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## D.C. Consumer Protection Procedures Act

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## D.C. CONSUMER PROTECTION PROCEDURES ACT

“Consumer protection affects everyone. It is particularly vital to the future of our cities, because the chief victims of cheating of consumers are the disadvantaged in our inner cities.”<sup>1</sup>

Recognizing the need for a comprehensive consumer protection agency with extensive jurisdiction and enforcement powers,<sup>2</sup> the Council of the District of Columbia in 1976<sup>3</sup> enacted the District of Columbia Consumer Protection Procedures Act (CPPA).<sup>4</sup> Substantively, the Act is unusually comprehensive because it prohibits twenty-four specific unfair trade practices.<sup>5</sup> In contrast, only fifteen of the forty-nine state consumer protection statutes enumerate prohibited trade practices, and none contain as many prohibitions as the District of Columbia statute.<sup>6</sup> The majority of the forty-

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1. THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK, REPORTS OF COMMITTEES OF THE ASSOCIATION OF THE BAR CONCERNED WITH FEDERAL LEGISLATION, THE COMMITTEE ON LEGAL ASSISTANCE, CONSUMER PROTECTION 45 (1969).

2. As Chairperson of the Committee on Public Services and Consumer Affairs, Councilmember John A. Wilson's top priority was the establishment of a vibrant consumer protection agency. Simon, *Guide to the D.C. Consumer Protection Act*, 2 DISTRICT LAW. 43 (1977).

3. The CPPA was introduced on September 23, 1975. 22 D.C. Reg. 1635 (Sept. 25, 1975). Hearings were held and the Council voted unanimously on January 13, 1976 to approve the bill. Interviews with Victor Simon, Esq., District of Columbia Office of Consumer Protection, Washington, D.C. (Aug. 1976-Jan., 1977) (Mr. Simon was Legislative Assistant to Councilmember Wilson and the Council's Committee on Public Services and Consumer Affairs during the drafting, committee review, and passage of the CPPA). Mayor Walter E. Washington vetoed that bill on Feb. 10 because he objected to the requirement that the agency director, general counsel, and administrative law judge be District residents subject to Council approval. Committee on Public Services and Consumer Affairs, Committee Report on Bill 1-253, the District of Columbia Consumer Protection Procedures Act, 27 (Mar. 24, 1976) [hereinafter cited as Report on Bill 1-253]. Member Wilson introduced a modified bill, 1-253, on March 4, 22 D.C. Reg. 4801 (Mar. 10, 1976), and it was unanimously passed on April 10. Interviews with Victor Simon, *supra*. The Mayor signed this bill and it became law on July 22, 1976. Simon, *supra* note 2, at 43.

The Office of Consumer Protection established by the CPPA evolved from dissatisfaction with the weak mandate and limited authority of the predecessor Office of Consumer Affairs. See Report on Bill 1-253, *supra*, at 4. In practice, the emphasis of that Office was not on forceful consumer advocacy but rather on consumer education and the promotion of an amicable environment for merchant and consumer. *Id.* at 5.

4. D.C. Law 1-76; 1976 D.C. Code Legis. & Admin. Serv. 87, reprinted in D.C. Code tit. 28, app. (Supp. IV 1977) [hereinafter cited as CPPA].

5. *Id.* § 5; See notes 15-19 & accompanying text *infra*.

6. Fifteen states have enacted statutes which enumerate deceptive practices. COLO. REV. STAT. § 6-1-105 (1973); GA. CODE § 106-1203 (Supp. 1977); IDAHO CODE § 48-603 (1977);

nine contain no such enumerations.<sup>7</sup> Procedurally, the Act is unique in several respects. It establishes the only state-level consumer protection agency mandated to accept, investigate, and evaluate individual consumer complaints.<sup>8</sup> In addition, it provides for a free public prosecutor,<sup>9</sup> and administrative adjudications resulting in final and binding remedies, including damages, restitution, and cease and desist orders.<sup>10</sup> Like many consumer protection statutes, the Act expressly provides for a private right of action without requiring that consumers first exhaust administrative remedies.<sup>11</sup> Significantly, the scope of such private actions is not limited to enforcement of the twenty-four specific substantive prohibitions. Not only does the Act empower the agency to enforce some sixty-five preexisting consumer statutes addressing varying aspects of consumer protection, but these statutes also may be privately enforced under the Act.<sup>12</sup>

Although unusually strong in these respects, the Act has significant weaknesses and ambiguities. Moreover, the limited resources devoted to enforcement by the District of Columbia effectively dilute the Act's strength. This Note will assess the Act's substantive provisions and admin-

IND. CODE ANN. § 24-5-0.5-3 (Burns 1974); MISS. CODE ANN. § 75-24-3 (Supp. 1977); NEV. REV. STAT. § 598.410 (1973); N.H. REV. STAT. ANN. § 358-A: 2 (Supp. 1975); OKLA. STAT. tit. 15, § 753 (Supp. 1975); ORE. REV. STAT. § 646.608 (1972); 73 PA. CONS. STAT. ANN. § 201-2(4) (Purdon Supp. 1977-1978); R.I. GEN. LAWS § 6-13.1-1(e) (Supp. 1975); S.D. COMPILED LAWS ANN. § 37-24-6 (1972); TEX. BUS. & COM. CODE ANN. tit. 2, § 17.46(b) (Vernon Supp. 1977-1978); VA. CODE § 59.1-200 (Supp. 1977); WYO. STAT. § 40-106(a) (Supp. 1975). See also Federal Trade Commission, Fact Sheet: State Legislation to Combat Unfair Trade Practices (Sept. 8, 1977) (available from Gale P. Gotschall, Deputy Director of Federal-State and Consumer Relations, Federal Trade Commission, Washington, D.C. 20580) [hereinafter cited as Fact Sheet]. Alabama, which has no such statute, maintains a clearinghouse to facilitate consumer protection actions under existing state law and to recommend new legislation. ALA. CODE tit. 5, § 19-2 (1975).

7. Some states have adopted the broad language of § 5(a) of the Federal Trade Commission Act which proscribes "unfair methods of competition . . . and unfair or deceptive acts or practices in or affecting commerce. . . ." 15 U.S.C. § 45(a) (1976). Fact Sheet, *supra* note 6, at 1; see, e.g., MASS. GEN. LAWS ANN. ch. 93A, § 2(a) (1972); N.C. GEN. STAT. § 75-1.1(a) (Supp. 1977).

Some other states have adopted similarly broad prohibitions reaching all forms of fraudulent, deceptive, and sometimes unfair acts and practices in trade or commerce. Fact Sheet, *supra* note 6, at 1; see, e.g., ARK. STAT. ANN. §§ 70-904, 70-906 (Supp. 1977); DEL. CODE tit. 6, § 2513 (1974).

8. Interviews with Gale P. Gotschall, Counsel for Federal-State Cooperation, Federal Trade Commission, in Washington, D.C. (Nov., 1976-Mar., 1977); Interviews with Victor Simon, *supra* note 3.

9. CPPA § 6(b).

10. *Id.* § 4(13).

11. *Id.* § 6(k)(1). Eight states do not provide for a private right of action. See Fact Sheet, *supra* note 6, at 2.

12. CPPA § 6(k)(1).

istrative scheme, with an emphasis on procedural issues and the impact of the choice of law jurisprudence of the District of Columbia.

### I. SUBSTANTIVE PROVISIONS

The CPPA expressly proscribes twenty-four specific trade practices.<sup>13</sup> Several of the prohibitions appear to be derived from the 1973 Suggested State Provisions for the Uniform Consumer Sales Practices Act which was drafted by the National Conference of Commissioners on Uniform State Laws and approved by the American Bar Association.<sup>14</sup> Except for broad proscriptions against misrepresentations concerning the quality, composition, service, condition, and price of goods and services, these prohibitions defy categorization and do not appear to reflect a systematic analysis of consumer protection issues. The list reads like a disjointed catalogue of unfair trade practices, drawing its strength from the sheer number of practices prohibited. Thus, for example, the statute prohibits advertising of goods in inadequate supply or without intent to sell,<sup>15</sup> false statements concerning the need for repair or replacement,<sup>16</sup> harassment of consumers,<sup>17</sup> and disparagement of competing products or services.<sup>18</sup> The Act affirmatively requires sellers to supply consumers with copies of documents pertinent to the consumer transaction involved, such as a lease, service contract, promissory note, or trust agreement.<sup>19</sup>

Although the list of unfair practices is long, and some provisions seem broad, it does not include a catchall prohibition of unfair or deceptive practices.<sup>20</sup> Thus, a consumer who is unable to fashion a complaint based

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13. *Id.* § 5.

14. UNIFORM CONSUMER SALES PRACTICES ACT, *reprinted in* 7 U.L.A. 306 (1977).

15. CPPA § 5(h).

16. *Id.* § 5(k).

17. *Id.* § 5(m).

18. *Id.* § 5(g).

19. *Id.* § 5(q).

20. One commentator has called for an amendment to provide such a general prohibition. Unpublished remarks of Joel P. Bennett, Esq., member District of Columbia Bar Committee on Consumer Law, before the District of Columbia Bar Association Seminar on Consumer Affairs (Oct. 3, 1976).

An example of a broad, flexible proscription for undesirable commercial conduct and practices may be found in the federal securities laws. Section 10(b)(5) of the Securities Exchange Act of 1934, 15 U.S.C. § 78j(b) (1976), makes it unlawful:

To use or employ, in connection with the purchase or sale of any security. . . , any manipulative or deceptive device or contrivance in contravention of such rules and regulations as the [Securities and Exchange] Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors.

This section has traditionally been regarded as a catchall to protect against particular devices not anticipated by the legislators. *See* SEC v. Texas Gulf Sulfur Co., 401 F. 2d 833, 859 (2d Cir. 1968). The Securities Act of 1933, which requires registration with the SEC of

on one of the twenty-four proscribed merchant activities may be confronted with obstacles arising from statutory interpretation.<sup>21</sup> Although not reflected in the public legislative history, it was the intent of the Act's draftsman not to include a catchall prohibitory provision.<sup>22</sup> The draftsman reasoned that enforcement of the twenty-four specific provisions would be enough of a challenge for the fledgling agency and that amendments broadening the substantive scope of the Act would be better delayed until the agency became solidly established. In addition, a comprehensive list of twenty-four prohibited practices would give the agency far more direction in its infancy than would a general catchall prohibition, the interpretation of which would be open to question.<sup>23</sup> In the absence of a general prohibitory provision, a clever merchant may circumvent the Act by devising an innovative scheme not now contemplated by the Act.

Of the enumerated trade practices, the broadest is the proscription of unconscionable contracts.<sup>24</sup> Although most statutes dealing with unconscionability do not define the term, the CPPA identifies several elements to

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most public, interstate offerings of securities, also has a catchall provision dealing with interstate offers and sales of securities. 15 U.S.C. § 77r(a) (1976).

21. The statutory interpretation obstacles are either the rule of *expressio unius est exclusio alterius*, or a claim that omission of a catchall prohibition must be treated as a deliberate legislative act. Regarding the *expressio unius* rule, Professor Sutherland has stated that since administrative agencies are statutorily established without inherent or common law powers, the general rule applied to enabling statutes is that the only powers granted are those which are expressed or necessarily implied. 3 SUTHERLAND STATUTORY CONSTRUCTION § 65.02 (4th ed. 1974).

Dean Ezra Thayer has suggested that an omission must be regarded as deliberate:

[O]mission . . . must . . . be treated as the deliberate choice of the legislature, and the court has no right to disregard it . . . . The true attitude of the courts, therefore, is to ascertain the legislature's expressed intent (except in so far as that inquiry is necessary in order to give effect to what is expressed), and then to consider the resulting situation in the light of the common law.

Thayer, *Public Wrong and Private Action*, 27 HARV. L. REV. 317, 320 (1913) (emphasis added)

22. Interview with Victor Simon, Esq., D.C. Office of Consumer Protection, in Washington, D.C. (Nov. 15, 1977) (for Mr. Simon's background, see note 3 *supra*).

23. *Id.*

24. CPPA § 5(r) lists several factors to be considered in determining whether a contract provision is unconscionable:

(1) knowledge by the person at the time credit sales are consummated that there was no reasonable probability of payment in full of the obligation by the consumer;

(2) knowledge by the person at the time of the sale or lease of the inability of the consumer to receive substantial benefits from the property or services sold or leased;

(3) gross disparity between the price of the property or services sold or leased and the value of the property or services measured by the price at which similar property or services are readily obtainable in transactions by like buyers or lessees;

(4) that the person contracted for or received separate charges for insurance

be considered. These elements, apparently borrowed from the Uniform Consumer Sales Practices Act<sup>25</sup> and the Uniform Commercial Credit Code,<sup>26</sup> include the sophistication of the consumer, the price of the goods, and the seller's knowledge of whether the consumer will receive substantial benefits from the contract. The District of Columbia definition is more extensive than the Uniform Consumer Sales Practices Act, since the District of Columbia Act mandates consideration of the potential unconscionability of separate charges for life insurance with respect to credit sales.<sup>27</sup>

## II. ADMINISTRATIVE SCHEME

The Act creates the Office of Consumer Protection<sup>28</sup> to enforce the enumerated prohibitions against unfair trade practices. The office is empowered to receive and investigate complaints and to initiate its own investigations.<sup>29</sup> To facilitate investigations, the Office may conduct hearings, subpoena documents and witnesses, issue cease and desist orders and consent decrees, and provide full remedies including restitution, repair, replacement, and damages in contract.<sup>30</sup> In addition, the Office administers the Consumer Credit Protection Act,<sup>31</sup> the Consumer Retail Credit Regulation,<sup>32</sup> and the Consumer Goods Repair Regulation.<sup>33</sup> The Office is specifically denied authority to award damages for tort claims; to deal with utility, taxicab, security, or landlord-tenant cases; or to deal with cases involving a government agency. Also beyond the scope of the Office's au-

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with respect to credit sales with the effect of making the sales, considered as a whole, unconscionable;

(5) that the person has knowingly taken advantage of the inability of the consumer reasonably to protect his interests by reasons of age, physical or mental infirmities, ignorance, illiteracy or inability to understand the language of the agreement, or similar factors.

The Uniform Commercial Code (U.C.C.) has not defined unconscionability. The drafters of the U.C.C. suggested, however that: "The basic test is whether, in the light of the general commercial background and the commercial needs of the particular trade or case, the clauses involved are so one-sided as to be unconscionable under the circumstances existing at the time of the making of the contract." U.C.C. § 2-302, Comment 1.

25. UNIFORM CONSUMER SALES PRACTICES ACT, *reprinted in* 7 U.L.A. 240 (1976).

26. UNIFORM COMMERCIAL CREDIT CODE § 5.108(4).

27. CPPA § 5(r)(4), *reprinted in* note 24 *supra*.

28. *Id.* § 3. The CPPA creates the positions of director, deputy director-chief of section of investigations, general counsel, and administrative law judge.

29. *Id.* § 4 (a)(1).

30. *Id.* §§ 4(a)(1), (2), (3), (13).

31. *Id.* § 4(b)(1)(A); District of Columbia Consumer Credit Protection Act of 1971, D.C. Code §§ 28-3601 to 3817 (1973 & Supp. IV 1977).

32. CPPA § 4(b)(1)(B); District of Columbia Consumer Retail Credit Regulation, Regulation 71-18, 17 D.C. Reg. 815 (June 11, 1971).

33. CPPA § 4(b)(1)(C); District of Columbia Consumer Goods Repair Regulation, Regulation 74-3, 20 D.C. Reg. 897 (1974).

thority are cases involving lawyer-client, doctor-patient, or clergy-laity relationships.<sup>34</sup> The Act does not apply to complaints against broadcasters or publishers for false or illegal advertising. Moreover, unlike several state statutes with similar provisions, the Act does not reach a publisher or broadcaster who has a direct financial interest in goods or services other than his own, nor does the Act expressly encompass the actions of the agents or employees of broadcasters or publishers.<sup>35</sup>

A consumer can trigger administrative action by filing with the Office a complaint plainly describing the suspect trade practice.<sup>36</sup> To the extent this suggests that only the filing of a complaint can begin the administrative process, it appears to be inconsistent with the power of the director to initiate an investigation,<sup>37</sup> since the director cannot file a complaint.<sup>38</sup> This apparent inconsistency can be resolved, however, by viewing the two statutory provisions as alternative mechanisms for initiating an investigation.

In any event, the Act is potentially weakened because the director may act only after a violation has occurred, and is not expressly authorized to seek injunctive or other relief when there is reason to believe a person is

34. CPPA §§ 4(c)(1), 2(A)-2(E).

35. An exemption for acts performed by publishers and broadcasters when they do not have knowledge of the false, misleading, or deceptive character of the advertisement is found in the Federal Consumer Credit Protection Act (Truth in Lending Act), 15 U.S.C. § 1665 (1976). The consumer protection laws of Delaware, Illinois, Iowa, Kansas, Maryland, Missouri, New Jersey, Pennsylvania, Vermont, and Washington contain similar provisions. See *Unfair Trade Practices and Consumer Protection Law* (revised for 1970) 3, reprinted in XXIX COMMITTEE ON SUGGESTED STATE LEGISLATION, COUNCIL OF STATE GOVERNMENTS SUGGESTED STATE LEGISLATION (1969) [hereinafter cited as *Law Revision*].

36. A full and complete description is not required and the description should be construed in accordance with the Federal Rules of Civil Procedure. Report on Bill 1-253, *supra* note 3, at 19. A complaint should not be dismissed for a failure to state a claim "unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957). See generally Clark, *Pleading Under the Federal Rules*, 12 WYO. L.J. 177 (1958); McCaskill, *The Modern Philosophy of Pleading: A Dialogue Outside the Shades*, 58 A.B.A.J. 123 (1952).

37. Compare CPPA § 6(a) which provides:

A case is begun by filing with the Office a complaint plainly describing a trade practice and stating the complainant's (and, if different, the consumer's) name and address, the name and address (if known) of the respondent, and such other information as the Director may require. The complaint must be in writing or reduced by the Director to writing.

with *id.* § 4(a) which provides: "The Office may (1) receive and investigate complaints and initiate its own investigation of deceptive, unfair, or unlawful trade practices against consumers. . . ."

38. Section 2(a)4 defines a complainant as:

one or more consumers who took part in a trade practice, or one or more persons acting on behalf of (not the legal representative or other counsel of) such consumers, or the successors or assigns of such consumers or persons, once such consumers or persons complain to the Office about the trade practice.

about to commit an unlawful trade practice. To avoid director impotence in the face of incipient or contemplated prohibited schemes, the Act could be amended by adding the words "about to execute" in the phrase which authorizes the Office to "determine whether a person has executed a trade practice" which is unlawful.<sup>39</sup> It should be noted, however, that such an amendment may be subject to attack as a prior restraint on speech.<sup>40</sup>

It has been suggested that the Act should be amended to empower the Office, when making investigations, to inspect records during normal business hours or after reasonable notice.<sup>41</sup> Absent consent by the subject of the investigation to the search of the business records, there is serious question whether such searches by the Office's representatives would be subject to the fourth amendment precondition of a search warrant.<sup>42</sup> The Supreme Court has held that citizens have privacy interests in their business establishments similar to those they have in their homes.<sup>43</sup> Moreover, exceptions to the fourth amendment warrant requirement have been permitted only in limited circumstances: when the ambit of the search was narrowly focused, the affected industries were historically regulated, and the search was related to a legislative purpose in regulating businesses engaged in an inherently dangerous enterprise.<sup>44</sup> Since the typical retail merchant does

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39. Compare CPPA § 4(a)(13) with §§ 5, 10, Law-Revision, *supra* note 35, at 8, 10.

40. An effort to curtail commercial speech before it occurs is subject to constitutional attack because any system of prior restraints of expression bears a heavy presumption of constitutional invalidity. *New York Times Co. v. United States*, 403 U.S. 713, 714 (1971) (quoting *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 70 (1963)).

41. Unsigned letter from Mayor Walter E. Washington to Council Chairman Sterling Tucker (undated) (drafted by Victor Simon, Esq., District of Columbia Office of Consumer Protection).

42. In *Barlow's, Inc. v. Usery*, 46 U.S.L.W. 4483 (U.S. May 23, 1978), the Supreme Court held that the fourth amendment protects commercial buildings as well as homes and therefore requires that Occupational Health and Safety Act inspectors secure a warrant or its equivalent before inspecting a business for OSHA violations. However, probable cause for the issuance of such a warrant is not as strict as that required by criminal law. A warrant may issue upon a showing of a specific violation or upon a showing that reasonable administrative standards for conducting the search have been complied with. 46 U.S.L.W. at 4486. See also *Michigan v. Tyler*, 46 U.S.L.W. 4533 (U.S. June 6, 1978) (describing fourth amendment standards governing entries to burned buildings when investigating the causes of a fire); *Zurcher v. Stanford Daily*, 46 U.S.L.W. 4546 (June 6, 1978) (upon probable cause, warrants may be issued to search any property, for the fruits, instrumentalities, or evidence of a crime; should first amendment interests be endangered, however, warrant requirements must be applied "with particular exactitude").

43. See *v. City of Seattle*, 387 U.S. 541, 543 (1967). See also *Camera v. Municipal Court*, 387 U.S. 523 (1967).

44. *United States v. Biswell*, 406 U.S. 311 (1972). See also *Colonade Catering Corp. v. United States*, 397 U.S. 72 (1970). These exceptions have been narrowly applied. See, e.g., *United States ex rel. Terraciano v. Montayne*, 493 F.2d 682 (2d Cir.), *cert. denied*, 419 U.S. 875 (1974) (search of pharmacist's records of narcotics permitted); *United States v. Del Campo Baking Mfg. Co.*, 345 F. Supp. 1371 (D. Del. 1972) (search for adulterated food



not fall within these exceptions, the City Council should proceed cautiously with any amendment of the statute which would purport to authorize the Office to perform warrantless administrative searches.

After the investigation is conducted, the director must determine whether reasonable grounds exist to believe that an unfair trade practice has occurred, and whether the practice has violated any other District of Columbia statute, regulation, rule of common law, or other law.<sup>45</sup> If reasonable grounds are lacking,<sup>46</sup> the director may dismiss the complaint. However, if he finds reasonable grounds,<sup>47</sup> the director must attempt to settle the case; if the complainant refuses to participate in settlement discussions, the director may dismiss the complaint.<sup>48</sup> If a settlement is not reached within forty-five days, the case may be referred to the administrative law judge for decision.<sup>49</sup> A hearing must be held between thirty to ninety days after a referral to the administrative law judge has been made.<sup>50</sup>

In addition to administrative remedies, the CPPA also provides for an

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permitted); *Youghiogeny & Ohio Coal Co. v. Morton*, 364 F. Supp. 45 (S.D. Ohio 1973) (search of historically regulated coal mines permitted). Moreover, the Court has been reluctant to expand the exceptions to the warrant requirement. *See, e.g., Almeida-Sanchez v. United States*, 413 U.S. 266 (1973); *G.M. Leasing Corp. v. United States*, 429 U.S. 338 (1977). *But see Air Pollution Variance Bd. v. Western Alfalfa Corp.*, 416 U.S. 861 (1974).

45. CPPA § 6(b)(2). The term "other law" is not defined in the Act, but conceivably may include federal consumer protection statutes or the law of another state which may be controlling in certain circumstances. *See* notes 62-63 & accompanying text *infra*.

Although the director's determination is to occur within 60 days after the filing of a complaint, a close reading of the Act suggests that the director might not have to make a determination within 60 days if the asserted violation is premised upon other than District of Columbia law, because "other law" determinations are omitted from the 60 day requirement. Section 6(d) provides in part: "within 60 days after the complaint is filed, the Director shall determine that there are, or that there are not, reasonable grounds to believe that a trade practice, *in violation of the law of the District of Columbia* within the jurisdiction of the Office has occurred" (emphasis added). It is unlikely that this result was intended by the draftsman, however, and it appears to have been an inadvertent omission.

46. Section 6(i)(1) of the Act provides, *inter alia*, that a complainant may appeal to the District of Columbia Court of Appeals when the Director exercises his authority under § 6(d), (e), or (h)(2) to dismiss a complaint. The standard of judicial review specified in § 11 of the D.C. Administrative Procedures Act is to govern such appeals. D.C. Code § 1-1510 (Supp. IV 1977). To the extent this portion of the statute may subject the director's determination to review, even if limited to the relatively narrow "arbitrary and capricious" standard, the statute reflects a more substantial encroachment upon prosecutorial discretion than is enjoyed by other officials charged with analogous complaint evaluation responsibilities. *See, e.g., National Labor Relations Act* § 3(d), 29 U.S.C. § 153 (d) (1970), *construed in Leedom v. Kyne*, 358 U.S. 184 (1958) (NLRB General Counsel's refusal to issue a complaint is unreviewable unless unconstitutional or plainly contrary to law).

47. CPPA § 6(d).

48. *Id.* §§ 6(e), (h)(2).

49. *Id.* § 6(e).

50. *Id.* § 6(f).

express private right of action for an aggrieved consumer,<sup>51</sup> and permits recovery of punitive<sup>52</sup> and treble damages,<sup>53</sup> as well as attorney's fees.<sup>54</sup> These provisions were designed to encourage the private bar to represent consumers.<sup>55</sup> Further, it is noteworthy that class actions are not excluded from the private right of action. Assuming that such actions are permissible, however, each class member must assert at least \$750 in damages, and the complex problems of class member determination and notice must then be confronted.<sup>56</sup>

There are two features of District of Columbia law, external to this Act and complemented by the close proximity of the Maryland and Virginia suburbs, which may work to increase its effectiveness and scope. First, the extent of the Office's personal jurisdiction appears to be governed by the District of Columbia "long-arm" statute,<sup>57</sup> which subjects any person to

51. *Id.* § 6(k)(1). Such a provision is consistent with a recent trend in other jurisdictions to provide a private right of action when a consumer is the subject of a deceptive trade practice. Forty-three states currently have some provision for private rights of action by consumers. Fact Sheet, *supra* note 6, at 2. New York, for example, expressly confers exclusive power on the Attorney General to bring an action. N.Y. GEN. BUS. LAW § 349(b) (McKinney Supp. 1977). In Florida, a consumer seeking to bring a private right of action might be required to post bond to indemnify the defendant for any damages incurred if the action is challenged as frivolous, without legal or factual merit, or brought for purposes of harassment. FLA. STAT. § 501.211(3) (Supp. 1977). In Georgia, a consumer must give the defendant thirty days notice of intent to file a suit so as to encourage settlement. GA. CODE § 106.1210(b) (Supp. 1977).

52. The standard for an award of punitive damages is the "amount of actual damages, frequency, persistence, and degree of intention of the merchant's unlawful trade practice and the number of consumers adversely affected." Report on Bill 1-253 *supra* note 3, at 23.

53. Twelve states have some form of recovery of treble damages: ARK. STAT. ANN. § 45.50.531(a) (1975); HAW. REV. STAT. § 480-13 (1976); LA. REV. STAT. § 51:1409 (A) (Supp. 1977); MONT. REV. CODES ANN. § 85-408 (Supp. 1975); N.J. STAT. ANN. § 56:8-19 (Supp. 1977); N.C. GEN. STAT. § 75-16 (1975); 73 PA. CONS. STAT. §§ 201-9.2 (Purdon Supp. 1977); S.C. CODE § 66-71.13(a) (1976); TENN. CODE ANN. ch. 438, § 10 (1977); TEX. BUS. & COM. CODE ANN. tit. 2, § 17.50 (Supp. 1978); VT. STAT. ANN. tit. 9, § 2461(b) (Supp. 1975); WASH. REV. CODE § 19.86.090 (Supp. 1976).

54. Although most states provide for the award of attorney's fees to the successful plaintiff, in Louisiana, if the Court determines that the action is groundless, an award of reasonable attorney's fees must be made to the merchant. LA. REV. STAT. § 51:1409(A) (Supp. 1977).

55. Report on Bill 1-253, *supra* note 3, at 23.

56. D.C. Code § 10-2180 (Supp. IV 1977).

57. D.C. Code § 13-401 (1973). CPPA § 4(a)(11) empowers the Office to implead and interplead parties under § 6, and § 6(b)(3) provides that the director may refuse to issue a complaint if the respondent would not be subject to the personal jurisdiction of a District of Columbia court. The District of Columbia long-arm statute is based on the UNIFORM INTERSTATE AND INTERNATIONAL PROCEDURE ACT, *reprinted in* 13 U. L. A. 283 (1975). Statutes based on this Act have been found constitutional. *E.g.*, *Bowsher v. Digby*, 243 Ark. 799, 422 S.W.2d 671 (1968).

In addition, personal jurisdiction could be established under this section for property interests, insurance relationships, or a tortious injury. This requirement is modeled on long

the jurisdiction of the District of Columbia courts who regularly transacts business or contracts to supply services in the District.<sup>58</sup> Under the long arm statute, minimal contacts are sufficient, provided they are strong and continuous.<sup>59</sup> However, contacts solely with the federal government do not trigger personal jurisdiction.<sup>60</sup> This exception recognizes both the District's unique character as the seat of the national government and the necessity for guaranteeing unimpeded access to the federal government by corporations throughout the country. At the same time, it prevents the District from becoming a national judicial forum.<sup>61</sup>

Second, when transactions involve consumers or merchants outside the District, current District of Columbia choice of law rules may make the CPPA the governing statute. The United States District Court for the District of Columbia recently adopted a governmental interest analysis in assessing choice of law problems in consumer contract disputes.<sup>62</sup> Governmental interest analysis involves identifying the governmental policies underlying each law in conflict and deciding which state's policies would be advanced by having its law applied in a particular situation.<sup>63</sup>

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arm jurisdiction acts. See ILL. REV. STAT. ch. 110, § 17(1) (1973). MICH. COMP. LAWS §§ 600.705, 600.715, 600.725, 600.735, (1976). (MICH. STAT. ANN §§ 27A.705, 27A.715, 27A.725, 27A.735 (1976)).

58. *Security Bank, N.A. v. Tauber*, 347 F. Supp. 511 (D. D. C. 1972). In examining contacts, a District of Columbia court will examine whether the party has derived substantial revenue from the production and sale of goods and whether the goods are to be used in the District. *Liberty Mutual Ins. Co. v. American Pecco Corp.*, 334 F. Supp. 522, 524 (D.D.C. 1971); accord, *Gillmore v. J.S. Inskip, Inc.*, 54 Misc. 2d 218, 282 N.Y.S.2d 127, 133 (Sup. Ct. 1967). See also *Founding Church of Scientology v. Verlag*, 536 F.2d 429, 432-33 (D.C. Cir. 1976). The District of Columbia Circuit has enunciated the rule that the "transacting business" requirement for long arm jurisdiction should be given broad interpretation, limited only by constitutional notions of due process. *Margoles v. Johns*, 483 F.2d 1212, 1218 (D.C. Cir. (1973)).

59. *Environmental Research Int'l, Inc. v. Lockwood Greene Eng'rs, Inc.*, 355 A.2d 808, 812 (D.C. 1976).

60. The "government contacts" principle was enunciated in *Mueller Brass Co. v. Alexander Milburn Co.*, 152 F.2d 142 (D.C. Cir. 1945).

61. See, e.g., *Siam Kraft Paper Co. Ltd. v. Parsons & Whittemore, Inc.*, 400 F. Supp. 810, 812 (D.D.C. 1975); *Norair Eng'r Assocs., Inc. v. Noland Corp.*, 365 F. Supp. 740, 742-43 (D.D.C. 1973).

62. *Swan v. American Security & Trust Co.*, No. 75-0961 (D.D.C. June 28, 1976) (unpublished opinion). In *Swan*, a Virginia consumer purchased an automobile in Virginia that was financed by a District of Columbia bank. In a suit brought after repossession of the automobile, the court applied District of Columbia law by employing the significant contacts approach and analyzing the contacts in terms of their relative importance. The court concluded that District of Columbia consumer laws were intended to protect consumers throughout the Washington metropolitan area, and since Virginia had no strong interest in protecting a District of Columbia creditor, District of Columbia law was applied.

63. *Milhollin, The New Choice of Law in the District of Columbia*, 24 CATH. U.L. REV. 448, 449 (1975). Governmental interest analysis has already been utilized by the District of Columbia courts for causes of action based on tort. See, e.g., *Tramontana v. S.A. Empresa*

### III. CONCLUSION

The D.C. Consumer Protection Procedures Act is an innovative statute that could, if utilized,<sup>64</sup> easily make the District of Columbia a leader in consumer protection. Under the statute, the director of the Office of Consumer Protection serves as a public prosecutor empowered to seek relief for individuals or classes of defrauded consumers, first through the administrative process, and then, if necessary, through the courts. The services of the director constitute an attractive alternative for poor or lower middle class consumers who otherwise must either retain private counsel, turn to overburdened legal aid services, or pursue such matters unaided by counsel. Assuming that the services offered by the agency are well-publicized and commensurate funding is provided, substantial litigation is an inevitable result. The likelihood of such active litigation, whether by the director or in privately initiated actions, makes critical the issues discussed above. Failure to effect needed clarifying amendments would leave the statute ambiguous and confusing in material respects, thus leaving consumers, merchants and the courts uncertain about the intended substantive law and provisions.

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de Viacao Aerea Rio Grandense, 350 F.2d 468 (D.C. Cir. 1965), *cert. denied*, 383 U.S. 943 (1966).

64. In fiscal year 1977, the Office of Consumer Protection received 4,950 complaints and resolved 2,930. It entered into formal negotiations in 20 cases and presented 14 cases to the section of hearings, 12 of which were actually heard. The Office claims to have saved consumers \$159,000 for the fiscal year, and estimates that it will save consumers \$300,000 in fiscal year 1978. 1 Government of the District of Columbia, Justifications for the FY 1979 Budget, 195 (1977) (prepared for the use of the D.C. City Council).