer should be allowed to accompany him if he does not have counsel;

(4) Adjournments at the request of creditors should be only granted for good cause, and discovery proceedings only permitted for good cause;

(5) Service of process by mail should be required in addition to whatever other methods are required;

(6) Summons served on consumers should contain a tear-off business reply card form of answer so that the consumer can obtain a trial without having to go to court simply to file the answer prior to the date for trial, of which adequate advance notice should be given.

If these safeguards could be provided for consumer defendants, an immense step forward toward justice for consumers would be taken.

In order to prevent the swamping of small claims courts designed to serve consumers as plaintiffs, there should be separate parts for cases where debt collection cases against consumers are heard, as distinct from consumer-plaintiff cases.

Respectfully submitted,

COMMITTEE ON FEDERAL LEGISLATION,
VINCENT L. BRODERICK, *Chairman.*

CONSUMER AFFAIRS,
Syracuse, N.Y., April 26, 1977.

RUSSELL SENATE OFFICE BUILDING,
Washington, D.C.

DEAR SENATOR: This Office will be unable to submit testimony on the Consumer Controversies Resolution Act as I had hoped. However, we would like to go on record as supporting the bill. While the overall merits of small claims courts, arbitration, and other means of mediation of consumers disputes are controversial, states and cities should be permitted to develop their own dispute settlement mechanisms suited to their own peculiar needs. Such a program would more effectively implement our own express policy and statutory mandate of trying to first resolve every complaint we receive through "conciliation, conference, and persuation."

I appreciate your help and I hope we'll be in touch again.

Sincerely,

IRA LEIBOWITZ,
Staff Attorney.

COUNCIL OF BETTER BUSINESS BUREAUS, INC.,
Washington, D.C., April 27, 1977.

HON. WARREN MANGUSON,
Chairman, Committee on Commerce, Science, and Transportation, U.S. Senate, Washington, D.C.

DEAR SENATOR MAGNUSON: Thank you very much for your invitation to appear before the Consumer Subcommittee for the purpose of presenting our views on S. 957, the Consumer Controversies Resolution Act.

In reading this bill I was pelased to find that the suggestions which we made when the bill was first introduced were followed in gratifying degree. It would thus appear to be unnecessary and possibly wasteful of the Committee's valuable time for us to offer oral testimony. It may be that there are a few minor points worthy of comment and if so I would prefer to send them to you in written form.

I am appreciative of the invitation you have extended but in view of the above I would prefer not to participate in the hearing on May 5.

Sincerely,

W. H. TANKERSLEY,
President.

BOSTON CONSUMERS' COUNCIL,
Boston, Mass., May 2, 1977.

CONSUMER SUBCOMMITTEE
Senate Commerce Committee, U. S. Senate, Washington, D.C.

DEAR SENATORS: I am writing on behalf of the City of Boston Consumers' Council to urge your support for Senate Bill 957, the Consumer Controversy Resolution Act, which would encourage efforts to reform the nation's small claims courts and develop additional dispute settlement programs.

For the past five years this agency has made consumer complaint resolution its primary activity. By carefully training a staff of consumer investigators (including a number of persons employed under the federal Comprehensive Employment and Training Act) in consumer law, investigation, and mediation techniques we have been able to resolve more than 70 percent of the 32,000 complaints received annually without the need for court action.

At the same time, we have actively participated in public efforts to broaden access to the small claims court and streamline court procedures.

But the benefits of a successful complaint resolution program that does not require going to court are enormous:

Cases can be settled more quickly and at a lower cost.

Disputes are settled more amicably (while many parties go to court only when all other constructive communication has ceased.

Local mediators often develop a clear channel for handling repeated complaints against large merchants that further streamline the dispute settlement process.

Cases that cannot be settled through the intervention of an agency like ours can still be taken to the small claims court at a later date.

Our experiences indicate that the substance and goals of the Consumer Controversy Resolution Act are realistic and worthy of your Sub-committee's strong support.

Please call on me at any time if I can provide you with additional information regarding Boston's experiences with consumer controversy resolution. My staff and I will help in every way possible.

Sincerely,

RICHARD A. BORTEN,
Executive Director.

THE SUPREME COURT OF MINNESOTA,
St. Paul, Minn., May 3, 1977.

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

DEAR SENATOR MAGNUSON: As Chairman of the Committee on Federal-State Relations of the Conference of Chief Justices I welcome this opportunity to com-

ment concerning S. 957, the Consumer Controversies Resolution Act. The subcommittee is to be congratulated for the effort it is making to assist the states in dealing with one of the most difficult problem in the judicial system. While the legislation is directed specifically to consumers' grievances, it has important implications for the more fundamental problem confronting our legal system, the adequate resolution of so-called "minor disputes" of all types. Your initiative is therefore most welcome.

It is important to note that the experience of the state judiciaries with federal grant-in-aid programs has, largely, been limited to experience under the Crime Control and Safe Streets Act which established the block grant programs of the Law Enforcement Assistance Administration. In most states the courts have fared poorly under the IEAA program, receiving less than six percent of block grant funds, on the national average. As a result, the L.E.A.A. program has failed to give adequate consideration to the needs of the courts.

Congress attempted to deal with this imbalance last year by amendments authorizing the judicial leadership of each state to create judicial committees to plan for the courts and by requiring that an "adequate share" of LEAA's funds go to court programs. We do not yet have the experience on which to judge the effectiveness of these amendments, but the Conference of Chief Justices, I believe, regards them as an interim, rather than a definitive, resolution to the complex problems faced in appropriately and effectively channeling federal money to state court systems.

While S. 957 does not involve funding problems as complex as those with LEAA, it is possible that it could lead to similar difficulties for the judiciary. First, the state administrator "designated in accordance with state law" would in most instances be in the executive branch, although it is reasonable to assume that the principal programs for the resolution of consumer grievances in most states are and will remain the responsibilities of the judicial branch of government. Plans draw by an executive agency seem certain to impact heavily on the courts, either directly or indirectly.

In addition, implementation of state plans under S. 957 would appear to require legislative action, both as to substantive law and as to procedure, as well as the appropriation of state funds to meet the high thirty-percent matching requirements. Failure to provide an adequate role for the state legislators has been another weakness of the LEAA program which has required amendment of the Safe Streets Act.

Given this adverse experience with the LEAA, we would suggest that the subcommittee consider amendment of S. 957 to provide that the state administrator be appointed and governed as to policy and administration by a board composed equally of the executive, legislative and judicial branches. Without tripartite planning there is no assurance that the judicial and legislative branches will be involved in such a manner as to assure the development of effective programs and long-range success.

The national administration of the program should be in an agency which has a direct interest in problems associated with the administration of the entire justice system. Whatever the short-term solution, there is reason to believe that the program ultimately should be administered by an independent agency, possibly one organized along the lines of the National Institute of Justice, as now proposed by the American Bar Association.

There is a clear need for improved programs and new resources for the resolution of "minor disputes." Federal funds administered effectively in cooperation with the States could play a needed and significant role in developing these resources and programs. A state judicial system must resolve disputes and controversies of all kinds, and Federal funds should be so employed as to maintain a harmonious balance between the various areas of the system. I would urge that S. 957 be amended to provide for tripartite planning and administration at the State level and to permit its ultimate incorporation into a more broadly conceived Federal program in aid of the States for the overall improvement of their systems.

The opportunity to comment is appreciated sincerely.

Yours very truly,

ROBERT J. SHERAN,
Chief Justice of Minnesota.

NATIONAL RETAIL MERCHANTS ASSOCIATION,
May 10, 1977.

HON. WENDELL FORD,
Chairman, Consumer Subcommittee, Committee on Commerce, Science and Transportation, U.S. Senate, Washington, D.C.

DEAR SENATOR FORD: The National Retail Merchants Association ("NRMA") is pleased to submit its written comments on the Consumer Controversies Resolution Act, S. 957, which is currently being considered by the Senate Consumer Subcommittee.

NRMA is a non-profit voluntary national trade association with approximately 3,000 corporate members operating more than 30,000 retail outlets throughout the United States. As retailers, NRMA members have a substantial interest in legislation, such as S. 957, that affects their relationship with their customers.

S. 957 would encourage the "effective, fair, inexpensive, and expeditious" resolution of consumer dispute through the establishment of appropriate dispute resolution mechanisms that would be easily accessible to consumers, NRMA believes that the goals of S. 957 are laudable, and that both consumers and retailers will benefit from the existence of systems designed to settle disputes quickly, fairly, and inexpensively NRMA therefore supports S. 957 in principle.

While S. 957 represents a significant improvement over S. 2069, last year's version of this bill, certain aspects of the proposed legislation should be modified, as discussed herein. We believe these changes may be made without at all affecting the legislation's intent, or diminishing the consumer's rights under the statute.

In particular, we believe that the bill would be significantly improved by the addition of a provision that would require a consumer to notify a business with which he or she has a dispute, and provide that business with a period of time (perhaps sixty days) to informally settle that dispute before resorting to one of the dispute resolution mechanisms contemplated in the statute. We have no doubt that a great many problems could thus be resolved to the satisfaction of all parties without the necessity or expense of more formal proceedings. NRMA therefore suggests that Section 5(d) of the Act be amended by striking "and" from Section 5(d)(4), renumbering current Section 5(d)(5) as Section 5(d)(6), and adding a new Section 5(d)(5) that would read as follows: "(5) require that the consumer notify the business with which the consumer has a dispute of the existence and nature of the controversy, and afford the business 60 days to resolve the dispute informally before resorting to a consumer controversy resolution mechanism; and"

We also note that the bill fails to require, or even suggest, that the state, in formulating its plans for dispute resolution mechanisms, should consult with the business community. Yet it is the business community which must deal with consumer complaints on a day-to-day basis and will have to work with whatever controversy resolution mechanisms the individual states ultimately establish. It is therefore both equitable and sensible that states consult with the business community in the development of their plans under the statute and the bill should be amended to so require.

NRMA appreciates this opportunity to express its views. We believe that with the appropriate changes, this would be a useful piece of legislation, and we therefore urge this committee to act favorably on our suggestions.

Very truly,

JAMES R. WILLIAMS,
President.

OFFICE OF THE ATTORNEY GENERAL,
Olympia, Wash., May 19, 1977.

HON. WENDELL FORD,
Chairman, Consumer Subcommittee, Committee on Commerce, Science, and Transportation, Washington, D.C.

Dear Senator FORD: I am writing to you and your Subcommittee to express my support for Senate 957, the Consumer Controversies Resolution Act, which you have co-sponsored along with Senator Magnuson of this state and others.

Although I take pride in the effectiveness of consumer protection enforcement in this state, there nevertheless remains much to be done to make the resolution

of consumer complaints more effective. Your proposed legislation would specifically deal with a very basic problem in the majority of small consumer claims, which is the process of resolving these claims. Presently, there are various mechanisms available to the consumers, such as small claims courts, mediation and arbitration, but they are often time-consuming, costly and unintelligible to the consumer.

This legislation should help provide states with the financial and technical assistance necessary to reorganize and streamline these processes.

I therefore wish to commend you and the co-sponsors of this bill and to urge its favorable consideration by your Subcommittee.

Sincerely,

SLADE GORTON,
Attorney General.

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