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BLEAK HOUSE 1968: A REPORT ON CONSUMER TEST LITIGATION

PHILIP G. SCHRAG*

While the other articles in this Symposium deal with scholarly and intricate questions of consumer credit and protection, Mr. Schrag presents the practical problems of consumer test-case litigation. Writing in an informal, anecdotal style, the author addresses himself to law students, telling them of the many obstacles they will face in this type of practice. He relates the innumerable and exasperating delaying tactics employed by his adversaries in several cases now being litigated. Looking beyond the theoretical efficacy of test-case litigation as a solution to the morass of consumers' grievances, Mr. Schrag's experiences suggest the need for basic reform of state procedure in order to permit more speedy resolution of the issues raised by such litigation.

This is the Court of Chancery, which has its decaying houses and its blighted lands in every shire, which has its worn-out lunatic in every madhouse and its dead in every churchyard, which has its ruined suitor with his slipshod heels and threadbare dress borrowing and begging through the round of every man's acquaintance, which gives to monied might the means abundantly of wearying out the right, which so exhausts finances, patience, courage, hope, so overthrows the brain and breaks the heart, that there is not an honourable man among its practitioners who would not give—who does not often give—the warning, "Suffer any wrong that can be done you rather than come here!"

—Charles Dickens, Bleak House

DURING 1968, I spent most of my time as a staff attorney of the National Office for the Rights of the Indigent (NORI), the poverty-law affiliate of the NAACP Legal Defense Fund, trying to bring test cases to challenge some unjust doctrines of consumer law. This article is a chronicle of my attempt. For law student readers, I hope that it is also a picture both of what test litigation is like, day-by-day, and of the interaction between legal theory and litigation strategy, because I know of no similar literature available to students considering employment with a test-case organization. What follows is not a happy tale, as I have found the courts to be so insensitive—not only to the need for substantive law reform but even to the need for a semblance of expeditious justice—that the passage quoted above from Dickens is the only one I could find to describe accurately the lower and middle echelons of our modern judicial system.

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I

THE SETTLEMENT SYSTEM

While at law school, I spent a few months as a volunteer for the local Legal Aid Society. My experience was disconcerting. Many of the cases—and most of the ones given to law students to handle—were consumer cases. Typically, a low-income wage earner would come to Legal Aid because his wages had been garnished or because a garnishment had been threatened. He had purchased merchandise on the instalment plan, and for some reason had stopped paying. Sometimes the reason was that he was dissatisfied with the goods—they had deteriorated even before his final payments were due. In other instances, the consumer had defaulted because emergency expenses, such as medical costs, had rendered him unable to meet his payments.

To “process” a consumer dispute, a student would generally interview the complainant (checking first to see that he was poor enough to be assisted by Legal Aid) and report the facts on a form. Then he would call the creditor or his representative and work out a settlement on the telephone, in about five minutes. The creditor, as soon as he heard Legal Aid was in the case, would usually agree to accept a somewhat smaller amount over a longer period of time. He might cancel “late charges.” Little consideration was given by either side to the merits of the dispute, except as points of discussion while each side was feeling out the other. Rarely would a case go to court—never would a consumer sue a creditor. This was understandable, given Legal Aid’s sole full-time attorney and infinitesimal budget.

Consumers and creditors seemed satisfied with the system. But I was uneasy for two reasons. First, many low-income consumers nursed grievances but did not take advantage of “the system” because they believed that there is no way to break a written contract, because they did not know of Legal Aid, or because they could not meet the means test. A private attorney, on the other hand, would charge \$5.00 before he would even speak to them, and much more to represent them. Second, under the system, even consumers with complete defenses to a contract, such as fraud or counterclaims for damages, had to continue to pay under a settlement worked out by a law student.

A few months of listening to Legal Aid and legal assistance lawyers in New York convinced me that “the system” was the standard method of resolving consumer disputes in most localities, but that for a number of reasons it was even more unfavorable to consumers in New York City than it had been in New Haven.

For one thing, New York has thousands of retail sellers operating so close to the margin that many will engage in any degree of chicanery to make a sale. Thousands of fraudulent or unconscionable sales are made every day; thousands of warranties are breached. Customers who complain are put off indefinitely. Second, New York has a dozen finance companies which immediately buy up contracts signed by low-income consumers from the sellers. When a finance company buys a consumer contract, the buyer becomes a cipher in an IBM computer. The computer mails the buyer a coupon book and instructs him to mail to it one coupon each month along with his check or money order. With the coupon book, the buyer receives a notice that if he has any complaints about the goods he bought, he must notify the finance company of them within ten days or lose forever his claims and defenses.¹ (I have never met a consumer who read the notice when he received it, nor have I met one who understood it when I read it to him.)² If the buyer later has a problem (*e.g.*, a leg falls off his table a month after he bought it), and calls the store, they tell him: "We sold your contract to the credit company—we have nothing to do with you any more." And if he calls the credit company, he is told: "All we do is collect your payments; we're not responsible for the quality of the merchandise."

As everywhere, buyers confronted with this kind of treatment often stop paying; they think this will force someone to pay attention to their complaint, or at least effect rough justice. But as soon as a payment is missed, the computer starts spitting out dunning letters, and even letters over the signature of the collection attorney threatening suit.

The consumer may then be informed that a suit has been commenced against him, but more often, the finance company's collection attorney fills in a standard form complaint and gives it to a process server or city marshal who destroys it and files a perjured affidavit of service; "sewer service," as it is called, is widespread.³ So a buyer first learns that a default judgment has been entered against him when his employer notifies him of a garnishment and warns him that more than one wage garnishment is

¹ This notice is pursuant to N.Y. Pers. Prop. Law § 403 (McKinney Supp. 1968), which seems to give a statutory basis to the "holder-in-due-course" doctrine in New York, provided that the notice is sent.

² For a typical text of the notice, see text accompanying notes 15-16, *infra*.

³ See Comm. on Legal Assistance, N.Y.C.B.A., Does a Vendee Under an Installment Sales Contract Receive Adequate Notice of a Suit Instituted by a Vendor?, 28 Record of N.Y.C.B.A. 263 (1968); Public Hearings, Abuses in the Service of Process, Before Louis J. Lefkowitz, Attorney General, January 13, 1966; 3 Colum. J.L. Soc. Prob. 17 (1967).

cause for dismissal. It is at this point that the consumer typically visits Legal Aid, if he sees a lawyer at all.⁴ Thus, when the settlement process begins in New York, the Legal Aid lawyer has to try to reopen a default judgment and has to face a finance company considered by the law to be a bona fide purchaser, immune from any defenses.

One nice thing about NORI is that when you get mad about a problem, you are pretty free to take a whack at it. So, in December 1967, I decided to bring a series of consumer test cases to shake up the system, or at least to strengthen the bargaining power of the consumers' representatives. I set two goals⁵ to work towards: (1) abolishing the doctrine of the so-called holder-in-due-course of consumer paper, so that finance companies would be liable for the misdeeds of the sellers they dealt with and would police them, thereby reducing the volume of unfair dealings. Abolition of this doctrine would also give Legal Aid a more viable threat of contested litigation. (2) Experimenting with new devices for the resolution of consumer grievances, other than informal settlement, which might give more consumers better relief. Punitive damages against sellers was one alternative which came immediately to mind. I notified Legal Aid that I was willing to take two or three interesting cases from them, to litigate rather than to settle; it was not long before I had a consumer client.

II

MR. ALLEN'S FREEZER

Frank Allen⁶ is a Negro in his twenties. He has a tenth grade education, lives in a city housing project, and earns about \$5000 a year. His wife also earns about \$5000 a year, or a little less.⁷ He told me of his encounter with a salesman in March 1966. The

⁴ Legal Aid lawyers have estimated to me that between 1% and 10% of poor consumers who could use a lawyer see one. In Manhattan Civil Court alone, there are over 100,000 default judgments per year. Telephone conversation with Shyleur Barrack, Director, Uptown Office, N.Y. Legal Aid Soc'y, Oct. 19, 1968.

⁵ A third goal might have been to prevent sewer service, by winning a big damage judgment against a process server. But other groups, including the City Bar Association, Mobilization for Youth, and the U.S. Attorney's office in the Southern District of New York, are working on this problem, so I gave it a lower priority.

⁶ All of the names of parties, lawyers (except myself and other consumer lawyers), and judges have been changed to protect privacy and because the cases discussed are still pending.

⁷ Legal Aid was particularly happy to refer Mr. Allen to us because he did not meet their means test. Of course, with a \$10,000 income the Allens could not possibly pay even the out-of-pocket expenses we have disbursed in their case; which have already run into thousands of dollars—most of it allocable to my salary and that of my secretary.

salesman, "Richard" (he never gave his last name), came to see the Allens, said he had been referred by a friend of Mr. Allen, and made them an appealing offer. He represented Quality Furniture, Inc., a large Harlem store, in business for 133 years. For less than twenty dollars a week, he would provide them with all the food they and their four-year-old daughter needed, so they would not have to fritter away their budget at grocery stores or supermarkets. He showed them a long list of the food that he would supply, and, "just to see how this would work to save money for you," he made up a list of the groceries they usually bought, which he would also supply. "This is a budget savings plan," he said. "We buy in bulk, and so we can pass the savings on to you. You will find this plan much cheaper than buying food in the stores. And all our food is the highest quality, Grade A." He noted that the Allens would still have to buy milk and fresh vegetables in the store but that his plan would supply everything else they needed. "This food will be delivered monthly," he said, "and you will need someplace to store it, so I will also provide you with a fine freezer, which will be less than \$8.00 a week, but the savings on the food will be so great that the freezer pays for itself and is essentially free."

Mr. and Mrs. Allen always had trouble with their budget and were constantly in debt, so they were inclined to accept. Richard assured them that they could cancel the whole deal after four months, simply by not reordering food at that time. So, Mr. and Mrs. Allen signed the contract. They did not read it first, because they could see that it was written in legalistic language they could not understand; and in any event, Richard seemed like an honest fellow, represented one of the largest Harlem stores, and had come recommended by their friend. (Mr. Allen later found out that his friend had signed up for a food plan a few days before, and Richard had given him a \$25.00 discount for recommending a friend who would also sign a contract.)

A week later, a great volume of food arrived, along with a freezer. The food was not the high quality Mr. Allen expected, but it was tolerable. The quantity, however, was so small that it ran out long before the four months it was supposed to last; and the Allens had to buy as much from stores in the final weeks of the four months as they did before they started the plan.

A week after the food and freezer came, Mr. Allen received from Budget Finance, Inc., two coupon books, one for the food and one for the freezer. One required him to pay \$30.22 a month; the other required him to pay \$74.83 per month. Mr. Allen looked

at the books, saw that he did not have to make his first payment for about four weeks, and threw the books—along with some accompanying forms—into a drawer until the first payments were due. (At this point, he wasn't sure whether the food supply would last or not.)

After grumbling for four months, but making all payments on time, Mr. Allen called Richard at a number the salesman had left and told him that he was not reordering because he was dissatisfied with the inadequate quantity of food supplied. "You can pick up the freezer any time," he said. "Oh no," said Richard, "you can cancel the food, but you may not cancel payments on the freezer. You signed a contract to buy it, by paying \$30.22 a month for three years. Look at your copy of the contract."

Mr. Allen looked at the contract and saw for the first time that he had agreed in writing, not to rent a freezer, but to buy one at a price of \$1087 over three years. He was shocked by the price because he had never heard of a freezer costing more than three or four hundred dollars. "I'm going to talk to a lawyer," he told Richard. "Don't do that," said Richard. "I'll straighten this out and call you back." He never did.

Mr. Allen went to see his union's lawyer, who told him that contracts were binding and that once he signed, there was nothing he could do. "Besides," said the lawyer, "it appears that a credit company bought your contract; and if you don't keep up your payments, they'll garnishee your wages and you may be fired."

Mr. Allen kept up his payments for fourteen months, becoming angrier with each payment. Finally he went to Legal Aid and was referred to me.

I was very pleased to have a client who was in the rare position of not having defaulted, much less not having lost a default judgment. It seemed like a fine opportunity to test an affirmative strategy—suing rather than being sued. I told Mr. Allen that my organization was in the test-case business—and that if we represented him, his case might take a long time to litigate, although the potential payoff was great, for others as well as for himself. I said that if he preferred to try for a quick compromise settlement, I would find a good lawyer to represent him. He said he would stick with me, and we started to draft a complaint.

Among the advantages of bringing a suit rather than defending is the choice of venue. Budget Finance, which as far as I know does not engage in sewer service, gets its default judgments by bringing all of its suits in Queens, making it very inconvenient for defendants in Manhattan and the Bronx to appear. We chose

to sue in Manhattan. More important, I decided to sue in state supreme court rather than in civil court. This had several advantages: I could ask for large amounts of damages; the judges were reputed to be more academically oriented and better in general; the West Publishing Company was more likely to print any decision I obtained; and I could appeal to the appellate division rather than to the appellate term. Of course, the federal district court would have been an even better forum. But, although there are a few theories under which federal causes of action may be said to lie to remedy consumer abuses (*e.g.*, implying a tort from the mail fraud statute or the FTC Act), contract law is basically state law, and it is the state courts that must be looked to for reform.⁸

The decision of whom to sue was easy—I decided to join as defendants the finance company which held the contract, the store for which Richard worked, and Richard, whose last name (Lewis) was discovered only after an extensive telephone conversation with his employer in which I pretended that I was a prospective customer. Having three defendants made it more likely that I would recover against at least one of them and gave me a statutory right to discovery against all of the principals, since they would all be parties.

For a first cause of action, we alleged that the contract was unconscionable under Section 2-302 of the Uniform Commercial Code,⁹ because the price charged—even the \$840 cash price—was outrageously high. We demanded rescission, or at least reformation, of the price term. This cause of action sought an important, though relatively slight, clarification of the law. In an earlier case, *Frostifresh Corp. v. Reynoso*,¹⁰ an extremely high price alone was enough to justify reformation. But the case went no higher than the appellate term, has not been used much since, and involved a contract executed in English by a Spanish-speaking salesman and buyer. It was unclear whether that last fact was relevant: the court said the buyers were handicapped by “lack of knowledge, both as to the commercial situation and the nature and terms of the contract which was submitted in a language foreign to them.” Did that mean that the foreign language was an essential feature of the case, or is “legalese” sufficiently foreign to a poorly educated man? And the court allowed the seller to recover its wholesale cost, with interest, to which the appellate court added trucking and

⁸ I now question my judgment in rejecting federal court. Read on.

⁹ N.Y. U.C.C. § 3-302 (McKinney 1964).

¹⁰ 52 Misc. 2d 26, 274 N.Y.S.2d 757 (Nassau County Dist. Ct. 1966), modified, 54 Misc. 2d 119, 281 N.Y.S.2d 964 (2d Dept. 1967).

service charges, a reasonable profit, and reasonable finance charges! No further appeal was taken by either side. I felt we should attempt to clarify the elements of the cause of action and to improve on the measure of damages.

For a second cause of action, we alleged fraud—Richard's leading my client to believe that he was renting the freezer and his assurances that the food would last for four months. Further, I drew upon a 1961 case¹¹ which held that punitive damages lay for fraud where the fraud could be shown to be the "basis" of a seller's business—a regular business practice. I knew from Mr. Allen's friend that Richard had made similar fraudulent representations to him, and I soon found out that he had made similar representations to other buyers. The 1961 case had gone almost unused and had never been applied in a case of sales to low-income consumers; this looked like a good opportunity to blaze a trail. In addition, a demand for punitive damages would make it impossible for Budget Finance to moot the case by returning my client's money. I therefore asked for \$50,000.

As additional causes of action, I complained of several violations of New York's Retail Instalment Sales Act¹²—the contract given Mr. Allen by Richard had no date, no seller's address, and omitted material terms negotiated orally (*e.g.*, the freezer and food sales were on separate contracts, and neither contained the warranty that the food would last four months). In addition, the printing on the contract was in six-point type rather than the eight-point type required by the law. But all of these violations put together could not gain more for Mr. Allen than recoupment of the credit service charge¹³—\$235—and he could get that only if Budget failed to "correct the violation" (whatever that means) within the meaning of Section 414(3) of the Personal Property Law¹⁴ within ten days of notification of the violation by the buyer.

There remained the issue of the holder in due course. Among the papers received by Mr. Allen with his coupon book¹⁵ was a document he had never read or tried to read—the notice which under New York law enables a credit company to become a bona

¹¹ Walker v. Sheldon, 10 N.Y.2d 401, 179 N.E.2d 497, 223 N.Y.S.2d 488 (1961).

¹² N.Y. Pers. Prop. Law § 402(1) (McKinney 1962) (date); id. § 402(3) (a) (seller's address); id. § 402(a) (entire agreement must be in writing); id. § 402(1) (eight-point type).

¹³ Id. § 414(2).

¹⁴ Id. § 414(3).

¹⁵ Another was a credit life insurance policy. One reason that nobody reads the documents sent out by finance companies is that the critical ones (*e.g.*, notifying buyers they are waiving rights) are not only written in "gobbledygook" but are slipped in among a volume of other papers.

fide purchaser of a consumer contract. It consisted of a single 125-word sentence, to wit:

1. If the within statement of your transaction with the seller is not correct in every respect; or 2. if the vehicle or goods described in or in an enclosure with this notice have not been delivered to you by the seller or are not now in your possession; or 3. if the seller has not fully performed all his agreements with you; you must notify the assignee in writing at the address indicated at right in [sic.] or in an enclosure with this notice within ten days from the date of the mailing of this notice; otherwise, you will have no right to assert against the assignee any right of action or defense arising out of the sale which you might otherwise have against the seller.

I had two possible attacks on Budget's status. One was to show that they had not acquired the contract "in good faith" and "without notice of a claim or defense." This would require proving a course of dealing between them and Quality Furniture or some other proof indicating they had knowledge of overreaching. Perhaps the price of \$1087 for a freezer—apparent on the face of the contract—would be sufficient. The other strategy was to argue that despite Section 403 of the Personal Property Law,¹⁶ Section 9-206 of the Uniform Commercial Code¹⁷ left the court free to abolish holder-in-due-course status for all purchasers of consumer paper. I decided to allege all of these theories and to elect among them only after I had used discovery to learn more of the relations between the companies.

I instructed Mr. Allen to keep up his monthly payments, but to put them into a savings account rather than sending them to Budget. Then, in early December 1967, I hired a reputable process server and looked forward to an early confrontation with the issues.

January

I dimly hoped, of course, for a motion to dismiss or to strike part of my complaint. The essential issue in most civil test cases in federal court is resolved at an early stage, in litigation over the complaint. The issue to be resolved usually turns on whether or not the new cause of action being pushed by the plaintiff exists. A ruling on a motion to dismiss for failure to state a cause of action, and subsequent appeals, short-circuits months or years of pre-trial investigation, as well as the trial itself. But I owed it to my client to put all of his causes of action into the complaint; and most, if not all of them, were patently undismissible. Also, it was in my

¹⁶ N.Y. Pers. Prop. Law § 403 (McKinney 1962).

¹⁷ N.Y. U.C.C. § 2-206 (McKinney 1964).

opponents' interest to avoid any decision for as long as possible—both to delay my case and to avoid any precedents. They decided to answer the complaint.

I first heard from Budget's collection attorney—how much would I settle for? In expectation of such an offer, I had discussed settlement with Mr. Allen, and we agreed that under no conditions would we accept a settlement that did not include some punitive damages. Such a settlement would have been so unusual that it could itself have been publicized and would have demonstrated that an aggressive complaint was enough to improve upon the settlement system. This was equally evident to Budget, so a settlement was out of the question. The collection attorney requested an extension of time to answer; he told me that Budget did not consider him capable of managing contested litigation. Although I was anxious to get on with the case, particularly in light of inevitable delays due to court congestion, I agreed to the extension, as it is the general custom to do so.

On January 10, I received Budget's answer from Bender, Segal, Parker & Lochinger, their Wall Street counsel. Budget denied or had no knowledge of most of the allegations in the complaint and claimed that, in any event, it was a holder in due course of the contract, having sent Mr. Allen a notice. Along with the answer came a notice to take the oral deposition of Mr. Allen on January 23.

I was annoyed, but not entirely surprised by this demand. Annoyed, because to save Mr. Allen the trouble of having to miss work to attend a deposition, I had put into the complaint just about every fact he had told me. Not surprised, because oral examination is a natural enough device to harass a plaintiff. But on the whole, I was not very upset. After all, Mr. Allen was just a man who bought a freezer. He had very little information to give them—certainly none that could hurt his case. He was extremely angry at what had been done to him—so his answers to their questions were likely to be damaging to them. And since he had so little to say, it would all be over in an hour or two—and then it would be my turn.

Along with Budget's answer and notice came the combined answer of Richard Lewis and Quality Furniture, who had hired the same lawyer, a sole practitioner named Alfred Stone, to represent them. (I later learned that Stone was one of the city's leading collection attorneys, and worked for several small finance companies as well as for Quality.) This was curious, because the joint answer denied an agency relationship between Lewis and the

store; such a denial would be in the interest of the store but not of the salesman. My hunch is that the store agreed to hire the lawyer and gave the salesman a free ride. In any event, the agency relation was easy to prove, so I was more intrigued than concerned about the denial.

Their answer included a demand that I amend my complaint to add as a co-plaintiff and necessary party Mrs. Allen, whose name was on the contract. I had indeed overlooked this detail. I had no objection to doing so, except for the vague feeling that at some point, a defendant might demand to examine Mrs. Allen, as they would have a right to do if she were a party.¹⁸ A seller obtaining a wife's signature to a contract gets more than additional security—it gets an extra opportunity to make life difficult for the buyer if either side wishes to threaten litigation.¹⁹

The day before Mr. Allen's examination began, I went over his case with him again. He had little to add that was not in his complaint, so I felt reasonably confident that the questioning would be brief.

We arrived at Bender, Segal's for the examination at 10:30, as required by the notice, but Bender, Segal kept us waiting until 11:00. Finally a young lawyer emerged into the waiting room and introduced himself as Jack Schwartz; he would conduct the examination in the conference room. Alfred Stone did not show up, and at 11:15 we began. Although the traditional New York practice is to object to every possible question, I had resolved not to object even to improper questions unless Mr. Allen felt really harrassed; objections would take more time, and litigation over their propriety would delay the lawsuit and waste my time. Yet Schwartz's first questions almost provoked me, for he launched into an inquiry into Allen's finances—his earnings and that of his wife. But after a while, he got back on the track and asked about Mr. Allen's discussions with Richard. His questions covered every facet of the sale: how Allen knew who Richard was and whom he represented; who had made the referral; what his friend who referred him had said; what Richard had said about the food and the freezer; what Richard had shown him (the list of foods to be supplied, which Allen brought to the examination, as required); what papers Allen had signed; and what Allen had said when he called Richard to cancel. Schwartz's style of questioning was

¹⁸ N.Y. Civ. Prac. Law § 3101 (McKinney 1963).

¹⁹ Of course, a court can enjoin discovery to prevent harrassment. But how can one prove, before the fact, that a proposed deposition is not in good faith? And how can one prove it even after the fact, if the examiner is clever enough to ask relevant but essentially unnecessary questions?

so detailed and so nearly repetitive (but not truly duplicative and therefore not objectionable) that the examination seemed hardly to be progressing. One brief sample:

- Q. Did Mr. Lewis give you the freezer contract to look at during your discussion?
- A. Are you referring to giving it to me to read?
- Q. Yes.
- A. No.
- Q. Did you ask him to see it?
- A. No.
- Q. Did he explain to you what its contents were? What it said?
- A. No.
- Q. When was the first time that you saw it?
- A. I think that night.
- Q. More specifically, when during the course of this discussion or conversation with Mr. Lewis did he first present you with or hand to you this document, or the original?
- A. I don't recall.
- Q. Was it after he had done all his figuring on the yellow paper, as you testified before?
- A. Yes.
- Q. Was it already filled in the way it is now?
- A. I don't recall.
- Q. To your knowledge or to your recollection did Mr. Lewis fill in anything after he handed it to you?
- A. I don't recall. I was just asked to sign it.
- Q. Did you ask any questions when he asked you to sign this?
- A. No.
- Q. Had you already agreed to purchase the freezer?
- A. Purchase? No, rent.
- Q. Is your signature on it?
- A. Yes.
- Q. Is your wife's?
- A. Yes.
- Q. Did you both sign that, the evening of your first visit from Mr. Lewis?
- A. I think so.
- Q. At the time you signed it, were all of the writings now on it filled in?
- A. I don't recall.

- Q. Did you read it before you signed it?
A. No.
Q. Did your wife?
A. No.
Q. Were you given an opportunity to do so?
A. I don't understand you.
Q. Could you have read it?
A. Could I have read it?
Q. Yes.
A. Possibly.
Q. When you say possibly, what do you mean?
A. I was just asked to sign it.
Q. Were you told you could not read it?
A. No.

The examination became even more tedious as Schwartz began questioning Allen about each of the many papers that he had at some point received from Richard or Quality—forms to refer other customers, lists of groceries, invoices which came with the food, envelopes in which other papers had been placed, etc. When did Allen first see each paper? Where? Whose writing was on it? What had Allen scribbled on the back? When? What did Richard say about it? And so on.

Shortly after 1:00 P.M., Schwartz announced that he had much questioning left to do. Somewhat angry about the pace, but anxious to get the examination over with, we broke for lunch. After lunch, the same slow process was repeated: What had Mr. Allen signed on Richard's second visit? Had he read the papers? When was this visit? Who was present? What was said? Another hour passed. Mr. Allen began to get confused about all the papers; occasionally he contradicted himself. Still, objections would only prolong the examination, and the contradictions were about trivial details. Finally Schwartz concluded his questions about the transactions. Surely we must be finished. But:

- Q. You say the contract was unconscionable.
A. What do you mean by unconscionable?
Q. That is your word.
Schrag: Can you rephrase the question?
Obviously his attorneys drafted the complaint.
Schwartz: I am afraid I cannot rephrase the question because I do not know any other word to ask him. I cannot define unconscionable in your complaint. . . .

- Q. Are you familiar with Section 2-302 of the Uniform Commercial Code?
- A. No, I'm not.
- Q. Can you tell me what unconscionable means in your complaint?

I was sure that my client would say "no," and that would be an end to this line of questioning, but he said, "yes."

So here I had a problem. Of course I wanted my complaint to be read as broadly as it could be, so that it would not limit my proof at trial. But if my client discussed his understanding of the complaint, would that limit my proof? On the other hand, if I objected, would we have to spend weeks litigating the issue? I objected, and Schwartz defended his question on the ground that "the purpose of discovery is to enable me not to be surprised when I come into court." Finally, though his reason was preposterous, I decided to see how my client would field the question before cutting off further questioning and provoking a delay. Fortunately, Mr. Allen said that he had no personal knowledge about unconscionability and that any information he had about it was on the advice of counsel.

But Schwartz had begun a whole new line of questions—and he began reading down the complaint, paragraph by paragraph, asking Mr. Allen about his legal claims: Just which part of Richard's statement was fraudulent? How do you know that the representations were false? What do you mean by an exorbitant price? Is that just a high price? High with relation to what? I constantly expected my client to say that he didn't know or understand, but each time, he attempted to explain the complaint I had drafted as best he could, even after some dialogue between Schwartz and myself about how the witness could not know such things.

And now it was 5:00 P.M., and although Mr. Allen had been answering questions for a full day, Schwartz announced that he had many more questions—that he had not even begun to ask about Mr. Allen's relation to Budget Finance. "Of course you are free to seek a protective order from the Court," he said, "but my questioning has been relevant and you will not win" (a forecast concurred in by neutral sources). Reluctantly, I agreed that if I did not seek such an order, I would produce Mr. Allen again after we both had the transcript of the first session.

Meanwhile, I had begun my investigation. On January 19, to lay the groundwork for an oral deposition, I served Richard Lewis's lawyer with a demand to see all of the documents which

might lie in the background of the case: contracts between Lewis and Quality Furniture; agreements between Quality and Budget, invoices showing the price Quality paid for freezers, lists of other freezer customers (relevant because such customers were witnesses to the pattern of Lewis's selling techniques), etc. I demanded that these documents be produced in my office on February 1.

Early in January, a Harlem newspaper had carried some publicity about the institution of a consumers' test case, and as a result I received many requests for help from the community. From these, I selected three other cases, which I commenced in rapid succession while I awaited discovery in *Allen*:

Buenavidez v. Lewis: One request for help came from Salvador Buenavidez, a Bronx resident of Puerto Rican birth, who worked as a can inspector. He had also been victimized by Richard Lewis's freezer sales. The facts of his case were virtually identical to those of Mr. Allen's. I took his case because it would enable me, for very little extra investigative work, to bring a second action against Lewis, Quality, and Budget, in case the *Allen* suit was somehow mooted or in case I might wish to try some variation in strategy—a sort of controlled experiment. Initially, I modeled Mr. Buenavidez's complaint on that of Mr. Allen and demanded \$50,000 damages. Budget followed with a parallel answer and a demand that he be orally examined—in February.

Collins v. Budget Finance: Delores Collins' case was the saddest that came to my attention. She is black, separated from her husband, and very poor. Her annual income is \$2281, including a small welfare allowance. She lives in a public housing project in the Bronx. In 1965, a door-to-door salesman had come to her house offering bargains in wall-to-wall carpeting—three rooms for \$300. Mrs. Collins' apartment was drab without carpeting, and other people in the project had carpets, so she was interested in his bargain. But when he showed her a sample of what he would give her, she realized that it would fall apart in a month. So he showed her a better grade of carpeting, measured her room, and told her that she could have the best grade carpet for only \$7 or \$8 a week. She signed his contract without thinking to ask him the total price, and he promised her that if the carpeting tore or came up from the floor, his store—Buy-Well Furniture—would repair it, free, for twenty-five years.

Shortly thereafter the carpet was installed, and Mrs. Collins received a coupon payment book from Budget Finance, requir-

ing her to pay \$30.63 monthly for 36 months—a total of \$1202.68 (more than half a year's income) for three small rooms of carpeting. (We subsequently had the carpet appraised, and it is worth perhaps a third of the price she agreed to pay.)

But Mrs. Collins made no complaint until several months later when the carpet began to come up from the floor. She called Buy-Well, and they sent a man to repair the rug. She was pleased by this service, but a couple of months later, the rug came up again. Again she called Buy-Well, and again they sent a man. A few months later, the problem recurred, and somewhat annoyed, she called Buy-Well to complain. But the telephone had been disconnected.

Alarmed, she called Budget Finance, to which she had been making regular payments. Buy-Well was out of business, they informed her. Well then, she demanded, Budget would have to send a repairman to fix her rug, as promised. No, said Budget's receptionist—Budget was not responsible for any promises made by the store, and Mrs. Collins was simply out of luck.

With Mrs. Collins, I drafted a complaint against Budget, alleging breach of warranty and unconscionability, as well as making a series of allegations concerning Budget's status as a co-seller or mere assignee rather than as a bona fide purchaser of the contract. This seemed like a most sympathetic case to challenge the law of bona fide purchaser, for Mrs. Collins was clearly defrauded; and because Buy-Well had gone out of business, she had to have recourse against Budget if she were to have recourse at all. I therefore claimed that Budget took the contract subject to her claims because:

- a) of its close relationship to and course of dealing with Buy-Well (the contract was printed on a Budget form, which might not alone be enough to implicate Budget but which pointed to a close connection);
- b) Budget did not ascertain before buying the contract that Buy-Well was reputable, honest, and sufficiently capitalized (a victory on this theory would go far toward making finance companies investigate the retailers they worked with);
- c) the contract had, on its face, certain violations of the Retail Instalment Sales Act—*e.g.*, no sufficient description of the goods sold;
- d) Budget had notice or knowledge that the sale was a door-to-door sale;
- e) Budget could not immunize itself against claims for

breaches of warranty which occur as a result of latent defects.

I did not know on which of these grounds I could win, but given the state of New York law, a victory for any of these reasons would be significant. It remained only to learn some of the facts concerning the relationship between Budget and Buy-Well, and I could go to trial and seek a precedent.

But first, it was Budget's turn to move; and with their answer, they demanded that Mrs. Collins be examined in February.

Day v. Dependable Credit Corp.: Robert Day's problem combined those of Mr. Allen and Mrs. Collins. Mr. and Mrs. Day had bought a freezer and food plan from a door-to-door salesman. They were relatively satisfied with the food but had not realized until long after they signed the contract that \$1163 was an outrageous price to pay for a freezer. Theirs was also an especially appealing test case because a few months after the sale to the Days, the Attorney General of New York had enjoined the company from selling freezers by means of fraud and at exorbitant prices. Ten weeks after being enjoined, the seller went bankrupt (presumably because no finance company wanted to come under the scrutiny of the state by buying paper from the seller). But Dependable Credit Corp., the finance company which bought the Days' contract, was enforcing it and \$800,000 worth of other freezer contracts; the injunction was causing it no discomfort at all. This too seemed to be a good case in which to challenge the ability of finance companies to immunize themselves from claims. Once again I brought suit for punitive damages.

February

There were times during February and March when I felt as though I shared offices with Messrs. Bender, Segal, Parker & Lochinger. Their oral examinations of my clients seemed endless. Mr. Allen was brought back, and his testimony consumed a total of 247 pages. Mr. Buenavidez was examined, required to appear a second time, and brought back for still a third session; his testimony required 411 pages. Mrs. Collins's testimony took only one day, because compared with the purchasers of freezers and food, who had countless invoices, she had very few documents which could be gone over line by line. Hence Jack Schwartz could think of only 863 questions to ask her. When I joined Mrs. Allen as a party plaintiff, Budget's attorneys, as I feared they would, exercised their right to require her to be questioned; and she

had to submit to a day of examination. Mrs. Buenavidez was similarly examined.

Any further quotation of the questioning would render this article too tedious to bear. Suffice it to say that I found myself continually apologizing to my clients for causing them to be subjected to the length and difficulty of the questioning; its infliction upon clients is a very real cost of making a test case out of a dispute which could be routinely settled in an hour—though such a settlement also has costs, which are, however, less tangible. Schwartz's questions continued to be very nearly repetitive, although he was careful never to ask precisely the same question a second time, unless the witness gave an ambiguous answer. The trouble was that my clients had great difficulty recalling precisely the events in a sale which had taken place two years earlier, and each minor uncertainty provided Schwartz with fuel for an additional half-hour of questioning. In two or three days of questioning, there were also inevitable self-contradictions; and these often occasioned an attempt by Schwartz to go over the same ground again, to "straighten it out."

Schwartz never ceased asking my clients to interpret the legal wording of their complaints and to interpret for him their allegations. I might have prevailed if I had objected to some of these questions, but I adopted the simpler response of permitting my client to answer after I had made a speech on the record that my client was not a lawyer and that we would not be bound by any legal interpretation he or she placed on the complaint.

These examinations became an enormous burden on my time and effectively precluded me from initiating any new cases. Between the time it took to prepare my clients for examination, attend day after day of questioning with client after client, and read through the transcripts with my clients, several man-weeks were expended. (Of course, I received some satisfaction at the thought that whatever my time cost NORI, Bender, Segal would be billing Budget many, many times as much.)

I was still opposed to making motions to halt the questioning, both because the courts are generally reluctant to restrict disclosure (or so say the reported cases²⁰) and because I wanted to go to trial as soon as possible. One cannot get on the trial calendar until all discovery is completed. Yet at one point I became so annoyed by the incessant questioning of poor people who knew very little other than that they had bought merchandise

²⁰ See the cases cited in J. Weinstein, H. Korn & A. Miller, *New York Civil Practice* ¶¶ 3101.07-.08 (1968).

and been cheated, that I sought the court's protection. I moved to condition Budget's right to examine Mrs. Buenavidez upon their either scheduling the examination on a Saturday or reimbursing her for the wages she would lose by having to attend the examination and upon their paying a reasonable counsel fee for her to be represented at the examination. In my motion papers, I pointed out to the court that on the \$200 per week combined earnings of Mr. and Mrs. Buenavidez, they supported themselves and their two adolescent children and sent money to Mr. Buenavidez's parents in Puerto Rico. They were also in debt. I showed that Mr. Buenavidez had already submitted to three full days of interrogation and that it would be a hardship for Mrs. Buenavidez to lose even a day's wages, whereas Budget was a sixty million dollar company.

Budget's lawyers opposed this motion, arguing that "the testimony of Salvador Buenavidez is replete with innumerable instances in which he stated that he had no recollection or a very limited recollection of various aspects of the transaction," that "it is *plaintiffs* who seek the protection of this Court," and that "it is hard to imagine that a potential loss of less than \$35.00 would cause such hardship to these plaintiffs (who earn over \$10,000 per year) as to require that this Court order examination to be held on a week-end." Finally, Budget noted that Mrs. Buenavidez, as a plaintiff, "is subject to the absolute right of Budget to obtain disclosure . . . the choice of method by which to obtain such disclosure lies with defendant Budget."

The Court denied my motion but ordered that the examination begin at 2:30 P.M., so that Mrs. Buenavidez could attend work for half a day.

Meanwhile, I attempted to proceed with my side of the cases. On the morning of February 1, I expected Richard Lewis's attorney, Alfred Stone, to appear in my office with the documents I had demanded relating to Mr. Allen's case. But when no one arrived at the appointed hour, I called Mr. Stone. "Didn't you get my motion papers?" he asked. "I sent them out the day before yesterday." The making of a motion to prevent discovery stays the disclosure until the motion is decided.

The next day, I received Mr. Stone's motion papers. I noticed that although a movant may make his motion returnable in eight days, Mr. Stone had "noticed" his motion for February 18, nearly three weeks away, and had thus prolonged the period that my discovery was stayed, even if he lost his motion. For grounds, Mr. Stone argued that the notice served "does not spe-

cifically designate the documents to be produced, and furthermore the items demanded clearly indicate that the plaintiffs have embarked on a fishing expedition" This was surprising to me, since I thought my descriptions had been extraordinarily particular.²¹ In my papers, I pointed out how specific each of my descriptions was and that Mr. Stone had made no claim that he did not know what I was referring to. In addition, I explained the relevance of each category of papers I demanded to see to my theory of the case.

On February 18, I appeared in court, fully expecting to argue this motion so that I could get on with the case (having lost three weeks) and perhaps encourage the court to write a short opinion on the relevance of the documents I'd asked for, which might suggest some movement in the law. My first shock was the discovery that two hundred and fifty motions were scheduled to be heard that day and that this was an average calendar. My second shock was the sight of the courtroom; as the clerk called the calendar, he could hardly be heard over the hubbub, as dozens of attorneys engaged in last-minute negotiations. And after the clerk called, "Oyez oyez, all those with business for this honorable court, step forward and be heard," I received my third shock of the day: I stepped forward to announce myself ready for argument, and the judge said, "You should know we don't allow argument on discovery motions; submit your papers."

My fourth shock occurred later that day, when another lawyer informed me, in response to my story of what had occurred, that not only do the judges not allow argument, but that the docket is so crowded that they do not read the motion papers; the papers are usually read by someone from a pool of law assistants who writes a short decision to which the judge assigned to motions puts his name. And my fifth shock came three weeks later when, having waited all that time for some decision, the court ruled:

²¹ E.g.: "Any and all contracts, other agreements, or memoranda (including correspondence) either expired or presently in force, between Richard Lewis and Budget Finance Corp., relating to the relationship between them with regard to the sale of appliances, freezers, refrigerator-freezers, and/or food plans by Richard Lewis to consumers; including, without limitation, any agreement or memorandum relating to the provision of credit to consumers by Budget, the investigation of consumers' credit reliability, the supplying of blank contracts by Budget to Richard Lewis, either directly or through Quality Furniture, Inc., the sales practices used by Richard Lewis, the assignment of contracts to Budget, the commissions to be earned by Richard Lewis on sales of refrigerator-freezers, the discount to be charged by Budget on assignments to it of contracts for the sale of refrigerator-freezers, and the papers to be supplied to Budget in contemplation of or in connection with the sale of refrigerator freezers or food plans."

Motion for a protective order vacating the notice of discovery and inspection is denied without prejudice to renewal upon proper papers, including a copy of the complaint, without which the court cannot determine the propriety of the items objected to, which defendants maintain go beyond the scope of the transaction involving plaintiff.

In other words, my adversary had lost because he had not filed enough papers (the complaint had been filed in the court clerk's office, but the motions judge and clerks evidently do not pull papers from their own court files—the complaint must also be annexed to motion papers). But in reality, since my adversary was free to start all over again, I had lost many hours in preparing papers and had lost six weeks' time.

Somewhat miffed, I decided to try a different approach. One reason for initially demanding the inspection of documents, rather than an oral examination of Richard Lewis, was that I had naively thought that such a strategy would enable me to begin my investigation more expeditiously. New York law provides that the plaintiff may not serve a demand for an oral examination within twenty days of service of the complaint without leave of the court—which leave, if forthcoming, inevitably requires more than the statutory twenty days.²² The purpose of this rule is to give a defendant an opportunity to obtain priority in taking a deposition. But the statutes contain no such twenty-day rule in the case of demands for inspection of documents. Therefore, I had served my abortive demand for inspection of documents within twenty days of my amended complaint, thinking that this would give me a head start in discovery.

By the time I "won" the motion, however, more than twenty days had passed, so I served a demand for an oral examination, requiring Richard Lewis to bring with him all of the documents I wanted to see.

Once again I was served with a motion for a protective order, staying discovery. The ground for Mr. Stone's motion was simply that the deposition of Mr. Allen, which Budget was taking, had been recessed indefinitely, and "it is elementary that the right of defendants to examine the plaintiffs has priority and the examination of the defendant may not go forward until the examination of the plaintiffs has been completed."

Once again I was furious at the delay (again, Mr. Stone gave me three weeks before the motion was submitted to the court) but convinced that this would be an easy victory, I an-

²² N. Y. Civ. Prac. R. 3106(a) (McKinney 1963).

swered his motion papers by pointing out that "priority of disclosure" is simply a shorthand for the twenty-day rule, and I had not transgressed the rule requiring a twenty-day lag between the service of the complaint and the service of a notice for an examination. I pointed out that at the rate we were going, the examination of Mr. Allen might take several sessions, spread out over a period of months, and it would delay the case if my right to discovery had to await defendants' completion of their discovery.

I had to wait until March 4 for this motion to be submitted to the court. Meanwhile, an extraordinary development occurred in the case of Mr. Day, the man who had bought a freezer from the now-bankrupt seller.

I had sent the summons to a reputable process server to be served upon his creditor, Dependable Credit, a corporation with offices in Queens. New York law requires that a corporation be served by serving an officer or managing agent of the company, and a few days later I received from the process server an affidavit that he had served Sam Gardner, a managing agent. But on February 14, the valentine I received from Dependable was a motion to dismiss my complaint for improper service. The grounds: the process server had made no attempt to find an officer, but had simply given the summons to Gerry King, a mere "collector" for an entirely different finance company in the same building which just happened to share offices with Dependable. King, according to Dependable's attorneys, was just standing in the lobby when the process server arrived.

The first thing I did was to Xerox another summons and send it off to the process server to be re-served. Then I called Dependable and asked for Sam Gardner. "Do you remember when the process server came last month," I asked, "and served you with a summons on behalf of Mr. and Mrs. Day?" "Yeh, I remember." "Well how come your company says the process server didn't give the papers to you, but to Gerry King?" "Oh, I don't remember the incident at all. I don't know anything about it."

Satisfied that something fishy was going on, I asked my process server to write a detailed affidavit for me the second time, describing everything that happened. Once again he hit a snag. He identified himself to their receptionist and asked to see an officer. A man appeared from the back room and said he would take the papers. "What office do you hold?" asked the process server. "None of us here hold any office and you can designate me in any capacity you see fit," said the man. Whereupon my

process server felt that he had no alternative but to give him the summons.

To oppose the motion to dismiss, I submitted both affidavits of service and told the court all of what is detailed above. By way of reply, Dependable asserted that regardless of whether it was King or Gardner who received the first summons, service was improper, because neither of them worked for Dependable, but both worked for another company in the same office. And so did the man who took the second summons.

The venue of the *Day* suit was in Bronx County, and so on March 1, the return date of the motion, I took the subway up to the Bronx courthouse to submit my papers. But the case was not on the calendar. Puzzled, I called Dependable's lawyers. "Why isn't your motion on the calendar?" I asked.

"What do you mean?" they said. "Sure it's on the calendar. Where are you calling from?"

"Supreme Court, Bronx County."

"Oho! Read the motion papers more carefully," they said. "A motion can be made returnable in the county of venue or any adjacent county,²³ and we made this motion returnable in Manhattan." And so they had.

At this point it was 9:30 A.M., and the calendar was being called in both counties. I feared that if I didn't submit my papers when the case was called, my complaint would be dismissed by default. So I ran out of the court house in the Bronx, hailed a cab, and headed for Foley Square, Manhattan. I figured that I was likely to be number 125 or so on the calendar, and if so, they would reach me about 10:00 A.M.

What a half hour! As I pushed forward on the front seat (to make the cab go faster), the driver gave me a running lecture on why the United States should use nuclear weapons in Vietnam. Just what I needed. As we arrived at Foley Square, my watch read 9:55. I paid the driver and started to leave the cab, but he complained that a 60¢ tip wasn't large enough. I had neither the time nor the inclination to pay him more, and as I bounded up the steps I could hear him cry after me, "I hope you lose!"

Outside the court room, the docket was posted. I was number 137. I ran in the door, to hear the clerk call, "142." And I thought that indeed I had lost the case.

But after catching my breath, I started pleading with a succession of clerks, and finally one sympathetic fellow accepted

²³ *Id.* § 2212(a).

my papers and put them in the proper file. Now I had only to wait an indefinite number of weeks to hear the result.

March

As I have already remarked, the bulk of my time in March was spent in preparing for and attending examinations of the Allens and the Buenavidezes. But, simultaneously, I pushed forward, still trying to get my side of the cases off the ground.

On March 12, the court decided, as usual without opinion, Mr. Stone's motion to prevent me from examining Richard Lewis until the Allens had been fully examined:

Defendant Richard Lewis is directed to appear for examination ten days after the completion of the examination of the plaintiffs.

Stymied once again. However, there was still outstanding my demand for inspection of the documents, and Stone had not renewed his motion to preclude that discovery. So the next day I sent him by hand delivery a demand that he produce the documents on March 15.

No one appeared on March 15. Again I called Stone, and again he told me he had a motion in the mail. His renewed motion again complained that I had not described the documents with sufficient specificity, and also noted that the court had directed his client to appear for an examination some time in the future. "It is submitted that when such examinations are completed and the examination of the defendant Richard Lewis is had, the necessity of the production of the particular documents now sought to be produced will be more readily determinable and the plaintiffs will then be enabled to apply for the discovery and inspection of any documents which they specifically designate." This motion, also, was not returnable for three weeks, so I had to wait until April 8 to submit essentially the same arguments we had been through before.

Through March I waited for a decision as to whether Mr. Day's case against Dependable Credit was on or off. After a month's watching of the daily decisions printed in the *New York Law Journal*, I finally spotted this resolution of the issue on March 27:

Motion is held in abeyance pending receipt of a report from the Hon. James Gabel, Special Referee, to whom the issue is referred. Counsel are directed to arrange for a hearing date.

I at once had the vision of many months' delay simply in finding out whether my summons had been served, before we could even

begin to process the case. But there was nothing to be done except arrange for a hearing date and prepare for a hearing.²⁴

April

On April 16, the Office of the Referee set May 14 as a hearing date in the *Day* case. By this time I was getting used to successive delays of a month at a time.

Meanwhile, I began my discovery in the case of Mrs. Collins. I waited until her deposition had been completed, to avoid another hassle over "priority," and then served Budget, on April 16, with about ninety interrogatories relating to their connections and course of dealing with the carpet seller, Buy-Well. I chose to use interrogatories rather than an oral deposition because I feared that on an oral examination, any individual officer or employee of Budget would disclaim knowledge of more than a small portion of Budget's operations, and I would have to take dozens of examinations to find out the facts. On the other hand, interrogatories would search the company's corporate knowledge and could always be followed up by depositions to learn more details. Following a leading form book, I addressed my questions to be answered by "Budget Finance Corp., by an officer or agent thereof." I asked many detailed questions about the knowledge Budget had of Buy-Well, such as "To the knowledge of any officer, director, or agent of Budget, did any of Buy-Well's incorporators have any prior business experience? Had any of them directed a business which had failed?" After serving the interrogatories, I sat back to wait, not so much for answers as for an expected motion to dismiss the questions. I did not know the grounds Budget would claim, but by this time I had caught on to the fact that in New York, no one submits voluntarily to discovery; there are always several weeks or months of haggling first.

While I was waiting, the court ruled on Mr. Stone's third motion for a protective order in the *Allen* case:

Motion for a protective order vacating the notice of discovery and inspection is granted without prejudice to plaintiffs' seeking such discovery after completion of the pending examinations, at which time the relevant documents will be specifically identified.

This was only a minor disappointment, because the end was in sight: on April 16, Bender, Segal completed questioning the Al-

²⁴ I had also served a third summons on Dependable by serving New York's Secretary of State. But by that time, the statute of limitations had run on some of my causes of action, so it was important to establish that my first service was effective.

lens; and so, by the court's previous order, I had a right to examine Richard Lewis by April 26. Thus, on April 17, I called Mr. Stone and told him that the examinations were completed. But he took the position that the examinations of the Allens were not "completed" until the transcripts were typed and signed by the Allens.

I had no choice but to accept his interpretation, because it would take longer for me to make a motion to the court (on eight days' notice) to order the examination scheduled and to wait for the decision, than to wait for the transcripts and have my clients read and correct and sign them.

Towards the end of April, Bender, Segal moved to vacate all of my interrogatories in the *Collins* case.

They relied upon a variety of grounds, but most heavily on the claim that I was asking questions about Budget's "present knowledge" of Buy-Well's status and activities, whereas "the present knowledge of any of Budget's officers, directors, or agents is not material, because it is not in any way related to, or indicative of, the knowledge, if any, of the persons concerned at the relevant time." Bender, Segal listed by number several of my questions which supposedly indicated that I was asking questions about an irrelevant period of time. These included such questions as "To the knowledge of any officer, director or agent of Budget, what were Buy-Well's assets at the time of the assignment?"

I answered these contentions by arguing that we sought to demonstrate a continuing close relationship between Budget and Buy-Well, and all the relations between them were relevant to proving the existence of the course of dealing. Then I waited for May 9, when the motion would be submitted.

May

The *Collins* motion was indeed submitted to the court on May 9, but there was to be no decision that month, nor indeed until June 14.

In the *Day* case, I had an equally frustrating delay. Shortly before the hearing scheduled on the issue of service of process, my adversary informed me that he had broken his hip, and the hearing would have to be adjourned. And the referee's office notified us that the earliest adjourned date they could set would be June 14.

But in the *Allen* case, I expected real progress towards examining Richard Lewis. The transcripts of the examinations of the Allens were signed May 3, and I notified Mr. Stone of the event, saying that I expected to examine his client by May 13, in con-

formity with the court's order. He said he would talk to his client about a date and call me back. But by May 7, he had not called me back, so I called him again. He said he had not been able to reach his client who "didn't have a telephone,"²⁵ and he would call me in "a couple of days." Since that would take us almost to the tenth day after May 3, I sent him a hand-delivered letter notifying him that I would conduct the examination on May 13, at 10:00 A.M.

I hired a stenographer for the morning of the 13th, and this time I genuinely expected Stone and Lewis to appear. But they did not. And so, after waiting for fifteen minutes, I called Stone.

He said that he hadn't reached his client, that he thought his client might get in touch with him "any day now" and that he hadn't called me the day before because that "was a very hectic day for me."

I was extremely angry, both because I was getting nothing in return for having subjected my clients to questioning, and because I was getting no closer to testing the legal issues I had set out to challenge. So once again I went back to my typewriter, this time to write a motion to strike the answer of Richard Lewis for his failure to appear²⁶ or alternatively to order him to appear and to pay the stenographer's bill and reasonable attorney's fees for the time I had to spend writing motions to make him appear.

Stone answered by saying that "we could not possibly communicate with our client . . . on such short notice. [Schrag is trying to have this court impose] costs on the defendant Lewis who had been completely unaware of these conversations between counsel and who is certainly not avoiding any examination. [We do not] understand the reasons for this apparent zeal on the part of the moving attorney [T]here is no particular urgency to the proceedings herein." He concluded by requesting that the court merely fix a date and time for Lewis to be examined at the court house, which struck me as an odd request since the examining party is supposed to have his choice of where to conduct the examination.

June

On the third of June, my motion to punish Lewis was granted only to the extent of requiring Lewis to appear for examination on the 17th. No mention was made in the decision of my request

²⁵ Very shortly after I began my suit, Quality Furniture ended its relationship with Lewis; and their particular freezer racket came to an end. Chalk up three points for the strategy of affirmative suits for damages.

²⁶ Under N.Y. Civ. Prac. Law § 3126 (McKinney 1963).

for costs or counsel fees. The court set the court house as the place of examination. So by failing to appear within ten days as the court had earlier ordered, Stone was able both to delay the case by a month and four days and to have the examination switched from my office to the court house across the street from his office, with no penalty whatsoever.

But Stone and Lewis did appear on the 17th, and the examination must be reckoned a success. Lewis denied making any guarantees that the food would last four months but gave evidence going beyond my expectations about his close relationship with Budget Finance. He testified, for example, that when a customer gave him an order, he made the customer fill out a credit application (on a Budget form) which was then sent to the finance company. If Budget approved the credit, the customer was notified that the sale was final, but if Budget rejected the credit application, the customer was told the deal was off; Lewis made no effort to finance his sales except through Budget.

At noon, Stone flatly refused to come back after eating. He said he was a busy man with other things to do, nor could he come back to complete the examination during the next few weeks. I thought I had a right to insist on a continuation reasonably promptly, but given the inevitable month's delay between the making of a motion and its resolution, I had no way to enforce any demand for an earlier date. I therefore agreed to the setting of July 15 as an adjourned date.

In the *Day* case, the hearing on service of process was at last held. I had subpoenaed all three "collectors" who might have received my summonses and questioned them at length. It developed that not two, but a great many different finance companies shared the same offices in their building; that each of these companies had the same officers; and that while the collectors (telephone dunners) were on the payroll of one company, they sometimes performed services for others. It also developed that although the officers of the companies work on the premises, it was a regular practice, when legal papers arrived at the switchboard, for the receptionist to call a collector to accept them. King testified that he'd received four other papers the day he was served with mine (but wasn't sure mine were among them). Having brought out this testimony, I left the hearing feeling confident that I had made out a satisfactory showing of agency to receive process, but annoyed that it had already taken nearly six months to get this far.

In June, also, the court finally ruled on Bender, Segal's motion to strike my *Collins* interrogatories; their motion was granted.

One of the court's grounds had been relied upon by defendant: that many of the questions "contain no frame of reference as to time." That ruling was wrong, but at least I could feel that the court was trying to be rational. But the court's other ground, which had not been mentioned by defendant, was simply absurd: "Plaintiff does not expect a single witness to have the requisite degree of knowledge upon the matters sought to be disclosed and the requesting of a single person ["Budget, by an officer or agent thereof"] to furnish disclosure concerning the acts and personal knowledge of other officers and employees is onerous and oppressive." I had used that language only because I had copied it out of a form book, and it was supposed to be the proper way to search corporate knowledge. However, I had no opportunity to tell that to the court, since it came up with that ground on its own.

The court's objections did not seem insuperable, and I had no alternative but to start again, by serving a new set of interrogatories. I therefore redrafted my questions, inserting into each one a cumbersome phrase about the time period involved, so that they now read, *e.g.*,

To the knowledge, as of the date of the assignment, of any persons who were then and are now officers, directors, or agents of Budget, what were Buy-Well's assets at the time of the assignment in question?

I readdressed the questions to "Budget, by such officers or agents thereof as have knowledge of the facts," shipped them off to Bender, Segal, and waited for the inevitable motion to strike—which duly came.

July

At the beginning of July, after submission of memoranda of law by both sides, I learned that the referee in the *Day* case had accepted my theory that the collectors had been authorized by practice to accept papers, and that the summons had been served. I thought that at last that aspect of the case was over, but discovered that a referee's report does not automatically go to the court which ordered it written; I had still to move to confirm it, and give the other side an opportunity to dispute it. So I made my motion (I should note that all of these motions consume endless hours in time spent drafting arguments), and waited to see if it would be contested by Dependable Credit. It was.

Not only that, but in order to contest the report, Dependable needed a transcript of the hearing testimony, and the court reporter who had taken the testimony on his stenotype machine was

on vacation. Hence the motion to confirm the report would have to be delayed indefinitely. (It later developed that this reporter had won a stenotyping contest, and we had to wait a month while he competed in the finals, then came home and typed up our record. However, my adversaries in this case were much more friendly and pleasant than the lawyers who represented Budget and Richard Lewis, and they agreed to accept an amended complaint from me in the interim and get on with the case subject to dismissal if they won their motion to dismiss for improper service.)

On July 15, I completed my examination of Richard Lewis. This second session was less successful than the first. I asked him about other customers to whom he had sold freezers, pointing out that these questions were relevant because I had to prove a pattern or practice of fraudulent dealings in order to collect punitive damages. But Stone directed Lewis not to answer these questions nor to reveal the names of other buyers, on the ground that they were not relevant to any valid action I might have. In addition, Lewis did not produce any of his business records, claiming that he had gone out of business shortly before my suit was instituted and had destroyed all his records at that time because he no longer needed them. I felt certain that he was not telling the truth but had no way to prove that he had not destroyed his records.

At the beginning of July, contemplating the completion of the examination of Richard Lewis on July 15, I served Stone with a notice to examine the president of Quality Furniture on July 16. I had not wanted to examine him earlier, because I assumed that information revealed by Lewis would be of help in questioning officers of Quality. But on the 15th, Stone again announced that he would not comply with my demand, and I was relegated to choosing between the adjourned date he offered me—August 13—or moving to punish his client, a motion which, in the light of the history of the case, I felt no confidence about winning. I accepted his August 13 date.

August

But on August 9th, he wrote me:

Dear Sir:

Please be advised that our client Quality Furniture, Inc., has filed a petition in bankruptcy under chapter xi. Under the circumstances all proceedings against it are stayed until disposition of that proceeding. The examination scheduled for August 13th will therefore have to be delayed to some future date.

Ah, the regretful tone of his letter, Ah, the law. At this point I started thinking seriously about some other career.

A little research confirmed the fact that the federal bankruptcy court had indeed stayed all state court proceedings against Quality (to preserve the estate for the creditors) and that it was virtually impossible to have such a stay vacated. Yet this might delay my suits against them indefinitely.

With no particular plan in mind, however, I resolved to attend the first hearing in the case in federal bankruptcy court and do what I could for my clients. That hearing was set for August 27.

Meanwhile, I invented a tort. I served an amended complaint on behalf of Mr. and Mrs. Day, accusing Dependable Credit of engaging in a pattern and practice of purchasing unconscionable contracts, which on their face were exorbitant, and alleging that such conduct subjected them to liability for punitive damages. I hoped that this claim would seem so outrageous to them that they would move to dismiss, but they did not. They merely answered. So to provoke the issue, I served them with a notice to inspect all of the freezer contracts they had bought during the last three years. I knew they could not comply with this demand because they would have to fear that I would peruse the contracts to solicit new plaintiffs to sue them. Little did they know that I had my hands full with half a dozen cases. They had to object to the notice on the ground that my tort was unknown to the law. And they did, by a motion returnable August 23. They did me the favors of informing the court that this was an important test case and of arguing squarely on the merits rather than on some obscure technical ground. In my response, I too argued the merits, presenting the court with a somewhat academic analysis of the role of tort law in regulating merchant-consumer relations, quoting the Kerner Commission Report,²⁷ and marshalling whatever legal and secondary support I could for my tort. At last, after seven months, this was test case litigation as I had imagined it as a law student. I expected to lose, but at least I would have an appealable decision,²⁸ and I would be able to present an issue of some significance to an appellate court. I looked forward to September for a square ruling on the merits, one way or the other.

The next August event was a decision on Bender, Segal's motion to dismiss my second set of *Collins* interrogatories. Bender, Segal had argued once again that my questions were not specific enough in delineating the time period involved (I really could not imagine how to be more specific). I had pointed out to the court

²⁷ Report of the National Advisory Commission on Civil Disorders (1968).

²⁸ New York permits interlocutory appeals. See N.Y. Civ. Prac. Law § 5701(c) (McKinney 1963).

that the time period referred to was as specific as it could possibly be, that no one could have any doubt about what I was asking, and that I was asking only for corporate knowledge at the time of the assignment of Mrs. Collins' contract to Budget. And I noted that this time I had not addressed my questions to a single officer or agent, but rather to whatever employees knew the facts. The court ruled:

Motion to strike is granted with leave to serve new and proper interrogatories. Although afforded an opportunity to submit proper interrogatories, the defects heretofore appearing in the original questions have not yet been cured.

End of decision. Not a hint of what was wrong, or how I could serve more proper questions. The next time I saw Jack Schwartz, my adversary at Bender, Segal, I expressed my astonishment at the fact that the court did not seem even to have read my arguments. "I'm not going to knock them when I win," he said. "But what do you expect when they have two hundred and fifty motions a day, and the judges don't even get near motion papers, but permit their cases to be decided by clerks and assistants who have had at best a third-rate legal education?"

Toward the end of August, I moved to compel Richard Lewis to reveal the names and addresses of his other freezer customers (which Stone had ordered him not to do at the examination), on the theory that they were essential witnesses to the pattern of his fraud. His attorney resisted my motion. Since he claimed to have destroyed his records, I did not really expect to obtain names, but I thought I might at least obtain a ruling, which would be something of a precedent, that such names and addresses were relevant and therefore discoverable.

August 27—the first hearing on Quality's bankruptcy—turned out to be one of the more exciting days of the year. I arrived in the bankruptcy court a little early so as to hear some earlier case and get some idea of how the court worked, since I knew nothing whatever about bankruptcy. When I went into the hearing room, there were only three seats left, all in one row. I sat in the middle seat, and soon two gentlemen entered and sat on either side of me. Presently they began talking over me, and my mind snapped to attention when I heard one of them say "Quality." It developed from their conversation that one was Quality's bankruptcy lawyer and the other its treasurer, and they were talking about me. Evidently they did not know any more than I did what the status of my case was now that they had filed in bankruptcy. So far so good.

Quality's case was called by the bankruptcy referee, and the two men next to me and several others from around the room moved forward and sat at a big counsel table. The referee turned to the attorney for the chief creditor—the one with the largest claim—and announced that he would now hear nominations for members of the creditors' committee, which would supervise the operation of the store until it was either closed down in a full-fledged bankruptcy or reached a composition with unsecured creditors. "Whom do you nominate?" he asked.

With all the spontaneity of an obviously rigged election, the chief creditor nominated himself and several other people.

"Are there any other nominations?" asked the referee, in his best pro forma manner.

I figured it was now or never, and any forum for injecting an issue is better than no forum, so I stood up in the back of the room and announced, "I nominate Jack Greenberg."

The courtroom reacted like the audience in a movie wedding where the mysterious stranger runs into the church and objects to the vows. All eyes turned on me. The lawyers at the counsel table swiveled around to see who had spoken. The referee leaned forward, pointed at me and said, "*Who are you? And who is Jack Greenberg?*"

Edging ever so slowly into the aisle and forward, I explained that Jack Greenberg and I were Director-Counsel and Assistant Counsel of the NAACP Legal Defense Fund and that we represented consumers who were creditors of Quality in that they had pending in state court punitive damage claims against Quality for fraud in making sales. The referee was stumped by my unusual motion, and after some hesitation, he denied it, without giving any satisfactory reason. But clearly he felt badly about denying it, so he turned to Quality's lawyer and demanded to know about this alleged fraud.

Quality's bankruptcy counsel was, however, not its litigation counsel, and he had to admit he didn't know anything about the state court cases. This made the referee very angry.

The referee, unable to obtain any information from Quality, then turned to me and asked me the status of these cases, a question which I did not exactly seek to evade.

"Your honor," I said, "these cases were proceeding along in an orderly fashion, and the plaintiffs were systematically conducting discovery proceedings, when suddenly these proceedings were interrupted by your stay of all state court proceedings, which I hereby move to vacate."

General tumult at the counsel table, and Quality's lawyer rose to his feet violently asserting that this would jeopardize the estate, injure the creditors, and so forth, without quite explaining how. But the referee announced his inclination to grant my motion, whereupon the chief creditor claimed that he was a contributor to the Legal Defense Fund and would not object. "One of these days," said the referee to Quality's lawyer, "these people are going to inquire into all of the credit practices up in Harlem, aren't they?" "Yes, they are," said Quality's lawyer sheepishly.

Of course, nothing in the law is quite as simple as that: the referee instructed me to make my motion in writing, returnable September 17, and then it took him until September 30 to sign the order, so it took fully two months for me to get back to where I had been on August 9 when I was informed of the bankruptcy proceeding. And even then, the stay was vacated only as to my discovery, and I would have to apply for further relief (which I might not be granted) to go on the state court trial calendar.

September

At the beginning of September I left for a three-week vacation. I returned to find that I had won more little victories while I was away than during any comparable period while at work.

For one thing, the court had granted my motion to require Lewis to produce the names and addresses of his other customers. Unfortunately, it reached this decision without any opinion whatsoever, so the precedential value was limited. And, as I expected, even the immediate impact of the decision was slight. While I was still away, another NORI attorney interrogated Lewis (pursuant to the order) about his business records, but Lewis stuck to his story that "I never kept any books of account" and that "I threw away most of the things [records] that I had, being that I had no more any interest in the business. . . . What am I going to do with them? . . . Of course, to me it was garbage."²⁹

Second, the court decided, after nine months, that I had indeed properly served a summons on Dependable Credit in the *Day* case. And my adversary informed me that he would not appeal the decision, a remarkable departure from what seemed to be routine New York practice.

Third, and most surprising, my motion to see all of Dependable Credit's contracts was granted. Unfortunately, although both

²⁹ I was able to learn the identities of many of Lewis's other buyers by having a VISTA volunteer make door-to-door inquiries in neighborhoods where Lewis operated. But this method of investigation was extremely costly in man-hours.

sides had framed the issue on the motion in terms of a test of the existence of the tort of persistent unconscionability, the court's brief order in my favor was as cryptic as any that it had ever handed down against me:

Motion for a protective order modifying notice of examination before trial is denied, and defendant, together with the records set forth in plaintiff's notice, is directed to appear for examination before trial at Special Term, Part II [the part of the court for ex parte motions] of this court at 10 A.M. September 26, 1968, at which time rulings with respect to the admissibility of the records may be obtained from the justice presiding at said Special Term.

It was difficult to fathom what this order meant. First, the court seems to have thought that I was seeking, and the credit company resisting, an examination before trial; actually, I had simply asked for copies of certain written documents. More puzzling, what did the court leave to the ex parte judge to decide? Surely, after having read our papers, which fully briefed the issue of the existence of a tort cause of action, it could not be passing the buck for deciding that rather complex and important issue to another judge to decide on the spot on the basis of five minutes of oral argument, without submission of briefs. Yet the court did mean to give the ex parte judge something to decide, and it avoided in its decision any mention of the underlying issue.

Inevitably, my adversary and I got into an argument on the telephone as to what the order meant. But since I had won the motion, I was in a stronger position, and I was able to persuade Dependable's lawyers that the court must be presumed to have acted rationally, and it therefore must have resolved the tort issue in my favor and left it open to Dependable only to resist disclosure of particular contracts on grounds of privilege, rather than relevance.

Accepting this interpretation, my adversary announced that he would appeal the decision to the January term of the appellate division, and since that appeal would give me a second chance to obtain an authoritative opinion on the existence of a tort remedy, I was happy to consent to a stay of the disclosure until the appeal was decided.

My final effort in September was the drafting of a third set of interrogatories in the *Collins* case. A staff attorney older and wiser than I concluded that although the court had never said so either time, what it really found offensive in my first two sets of interrogatories was their sheer length—that ninety written questions was simply too much for the court, regardless of their relevance or of the equities. So I chopped them down to the nineteen

most important questions, those which I considered to be most essentially directed to the evidence I would need to establish. Once again these questions sought to establish Budget's state of mind and knowledge of Buy-Well's affairs at the time it bought Mrs. Collins' contract. In addition, I asked Budget (as I had done before) to attach certain essential documents to its answers, such as copies "of all documents reflecting [the payment to Buy-Well for the Collins contract], including, but not limited to, cancelled checks and ledger sheets," and "copies of any credit reports on the plaintiff and any relevant memoranda and correspondence."

Budget's objection to these interrogatories was that they were "simply immaterial, irrelevant and unnecessary, because they seek information beyond the scope of any proper issues raised by the pleadings." So once again, I hoped that by demonstrating in detailed terms the relevance of each question to proving the connection between Budget and Buy-Well, I could at least get the court to say, in ruling the questions relevant, that a finance company could be shown to lack bona fides if it had sufficient knowledge of the fly-by-night character of the dealers it purchased contracts from.³⁰ Of course, it would be six weeks before I got any decision at all.

October

Now the year was rushing to a close, and my activity became centered more and more around the case that had triggered all the others—Mr. Allen's freezer. On October 7, I sent Mr. Stone a copy of the freshly signed order of the federal court permitting my interrogation of Quality's officers to proceed. I asked him to select a date convenient for him so that he would not make a motion on the excuse that I had picked an impossible date. Not having heard from him, I called him a week later, and he said that he had not asked his client about a date, but he would do so the next week. Of course, the next week, when I called again, he said that he would not have time to contact his client until the following week. Having no choice but to set a date myself, I sent him a notice demanding examinations of Quality's president and treasurer on

³⁰ This minimal incursion on the immunity of finance companies is established law in some states. See *Unico v. Owen*, 50 N.J. 101, 232 A.2d 405 (1967), and cases cited therein. But no appellate court has said even this much in New York, and even the lower courts have not yet gone beyond saying that a finance company may be subject to defenses if it is "so identified with the seller to an extent that it could fairly be said that the dealings of one are inextricably interwoven with that of the other." *Public Nat'l Bank & Trust Co. v. Fernandez*, 121 N.Y.S.2d 721, 724 (N.Y.C. Mun. Ct., 1952).

October 31, and requiring them to bring with them their lists, if they had any, of Lewis's other freezer customers.

As usual, at the last possible moment Stone served me with a motion (returnable three weeks hence) for a protective order, claiming that I had no right to examine both officers until I first demonstrated that one did not have all the requisite knowledge and that I was seeking the production of improper and irrelevant documents, such as the list of the other freezer customers. I pointed out that we had already been through the issue of the lists of customers and that the law of the case had been resolved in my favor.

November

Or so I thought. Without further explanation, the court in November permitted the examination to proceed (at the court house, as Stone had again requested), but my demand to see the customer lists was stricken "as improper." Since I didn't think that Quality would produce such lists in any event, I did not bother wasting six months on an appeal.

Shortly thereafter, the court struck my third set of *Collins* interrogatories. Once again, its reasoning made little contact with the questions asked or the facts in the record. According to the court:

With respect to those portions of the interrogatories seeking detailed information as to the corporate makeup of the vendor, and the operation of its business, the business background of its principals, officers, and employees, the fact that the corporation is now dissolved, absent any other circumstances, does not create an obligation upon the defendant to procure these answers for plaintiff. The requirement that defendant reproduce quantities of books, records, documents and papers, bears [sic.] the cost thereof and furnish the same without charge to plaintiff, is oppressive and burdensome.

This decision was truly frustrating. I had not asked Budget to go out and "procure" anything; I simply wanted to know what it had known about Buy-Well. Nor had I relied, in my papers, on a theory having anything to do with the fact that Buy-Well was dissolved. I had just said that I was entitled to information in the possession of Budget. I had asked for the reproduction of a few pieces of paper, as I was entitled to do,³¹ but had not demanded copying of "quantities of books, records, documents and papers"; nor had I made any comments about the cost of reproduction.

³¹ N.Y. Civ. Prac. Law § 3131 (McKinney 1963).

Growing doubts about my own ability to write plain English were allayed only by Jack Schwartz's mentioning once again (referring this time to the latest *Collins* decision) that I could not reasonably expect any closer attention to the facts from such an overworked court.³²

The court granted me permission to submit proper interrogatories to another judge, for approval by the court, so I drafted still a fourth set of questions. This fourth set (now down to seventeen questions) was very much like the third; I cut out demands for some of the papers to be duplicated, and now asked for copies of only nine pieces of paper. My motion papers stressed that I was not seeking to make Budget "procure" anything. Basically, the fourth set of interrogatories was a desperate attempt to get some judge, assistant, or clerk, seriously to read through the motion papers and render a reasoned decision, even if only to say that the information I sought was irrelevant. At least that order would be worth appealing.

Of course, Jack Schwartz used the court's inattention to the facts against me. He argued:

In an artificial and contrived attempt to circumvent the ruling, plaintiff now proffers identical questions with the explanation that the questions do not require Budget to "procure" information regarding a third party. Mr. Schrag has thus seized upon some pretended semantic distinction in an effort to avoid the clear and unmistakable intent of Mr. Justice B——'s decision. This attempt to render Justice B——'s decision a virtual nullity is itself an affront to this court.

As the year 1968 ran out, the court had not yet ruled on the fourth set of *Collins* interrogatories.

December

Although *Quality's* bankruptcy proceedings made a trial in the *Allen* and *Buenavidez* cases seem further off than ever, there was still precedent to be set along the way. At the urging of Susan Freiman, a young, brilliant Legal Aid attorney with a flair for bankruptcy law, I went back to the federal court on another scheduled date for a hearing in *Quality's* case, to renew my motion to place a defrauded consumers' representative on *Quality's* creditors' committee. Again the courtroom spectators were astonished when I stood up in the audience and made an oral motion—this time to add Shyleur Barrack, the director of the Harlem office of

³² He correctly predicted also that the election of several new justices to the supreme court would not relieve the load in the motions part; more trials will be held, but no additional justices were assigned to motions.

the Legal Aid Society, to the committee. Both the creditors' lawyer and Quality's lawyer objected violently. "We on the creditors' committee are concerned with real creditors' claims, with claims of merchants who have advanced money or goods to Quality. We're not concerned with claims of consumers."

"That's exactly the point he's trying to make," said the bankruptcy referee. "Since you are not looking out for his clients' interest, he wants to add someone to the committee who will do so. And it's my job to see to it that the creditors' committee has as broad a spectrum of representation as possible."

"Well then," said the creditors' lawyer, "the reason you can't grant his motion is that his clients haven't filed proofs of claim. And no one is a creditor in this proceeding unless they have filed a claim in this court."

The referee didn't even ask me whether I had filed the proofs or not. "We'll soon find out if they have," he said. And from under his desk he whisked out a telephone, dialed the clerk, ordered the file sent to him, and recessed the case for ten minutes.

In the back of the room, the creditors' lawyer and Quality's lawyer buzzed anxiously about the calling of their bluff. Miss Freiman and I, meanwhile, exchanged smug looks, for, months earlier, without knowing exactly why we did it, we had filed proofs of claim on behalf of Allen; Buenavidez; and a Legal Aid client who had bought a freezer from Richard Lewis, was being sued by Budget, and had made a claim against Quality.

When the case was called again and the referee pointed out that our clients seemed to be creditors within the letter of Chapter xi of the Bankruptcy Law,³³ the creditors' and debtor's lawyers had run out of objections. The referee granted my motion, whereupon, as before, the objectors withdrew their objection "for the sake of peace."

That afternoon, in trying to assess what we had accomplished, we discovered that voting power on a creditors' committee is proportional to the dollar value of the claims a member represents. Since our punitive damage claims amounted to over \$100,000, we represented the largest creditor, and were running the store.

The next week, we all went to the creditors' committee meeting: Barrack as a member, Miss Freiman and I as his special counsel. The members, lawyers for various creditors, had heard something of our success in court, but were nevertheless stunned by our physical presence in their midst; they had never seen any-

³³ 11 U.S.C. §§ 701-99 (1964).

thing like this, and simply didn't know what to make of us. "You're chasing a rainbow," one said to Miss Freiman.

"Perhaps there's a pot of gold at the end of it," she answered.

But when Quality's lawyer arrived, it became evident at once that we had come to participate in the last meeting of creditors, and to witness the end of a 133-year-old minor empire. Quality's owners simply could not reach a suitable arrangement with the creditors and were ready to consent to an adjudication of bankruptcy. The store would be closed down and sold at auction for the benefit of creditors.

But the consumers' representatives still had a role to play. We listened in silent amazement as the creditors decided not to close the store at once, but to obtain an adjudication of bankruptcy to take effect just before Christmas. Christmas sales would swell the pot which they would eventually divide; contracts for the merchandise sold would quickly be assigned to Budget for cash. No one mentioned the fact that each sale would involve express and implied warranties to consumers which would be meaningless because Quality would be out of business and Budget would claim to be a bona fide purchaser.

Back in court three days later, the creditors and Quality made a joint application for an adjudication of bankruptcy to take effect just before Christmas. Once again there was a stirring in the back of the court. "Before you sign that order, your Honor," said Miss Freiman in a tiny voice, "I think that there is something that you should know."

"What's that?" asked his Honor. And she told him about the warranties that would be valid for four years under the Uniform Commercial Code, or until Christmas, whichever came sooner.

"Are you suggesting that I close down the store at once?" he asked.

"I suppose I am," she said.

"So ordered," replied his Honor. And he ordered Quality's lawyer immediately to telephone the store and instruct the management to stop selling, to send home the employees, and to lock the door.

The lawyers for Quality and the creditors simply lost control over themselves. Flailing their arms, they demanded to know from Miss Freiman who she was and whom she thought she represented. "She doesn't represent any potential buyer; she has no standing to make a motion," yelled one of the lawyers. "I doubt she's even a lawyer."

But Miss Freiman, who did not represent a potential buyer,

stood mute, and after the room was again calm, the referee said quietly, "I guess you gentlemen will simply have to accept her as the representative of the community."

III

CONCLUSION

My involvement in the bankruptcy proceedings was one of the high and even humorous spots in what was otherwise a disillusioning year. Disillusioning because I learned how time-consuming and how costly test cases are, but most of all because I had thought that poverty lawyers and the judiciary—at least in the North—would be partners in reforming the law as quickly as possible. I learned, instead, that the lower state courts—on which so much really depends—are neither friendly nor hostile to law reform. Instead, they are totally indifferent.

In recent years, as the problems of the poor have shifted from those of racial discrimination to those of an imbalance of economic power, the legal questions of burning importance to the poor have undergone a corresponding shift from constitutional issues to rights under state law. As the law of consumer protection, landlord-tenant relations, and the family become foci for law reform efforts, state court test litigation becomes more and more important. Yet to the extent New York's practice and procedure is typical, the state courts have made an expeditious resolution of a novel issue all but impossible.³⁴

My experience demonstrated that even with virtually unlimited economic resources, a test-case lawyer is in trouble in New York courts. But so much work is involved in trying to force a case through the various stages of litigation that state court test cases are economically beyond the reach of most poverty law offices. I have just spent an entire year working on six cases.³⁵ Few, if any Legal Aid or OEO-sponsored neighborhood offices could afford to permit its attorneys to carry so light a case load; the community's need for immediate service is too great, compared to the minute budgets of the poverty law offices. Some of them are trying to establish law reform units; but these units are involved, for the most part, in federal litigation, such as welfare and

³⁴ Given the current state of trial court congestion, it may be three years before the *Allen* case is tried.

³⁵ In order to make this article reasonably brief and readable, I have described only three of them (counting *Allen* and *Buenavidez* as one). But these three are representative, and the others have encountered equally bizarre obstacles and delays.

public housing issues. I know of no other systematic program of consumer test litigation in New York State.

I believe that if America is to enjoy a peaceful evolution to a more equal society, the courts no less than the legislatures must be aware of the crisis depicted by the Kerner Commission Report and must be eager to share with other institutions of government the work of reform. Judges should not even have to wait for lawyers to present them with test cases to reform the law; they should know that the rules now applicable are terribly unfair to the poor and should seek out ways to render the legal system more just. Some courts—most notably the Supreme Court when it decides a case like *Jones v. Mayer Co.*³⁶—seem to do just that.³⁷ And although I know nothing at all about any of his other decisions, the bankruptcy referee I have described seems to me to have a sense of the role baseline adjudicators must play in enabling the poor to employ legal processes to help them.

But although every motion paper I have submitted to a state court has presented it with an opportunity for reform of some aspect of the law, I have been given little reason to believe that such courts are aware of our national problem, much less desirous of helping to resolve it by propelling the law in a more just course. In ordinary times, a Court of Chancery as deaf to the need for expeditious justice as the court Dickens described would be a tragic mockery of the origin and theory of Equity. Today it forebodes disaster.

IV

EPILOGUE

I finished writing this history on New Year's Day, 1969, and, on the theory that any twelve-month period is representative of a continuous process, I had not intended to bring it up to date in galley proofs. But recent events have changed my mind.

In the *Allen* case, it seems unlikely that I will be able either to have the facts tried or to obtain recovery for my client. The federal court is moving toward hearing claims against the bankrupt and distributing its assets, but the Bankruptcy Act permits only tort claims based on *negligence* to be proved and allowed in bankruptcy proceedings;³⁸ for historical reasons,³⁹ intentional

³⁶ 392 U.S. 409 (1968).

³⁷ But see Steel, *Nine Men in Black Who Think White*, N.Y. Times, Oct. 13, 1968, § 6 (Magazine), at 56, particularly his comments at 118 on the Supreme Court's recent record in housing litigation.

³⁸ 11 U.S.C. § 103(7) (1964).

³⁹ 3A W. Collier, *Bankruptcy*, ¶ 63.25 at 1891-92 (14th ed. 1968). See Schall

torts are not provable in bankruptcy, so I may not be able to have my case heard in the federal forum. (Of course, my clients' claims will not be discharged in bankruptcy, but since Quality is not planning to reopen its doors, undischarged claims will be worthless.) The claims cannot be proved in state court in time to participate as judgment claims in the bankruptcy proceeding, because, even if there were no further delays whatsoever in the state court, it would be over a year before the cases could work their way to the top of the calendar. And delays such as those reported in this article are virtually inevitable.⁴⁰

As for *Collins*, the Court finally ordered Budget Finance to answer my interrogatories. But Budget answered more than half of the questions by stating:

Budget is unable to answer this question through its present officers, agents or employees or as a result of examination of its files.

The *Day* case was decided by the appellate division early in February. In that appeal, I had sought to sustain the lower court's denial to Dependable of a protective order by arguing that a pattern or practice of financing contracts that were on their face unconscionable was tortious. I made plain in my brief that I was relying for the relief demanded upon tort theory, not upon the Uniform Commercial Code:

We do not dispute appellant's argument that the Uniform Commercial Code does not provide for damages in the case of an unconscionable sale. Respondents do not look to the Code for the damages they demand. Rather they rely upon the common law doctrine that "the infliction of intentional harm, resulting in damage, without legal excuses or justification" is tortious. *Penn-Ohio Steel Corp. v. Allis-Chalmers Mfg. Co.*, 7 App. Div. 2d 441, 443, 184 N.Y.S.2d 58 (1st Dept. 1959). Respondents refer to the traditional doctrines of unconscionability for guidelines as to wrongful conduct; they refer to tort law for their remedy. . . . Unconscionability is a tort [as well as a contract defense] where it is a regular and knowing practice.

In its short opinion unanimously reversing the decision of

v. Camors, 251 U.S. 239, 250-251 (1920). In that case fifty years ago, the Supreme Court noted confidently that "[if] there be danger of mischief here . . . the Congress may be trusted to supply the remedy by an appropriate amendment." *Id.* at 254.

⁴⁰ I moved in the bankruptcy court for a hearing on my clients' claims in order to make that court decide, while there was time, whether it had jurisdiction to adjudicate those claims. I filed a memorandum arguing that under the Bankruptcy Act and the due process clause of the fifth amendment, I had a right to be heard to prove the claims. On March 6, after telling me that he had not read my memorandum, the referee denied my motion on the ground that tax claims and other priority claims might consume the entire estate realized by the sale of the bankrupt's assets, and that it would be premature to decide my right to share in the proceeds in advance of knowing whether, in fact, there would be any proceeds.

the lower court, the appellate division ignored the allegations of the complaint and the theory of my brief:

The plaintiffs seek to recover punitive damages from defendant asserting a complaint based on Uniform Commercial Code Section 2-302 in that plaintiffs were induced to buy a refrigerator freezer at an "unconscionable" price within the meaning of the said statute. . . . Section 2-302 of the Uniform Commercial Code does not provide any damages to a party who enters into an unconscionable contract. . . . The documents called for under the notice of inspection are neither material nor necessary to plaintiff's [sic] cause of action.

On the same day, a different five-judge panel of that court unanimously affirmed the order dismissing another of my cases, the class action referred to by Professor Dole in his article elsewhere in this issue. In the *Hall* case, the Legal Defense Fund, Consumers' Union, the Attorney General of the State of New York, and the law firm of Paul, Weiss, Goldberg, Rifkind, Wharton & Garrison had all joined to urge the Court that it was unjust and unwise to prevent consumers from having a day in court solely because their claims were too small to justify individual litigation—we urged that class actions were essential to the vindication of consumers' rights. Each side put literally hundreds of man-hours into the case. Here then, in its entirety, is the response of the Appellate Division to what is probably the most important consumer law issue of the decade:

Order entered Aug. 28, 1968, and judgment, unanimously affirmed, without costs and without disbursements. No opinion. Order filed.