

Summary

The Consumer Protection Procedures Act, DC Code Sec. 38-3901 et. seq., is the principal consumer protection law of the District of Columbia. The Act is a very useful tool for protecting the interests of the consuming public, but certain deficiencies, most of them procedural, prevent full use of this valuable legislation. The Committee on Consumer Affairs of Division 2 of the DC Bar recommends several improvements in the law, as follows:

- permitting orders of the Administrative Law Judge awarding monetary relief to consumers, which are not complied with by respondents, to be entered as judgments on which execution can be taken;
- reconciling the remedies available through the administrative process with those available through the judicial process;
- setting standards for the award of punitive damages and reasonable attorneys' fees
- streamlining the decisional process in the Department of Consumer and Regulatory Affairs
- tolling the statute of limitations while cases are pending before the Department of Consumer and Regulatory Affairs; and
- making it clear that certain real estate transactions (other than those regulated by the D.C. Rental Accommodations Commission) are within the scope of the Act.

The report is divided into two main parts. The first part is a general introduction to the subject, and the second part is a detailed description of the work done during the year. The first part is divided into three sections: a general introduction, a description of the work done during the year, and a summary of the results. The second part is divided into four sections: a description of the work done during the year, a description of the work done during the year, a description of the work done during the year, and a description of the work done during the year.

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Hon. David A. Clarke
Chairman of the Council
District Building
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Dear Chairman Clarke:

Since its enactment in 1976, the District of Columbia Consumer Protection Procedures Act (CPPA), D.C. Code Sec. 28-3901 et. seq. (1981), has been the principal consumer protection law of the District of Columbia. The bill established an Office of Consumer Protection and empowered the Director of that Office to receive and resolve complaints from consumers. The Office was directed to attempt to settle such complaints on terms acceptable to all parties, but where merchants violated the District's consumer protection laws (including prohibitions contained in the Act itself), the

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Director of the Office was empowered to present the complaint to an administrative law judge who could order any of several forms of relief for the protection of the individual complainant and the general public.

This system has worked increasingly well over the years, but experience with the Act has suggested that some amendments, most of them procedural, would strengthen it as an instrument for protection of the public. This seems like a particularly appropriate time for amendment, since the Mayor's Reorganization Plan No. 1 of 1983 merges the Office of Consumer Protection into the Department of Consumer and Regulatory Affairs (DCRA); not only is the reorganization of the office a good occasion for review of its statutory system, but amendment of the statute is in any event needed at this time because the present law refers to the agency, throughout, by its former name.

In this letter, the Consumer Affairs Committee of Division 2 of the D.C. Bar suggests certain changes in the law (other than changing the name of the agency) to correct the principal problems that the passage of time has revealed. In each case, we propose specific statutory language and explain why it would be desirable.

1. Enforcement of Orders

D.C. Code Section 28-3905(i) should be amended by adding a new sub-paragraph (5) as follows:

(5) (A) If an order in favor of one or more complainants has been

(1) entered by the Section of Hearings pursuant to Section 3905(g) and either (a) the order has been affirmed by the Court of Appeals or (b) the time within which an appeal may be taken has expired, or

(2) consented to by the parties pursuant to Section 3905(h), and the respondent has not made payment within twenty days after the entry of the final order or any time specified therein for payment whichever is later, the complainant or complainants may, without payment of fees or costs, apply to the Clerk of the Superior Court for a judgment enforcing the monetary portion of the award. The application shall include a copy of the order and verified proof that the order was served on the respondent at least ten days prior to the application for judgment.

(B) Within ten days after service of a copy of the application for a judgment pursuant to subsection (A) of this section, the respondent may apply to the court for a judicial order setting it aside on the ground that the Department of Consumer and Regulatory Affairs lacked jurisdiction over the respondent in the proceeding that resulted in the order. Unless the court sets aside the Department's order because of

lack of jurisdiction, the Clerk shall enter the judgment requested and shall issue such supplemental process as may be appropriate in aid of execution.

(C) If, after considering an application to set aside an order of the Department pursuant to subsection (B) of this section, the court determines that the application was frivolous, it shall award the complainant and the Department reasonable attorneys' fees for the time spent opposing the application.

(D) All other aspects of the Department's order shall be enforceable in the Superior Court pursuant to Section 3905(i)(3) and (4).

Explanation

When a District of Columbia consumer has been injured by a violation of the consumer protection laws, he or she may seek redress in either of two fora. The consumer may file a lawsuit in Superior Court. Unfortunately, unless the claim is under \$750 (entitling the consumer to bring the suit in the small claims branch), this traditional manner of seeking redress presents some serious obstacles. First, the consumer must pay a \$45 filing fee. Second, the consumer must wait for a year or more before the case is tried. Finally, the consumer must either obtain counsel or be prepared to confront the intricacies of the court's rules on a pro se basis.

It is very difficult to obtain counsel for consumer cases, because the factual investigation and legal research required in such cases often is as great as the work that would be required in cases involving much larger sums of money.

The Council wisely created an alternate dispute settling mechanism when it passed the Consumer Protection Procedures Act. Consumers can file a simple complaint with the Department of Consumer and Regulatory Affairs under Title 28, Sec. 3905 of the D.C. Code. If the matter is not settled during the course of a preliminary investigation and settlement conference, the matter can be set for hearing before an administrative law judge of the Section of Hearings. There is no filing fee, the waiting time can be as short as a month or two, and no attorney is necessary. Indeed, the Department of Consumer and Regulatory Affairs permits complainants to be represented by persons of their choice, including, for example, law students. Both George Washington University's National Law Center and Georgetown University Law Center have programs in which law students actively represent consumers in this forum.

The Department of Consumer and Regulatory Affairs is an efficient and effective mechanism for obtaining consumer redress where the District's consumer protection laws have been violated, but the statutory scheme includes one flaw that must be corrected. If the administrative law judge orders monetary redress in favor of the consumer, and the

merchant chooses to ignore the order, the Department or the consumer must at present file a lawsuit in the Superior Court for enforcement of the order. The consumer is somewhat better off than if he or she had never gone to the Department of Consumer and Regulatory Affairs in the first place, in that he or she need prove only the existence of the DRCA order, as opposed to the truth of the underlying allegations. In practice, however, the consumer has merely wasted several months by filing the complaint with the Department. To enforce the administrative law judge's order, he or she must still pay the \$45 filing fee in Superior Court, wait a year to obtain a judgment, and contend with the relatively intricate procedures of the judiciary. Only then can he or she obtain a judgment on which execution may be taken against assets of the respondent.

This procedure burdens the court as well as the complainant, for it consumes valuable resources of the clerks and judges to grant enforcement of an order where no issues are being contested, and all that needs to be done is to transform an administrative order (granted after the respondent has had an opportunity for a full due process hearing, including judicial review under the D.C. Administrative Procedure Act) into an enforceable award. The law should provide for an expedited procedure so that this ministerial act will not require the payment of fees or the passage of a substantial amount of time.

The committee therefore proposes that consumers be permitted to apply to the Clerk of the Superior Court to have judgment entered after awards are ignored by respondents. Under the Committee's proposal, a respondent could prevent this entry of judgment only by showing that the Department of Consumer and Regulatory Affairs had no personal jurisdiction. In the ordinary case, where the respondent was simply not willing to pay the complainant pursuant to the order, he or she would not be able to take advantage of the backlog in the Superior Court to avoid a just debt. At the same time, this expedited procedure would help to reduce the burden on the judges of the court.

The principal precedent for this procedure is Sec. 14(f) of the Commodity Exchange Act, 7 U.S.C. Sec. 18. Under this section, the Commodity Futures Trading Commission (CFTC) has the authority to order reparations to consumers injured by violations of the act. A reparations order issued by the Commission after decision by a hearing officer or administrative law judge may be filed in the United States District Court and thereby transformed into a judgment on which execution can be taken. No judicial proceeding is necessary; the administrative order is to be treated as a "local judgment" when it is filed with the clerk of the court. CFTC Interpretive Letter No. 79-4, Commodities Futures Law Reports ¶20,875 (August 2, 1979).

The Committee considered an alternative system for increasing the likelihood that beneficiaries of DCRA orders will collect on their awards. One of the reasons accounting for non-payment by respondents is that they are aware that the amounts involved are so low that lawsuits to enforce payment cannot be brought: the amount in controversy will usually not support a counsel fee. New York State's response to a similar problem (refusals to pay by businesses against which small claims judgments are entered) was to pass a law entitling the consumers, under certain conditions, to three times the amount of their original judgments, plus attorneys' fees. Uniform District Court Act and New York City Civil Court Act Secs. 1812. The Committee therefore considered suggesting that consumers who have not been paid pursuant to final DCRA orders for a period of twenty days after the orders became final be entitled to sue in Superior Court for three times the amount of the administrative law judge's award, plus counsel fees.

This more punitive approach may ultimately be necessary, but the Committee decided that an initial effort to solve the problem by streamlining the process of judgment and execution should be tried. If it does not succeed, it may be necessary to pursue a course of action along the lines adopted in New York.

2. Reconciliation of Remedies Available in Administrative Proceedings with Those Available in Court.

D.C. Code Section 28-3905(g)(5) should be amended by adding, after the word "remedies" the words "including punitive damages, treble damages, and awards of counsel fees to prevailing complainants,"

Explanation

The CPPA established an administrative procedure for resolving consumer disputes, obviating the need for filing law suits in Superior Court. This procedure allows consumers to press their claims without having to bear the heavy cost of attorney's fees, and at the same time reducing the already overcrowded court dockets. Unfortunately, the remedies available in Superior Court under CPPA, including treble damages, punitive damages and counsel fee awards under Sec. 28-3905(1), appear significantly more extensive than those available in DCRA. This creates a disincentive to using the administrative process.

The Administrative Law Judge is given the authority, under Section 28-3905(g)(5), to order any remedies that may be reasonable and necessary to prevent misconduct. Punitive and treble damages, and awards of counsel fees to prevailing

consumers, are often necessary to prevent and redress violations. But the Judge is not explicitly authorized to make these awards and the current Judge has taken the position that she lacks such authority. As a result, consumers who lack the education or resources to bring court actions can recover only one third or less of what they could collect in court.

3. Standards for awards of punitive or treble damages and reasonably attorney's fees

D.C. Code Sec. 28-3905 should be amended by adding a new subsection (s), as follows:

(s) (1) One of the purposes of this Act is to deter merchants from engaging in practices that are unfair or deceptive to consumers, or that otherwise violate the consumer protection laws of the District of Columbia. In order to effectuate this purpose, consumers should be encouraged to file complaints and lawsuits to vindicate their rights. The punitive damages and attorneys' fees subsections of this section are important mechanisms for encouraging individual consumers to protect the wider public interest by bringing violations to the attention of the proper fora.

(2) An award under subsections (g) or (k) of this Section shall include an appropriate measure of punitive damages

unless the trier of fact finds that the respondent's violation was the product of a good faith dispute of fact or law, or of an excusable contingency such as circumstances beyond the respondent's control that prevented compliance with law.

(3) Reasonable attorneys' fees, based on the market rate for time spent, shall be awarded to successful complainants under subsections (g) and (k) of this Section, unless the Section of Hearings or the court determines that special circumstances would render the award of such fees unjust. Reasonable attorneys' fees may be awarded to a legal services organization that is representing a consumer without charge, in order to promote the policies of this Act.

Explanation

The legislation as currently enacted gives no standards for adjudicators to follow in determinations of whether to grant successful complainants punitive or treble damages and reasonable attorney's fees. This section would provide guidance in line with contemporary legal theory and federal statutes which encourage litigation vindicating important public policies.

4. Streamline the decisional process.

The second sentence of D.C. Code Section 3905(f) should be amended to read as follows: Not less than 15 or more than 90 days after such transmittal, or sooner if the complainant and respondent consent, the case shall be heard.

Explanation

The present law imposes a mandatory 30 day minimum wait between the time a petition for hearing is filed in DCRA and the date on which the case can be heard. The 30 day waiting period, coming on top of delays of up to 240 days under Subsections (d) and (e), is longer than necessary. In addition, such a long waiting period poses special problems for consumers represented by law school clinical programs, two of which (at Georgetown and George Washington) presently assist consumers with cases in DCRA; the long delay makes it more difficult for consumers represented by students in these programs to obtain hearings while their student representatives are still available. The proposed amendment would reduce the waiting time to 15 days, or even shorter with the consent of all parties.

5. Tolling the statute of limitations while cases are pending at DCRA.

D.C. Code Section 28-3905(a) should be amended by adding a new sentence, at the end, as follows:

The statute of limitations with respect to claims by the complainant against the respondent encompassed by the complaint to the Department of Consumer and Regulatory Affairs shall be tolled while the complaint is pending before the Agency.

Explanation

Under the statutory deadlines established in the CPPA, many months may pass while the agency is investigating and hearing the case; appeals could add still more months to the process. In the end, the consumer may find that he or she still has a valid claim against the respondent, but that the DCRA lacked jurisdiction over the subject matter or over the respondent, and the consumer must begin again in court. The time spent in the administrative process may have caused the period specified by the applicable statute of limitations to have passed, however. To avoid punishing consumers for delays that are built into the administrative process, and to avoid

creating a disincentive to use that process rather than the courts, the statute of limitations should temporarily be tolled.

6. Certain Real Estate Transactions

Section 28-3901(a)(7) should be amended to read as follows:

"goods and services" means any and all part of the economic output of society, at any stage or related or necessary point in the economic process, and includes but is not limited to, consumer credit, franchises, business opportunities, the sale or lease of residential real estate, and consumer services of all types.

Section 28-3903(c)(2)(A) should be amended to read as follows:

(A) acts or practices which are regulated by the D.C. Rental Accommodations Commission.

Explanation

The broad language of what the CPPA was intended to cover was overlooked by the D.C. Court of Appeals in Owens v. Curtis, 432 A.2d 737 (D.C. 1981) when it ruled that because

the sale of real estate was not explicitly mentioned in the definition of goods and services, it was excluded from the Act.

The proposed amendment makes clear that the law is intended to include sales of real estate to consumers by merchants within the scope of the CPPA. It does so by specifically stating that such sales are included. The language "including, but not limited to," is also intended to reaffirm the Council's intent to cover all transactions between consumers and merchants, even if not specifically mentioned; and thus limits the reasoning of Owens that if a transaction was not specifically mentioned, it must be excluded.

The proposed amendment also clarifies the extent to which rental real estate transactions are excluded from the CPPA. The council probably intended to exclude such transactions only to the extent that they were already governed by the D.C. Rental Accommodations Act, so as to avoid exposing a landlord to conflicting legal obligations. As currently phrased, however, the exemption of "landlord-tenant relations" from the enforcement power could be interpreted as a blanket exemption from the CPPA of all landlord-tenant transactions, whether or not regulated by the rent control statutes. Thus, landlords, alone of almost all the merchants in the District, would not be covered by the CPPA. This is

neither fair to other merchants, nor to the District's tenants. Moreover, the rent control statutes do not contain any provisions prohibiting fraudulent practices by landlords, such as the use of illegal lease clauses, misrepresentations about services, or unconscionable practices such as the chronic failure to return security deposits. Thus, there would be a significant void if the CPPA were interpreted to contain a blanket exemption of landlords.

Sincerely yours,

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Chair
Consumer Affairs Committee of
Division 2 of the D.C. Bar

Philip G. Schrag
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cc: Members of the Council of the District of Columbia