

Informal Resolution and Formal Adjudication of  
Consumer Complaints by a Licensing Authority:

A Case Study

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CONSUMER COMPLAINTS BY A LICENSING AUTHORITY:

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ABSTRACT

New York City's Department of Consumer Affairs (DCA) licenses home improvement contractors and salesmen. DCA receives complaints from consumers with respect to all types of goods and services, and attempts in each case not within the exclusive jurisdiction of another agency to resolve the complaint informally. Where a complaint against a licensee cannot be resolved informally, a formal hearing is held at which both the consumer and the licensee are present and testify. They may also present witnesses and documentary evidence. In home improvement cases DCA retains a special inspector knowledgeable in construction matters who may be assigned, either prior or subsequent to an initial hearing, to inspect the job site, prepare a report, and be ready to testify at a hearing as to whether the work conformed to contract specifications and, if it did not, as to what additional work was necessary. Following the initial or adjourned hearing the hearing officer prepares a decision, which is reviewed and formally promulgated by a higher DCA official, either exonerating the licensee or ordering him to provide the consumer with a specific remedy (usually, completing or repairing the job) within a specified time. The failure of the licensee to either provide the specified remedy or to seek judicial review of the decision within the allotted time may result in the suspension, and thereafter the revocation, of his license.

This study examines the formal structures, formal and informal procedures, characteristic decisions, actual results, and associated costs of DCA's consumer redress process in home improvement cases. It contrasts this process as to each of these aspects with the process offered by New York City's small claims courts in similar cases. The descriptions and analyses are based on a sample of complaint files from each process, on a sample of DCA decisions, on direct observation of a sample of DCA hearings, on less systematic observations of small claims court hearings and of various aspects of both processes, and on interviews with officials, consumers, and contractors who were involved in each process.

The study concludes that both processes are equally effective, that neither is dispensable, that the costs of both are reasonable in view of their results, but that DCA provides higher quality fact-finding and remediation and is used much more frequently. The DCA process is recommended as a model for other jurisdictions. Suggestions for improving both the DCA and the small claims court processes in home improvement cases are also made.

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Textual Note

In this paper generic references to consumers will be to "she" and to "her", while generic references to contractors will be to "he" and to "him". This is to be understood simply as a convention. Since there will be many abstract discussions of relations between consumers and contractors, and since our language has two sets of pronouns, there is good reason to utilize this linguistic facility to simplify these discussions. When particular consumers are discussed, the appropriate pronoun will, of course, be used.

Footnotes are numbered consecutively and appear at the end of the text.

## I. Introduction

### A. Background of the Study

The question, "Does X have a legal right to a specific remedy?", has meant to judges and most legal scholars, "How should a court rule on X's claim (assuming the claim is properly before it)?" To X's lawyer, that question has meant, "How is a court likely to rule if and when I present it with X's claim?" For X, the same question should mean, "Given what I expect to win from bringing my claim in court, is any relief available to me at a reasonable cost?" I say "should", because X may be under the illusion that her question is the same as that of the judge's or lawyer's. However, any experience the consumer has with using the legal system to "get what she is entitled to" will quickly disabuse her.

When a consumer purchases a product or service which turns out to be defective and the seller refuses to make the necessary repairs or replacement, the cost to the consumer of obtaining redress in an ordinary court is usually prohibitive.<sup>1</sup> This is true even where the amount of her loss is quite substantial (several hundred dollars or more). For any but a very educated and self-confident person, a lawyer is a necessity in navigating the formal court system, yet the expected value of the consumer's recovery (the amount of her expected recovery, multiplied by the probability of her ever receiving it) is rarely significantly more than her expected attorney's fee.<sup>2</sup> Furthermore, her attorney would typically demand a substantial portion of his or her fee in advance of any recovery, recognizing that most consumer cases which do not involve physical injury will not generate large enough recoveries to make contingent fees profitable.<sup>3</sup>



Some low-income people have access to government-provided lawyers. Working class people, however, normally do not qualify for free legal assistance.<sup>4</sup>

Small claims courts are available for consumer redress cases in most jurisdictions. However, they: (1) generally require at least two personal appearances, one to file the claim and the second (absent a quick out-of-court settlement) to press it at the hearing; (2) require filing, process-serving, and perhaps judgment-executing fees (recoverable if and when a judgment is collected, but payable well before that contingent event); (3) have strict jurisdictional limits, typically \$1000 or less; (4) despite efforts at informality, favor the more articulate, organized, and aggressive person and tend to intimidate people with little education or experience with the system;<sup>5</sup> and (5) where they do not produce settlements, result in legal judgments which are frequently not collectable.<sup>6</sup>

The great practical impediments to consumers using ordinary courts to recover for economic (as opposed to physical) injuries, and lesser but still significant impediments to their effective use of small claims courts for this purpose, have two serious adverse consequences. First, lower income consumers suffer disproportionately. The amount of their unrecoverable loss is likely to be a higher proportion of their income or net worth.<sup>7</sup> Second, for those businessmen who do not always treat consumers fairly from considerations of conscience, concern for reputation, or desire to avoid unpleasantness,<sup>8</sup> the absence of official coercive mechanisms which predictably will force them to rectify injustices will likely result

in less scrupulous performance of their obligations initially, and a lesser willingness to settle informally any grievances which thereafter arise.

Both of these consequences tend to be particularly frequent and acute where consumers have developed problems with home improvement contractors. The amounts of money involved are usually substantial.<sup>9</sup> A consumer who does not obtain value for a significant proportion of her investment has suffered a serious loss. By the same token, a contractor who is asked to make good for this loss faces a much greater strain on his good intentions than, say, an appliance outlet confronting an aggrieved consumer.<sup>10</sup> Furthermore, contractors are unlike most other retailers. They do not have regularly staffed offices at known locations with substantial assets on hand. Therefore, they are more difficult to serve with legal process and more difficult to collect from if they attempt to avoid paying adverse legal judgments.

The problem of providing effective "alternative" low cost civil justice delivery systems has attracted substantial attention recently. Studies have been done of small claims courts,<sup>11</sup> complaint handling procedures by state Attorney Generals' offices,<sup>12</sup> and assorted arbitration and mediation schemes.<sup>13</sup> The inadequacies of the existing mechanisms for remedying consumer complaints have been systematically criticized.<sup>14</sup> Just this year, Congress adopted the Dispute Resolution Act, P.L. 96-390 (1980), in order to establish a clearinghouse for information about such systems, and to provide seed money for further experiments in implementing them.

One alternative civil justice system, based on the power to suspend or revoke home improvement contractors' licenses, has not been studied. It is found in New York City and operated by the City's Department of Consumer Affairs (hereinafter, DCA). Similar systems may exist in other jurisdictions.<sup>15</sup> This mechanism combines a licensing requirement with low-cost access to licenses, mediation of consumer complaints against licensees, a special inspection procedure for neutral and expert fact-finding, and a hearing procedure for complaints not resolved informally. The hearing procedure is backed up by sanctions when the contractor does not obey a remedial order issued as a result of a hearing. DCA can suspend or revoke his license, and once revoked, there is the possibility of subsequent judicial injunction or criminal prosecution against the ex-licensee.

DCA's system has several structural advantages over those which have been studied. Unlike prosecutors' offices, DCA can proceed past the stages of letters and phone calls, entreaties, arguments, and bluffs,<sup>16</sup> even where no criminal intent on the part of the contractor is manifest and where a decision in favor of the consumer is unlikely to have broad social impact. Unlike arbitration and mediation schemes, it does not require the businessman's voluntary acquiescence. Finally, unlike small claims courts, it is able to (1) order contractors to complete the job or repair defects, rather than being restricted to monetary judgments; (2) avoid the necessity for the consumer to pay a filing fee or make a personal appearance, unless a formal hearing becomes necessary; (3) resolve disagreements over whether or how the work was done through the report of an

official inspector, as opposed to a judge's or arbitrator's estimation of which party was more credible; and (4) knowledgeably enforce standards of conduct it has created for the home improvement industry.

#### B. The Present Study

The present study has two related purposes. The first is to determine the extent to which DCA's consumer redress process for home improvement complaints realizes in practice the structural advantages described in the preceding section. The second purpose is to evaluate whether this process provides a service worth continuing in New York City and worth emulating in other jurisdictions with respect to home improvement contractors, and perhaps in other contexts as well.

This study describes, analyzes, and compares, along various quantitative and qualitative dimensions, the processes available at DCA and in New York City's small claims courts for handling such complaints. The performance of the small claims courts has been used to provide baseline data for several reasons. Small claims courts in general, and New York City's small claims courts in particular,<sup>17</sup> have been studied widely.<sup>18</sup> They are the "alternative" dispute resolution forums most often mentioned when consumer justice is discussed. They therefore provide a familiar point of reference for describing and comparing a less well known alternative. Furthermore, aside from the "ordinary" courts, the small claims courts provide the only forums other than DCA's in which the dissatisfied purchaser of a home improvement in New York City can try to obtain a remedial order which is legally binding upon the contractor. This jurisdictional similarity facilitates comparisons. Finally, comparing the

structure, processes, and results obtainable in the two forums may bring into focus some of the relative strengths and weaknesses of "judicial" versus "administrative" tribunals.

I spent the first six months of 1979 gathering information, including systematic data, about how small claims court and DCA handle consumer complaints against home improvement contractors. I interviewed the relevant personnel, sat in on hearings, studied case files, and spoke with consumers and contractors. The remainder of this paper reflects the results of this study.

The structure and procedures of New York City's small claims courts and of DCA will be described in Chapter II, to the extent that these are relevant to the disposition of consumer complaints against home improvement contractors. Chapter III describes how I went about collecting systematic data on the functioning and effectiveness of the two processes. Statistical analysis of some of this data will be used in Chapter IV to estimate the effectiveness of the two forums and to facilitate comparisons between them. Chapter V begins by describing the remedial capabilities and practices of "ordinary" courts and comparing them with those of small claims courts and of DCA. The remedies offered by the latter two tribunals are then evaluated by comparing actual and optimal remedies for the full range of typical consumer grievances against home improvement contractors. This section of the chapter, and the concluding section recommending improvements in the remedial powers and procedures of both forums, draw heavily on cases from the collected data. Chapter VI contains cost/benefit analyses of the two forums, along with recommendations with respect to preserving small

claims court and DCA jurisdiction in New York City and replicating the latter elsewhere. Finally, Chapter VII analyzes the applicability of consumer redress hearings by licensing authorities beyond the context of home improvement cases, and concludes with some consequent reflections on the institution of licensing.

## II. Processes of Consumer Redress: Small Claims Court vs. DCA

This chapter examines what is involved for the consumer in making use of each forum, and what goes on "backstage" when the consumer does so. Since an understanding of procedures requires a familiarity with the structures in which they take place, the description of the procedures in each forum will be preceded by a brief explanation of the way in which each forum is organized.

### A. Small Claims Court Structure

There are six small claims courts in New York City, one in each borough and an extra one in Manhattan, serving Harlem. All are administratively part of the Civil Court of the City of New York. All but the Harlem court are located on the same premises as the remaining Parts of the Civil Court in their respective boroughs. In 1978 the Brooklyn court handled 17,060 claims, Queens 16,329, Manhattan 15,967, the Bronx 8,480, Staten Island 3,202, and Harlem 1,416, for a city-wide total of 62,463 claims.<sup>19</sup> Clerk's offices are open every day during business hours, and one evening per week in Brooklyn, Queens, the Bronx, and Harlem. The court sessions are held entirely on weekday evenings, beginning at 6:30 p.m.: 4 evenings per week in Brooklyn, Queens, and Manhattan, 3 evenings per week in the Bronx, one evening per week in Harlem, and one evening

every other week in Staten Island. The cases at each session are heard by a presiding judge, sometimes a back-up judge (2 evenings per week in Brooklyn, Queens, and Manhattan, one evening per week in the Bronx), and between five and eight arbitrators, who are attorneys who serve about one evening per month on a volunteer basis. About 30 people staff the various clerk's offices, and about another 25 (not counting decision-makers) assist at the evening sessions.

The jurisdiction of these courts is limited to "any cause of action for money only not in excess of one thousand dollars exclusive of interest and costs..."<sup>20</sup> Thus, a claimant who has suffered more than \$1000 damage must whittle his claim down to that amount or forego using small claims court. Nor can he obtain an order from the court requiring the defendant to do a specific task such as to complete a home improvement contract. He must settle instead for "damages", the closest possible monetary equivalent to what he would have received had the defendant performed. Furthermore, while small claims courts can order a defendant to pay a money judgment, they cannot punish him for disobeying. They are relegated in such cases to issuing an authorization (called an "execution") to a sheriff or marshall empowering him to seize and sell enough of the defendant's property to satisfy the judgment plus collection costs.<sup>21</sup> The small claims court in each borough has jurisdiction only if the claimant lives in that borough or if the defendant lives or has his place of business in that borough; however, regardless of the claimant's residence the court will not have jurisdiction if the defendant neither resides nor has his place of business in New York City.<sup>22</sup>



These courts also do not have jurisdiction if the claimant is a partnership or a corporation, thus keeping out most of the collection cases which swamp other small claims courts.<sup>23</sup> The small claims courts are enjoined to determine claims "in accordance with the rules and principles of substantive law".<sup>24</sup> Appeals can be taken "on the sole grounds that substantial justice has not been done between the parties according to the rules and principles of substantive law",<sup>25</sup> but since no court stenographers are provided for arbitrators, parties wishing to have their cases heard by an arbitrator must waive even this limited appellate right.

#### B. Small Claims Court Procedures

Small claims court procedures, unlike those at DCA, are the same regardless of the type of case involved. The experience of the consumer suing a home improvement contractor will therefore be similar to that of any other claimant no matter what the claim.

The consumer, or a friend acting on her behalf, must file her claim in person at the clerk's office of the court in which she wishes to sue. She is instructed by a large sign to fill out a form, called a "Request for Information", before getting in line. The form has places for "Name and Address of Party Being Sued", "Name and Address of Party Suing", "Amount: \$ \_\_\_\_\_" (a note at the top of the forms states "Maximum: \$1,000.00"), and "State Your Claim Here". Five lines are provided for the statement of claim, but there is plenty of blank space on the bottom and the back of the form for claimants to continue their statements.

The consumer then brings the form to the counter. About half the time she has to wait on a short line, but the wait is rarely more than 10 minutes.<sup>26</sup> At the counter the clerk on duty goes over the information with the claimant. The first item on the form, "Name and Address of Party Being Sued", is surprisingly often a stumbling block. A non-corporate defendant must be sued in his individual or partnership name rather than in the name (such as "Acme Contractors") under which his company may have dealt with the consumer. Corporations must be sued in the precise corporate name. Information on the "legal" name of both corporate and non-corporate businesses is easily available at the County Clerk's office of the borough where the business is conducted (in Brooklyn for example this is two blocks from the small claims court), and consumers who are not convinced that they have the correct legal name of the contractor are detoured there at this point.<sup>27</sup> If the consumer has not filled in an "Amount", or if the clerk cannot make sense of the written statement of claim, some discussion will take place around these items as well. The clerks are acutely aware that they have not been trained in the law, and are reluctant to give claimants anything resembling legal advice. Their concern with the consumer's statement of claim is rather that they have to fill in an item on the back of the file card labelled "Cause of Action", and therefore must understand the consumer's statement well enough to be able to decide what to write.

The clerk then collects \$3.40 in cash from the consumer (\$2.00 filing fee, + \$1.40 postage for the certified mail notice that goes to the defendant), and proceeds to fill in the names of the parties

and the "cause of action" on the 5" x 8" file card, which becomes the principal record in the case (the "Request for Information" forms are stored for about 6 months, and then thrown away). The consumer signs the card below the place where the clerk has paraphrased her statement of claim, frequently condensing a 50-word or longer statement of claim into a four-word "cause of action" such as "\$850 Breach of Warranty" or "\$250 Return of Deposit". The clerk then informs her of the hearing date. The hearing is generally about a month after the claim has been filed.<sup>28</sup> The consumer is not given a choice of dates. The clerk may also give her some last words of advice, typically that she should bring her papers with her (in cases where documentary evidence is crucial) or that she should bring along an expert or a paid bill (required in cases where she is alleging damage to her property). Needless to say, some clerks are more forthcoming than others, and at least in Brooklyn they vary in attitude from polite and helpful to snippy and short. Claimants are not, however, encouraged to air their questions about what the hearing will be like; rather, they are told where to report next, and that further instructions will await them when they arrive.

The next day a clerk sends out a formal notice to the defendant, by certified mail, return receipt requested, instructing him that the claimant "ask judgment in this Court against you for \$ \_\_\_\_\_ together with costs upon the following claim: \_\_\_\_\_." The clerk fills in the amount and the claim exactly as it is written in the "Cause of action" section on the back of the card. Defendant is presumably familiar with the claimant and she has almost always complained to him directly before filing her claim. Therefore the

identification of the claimant on the notice, along with her address, and an otherwise cryptic statement of her claim, is generally sufficient to remind the defendant of her complaint. The notice goes on to inform the defendant of the date, time and place of the hearing, and that he may present his defense and any counterclaim he may desire at the hearing. It also informs him that a default judgment will be entered if he does not appear, that if he has any "witnesses, account books, receipts or other documents" which support his defense or counterclaim he should bring them to the hearing, that if he requests before the hearing the clerk will issue subpoenas without fee, and that "Corporation defendants may appear by an officer or major stockholder, but Voluntary Associations must appear by attorney."

If the notice is returned from the post office "undelivered" (meaning defendant was not home when the postman arrived, and did not respond to the notice which the postman left in his mailbox to come to the post office to pick up a certified letter) the Clerk's Office mails it out again for a second try. If, however, it is returned marked "refused" (meaning defendant told a postal service employee that he would not accept the letter), it is treated as a complete service of process. If the notice is neither delivered nor refused on the second try, the claimant is notified and given a chance to attempt a personal service. This can be done by any adult other than herself, including a professional process-server. If this is successful, the person who actually served the defendant files an affidavit of service with the Clerk's Office.

Since hearings are initially scheduled within a month of the filing of the claim, any significant delay in service requires that

the hearing be adjourned. The parties can also get the hearing adjourned by mutual agreement, and defendant is always given at least one adjournment by the court upon request. Actually, a savvy defendant can get two adjournments almost automatically. He can get the first by asking that the case be heard "by the Court" when it is called on the original hearing date. An adjournment is virtually assured because the judge's hearing time (from about 7 p.m., when he finishes the calendar call, until about 10, when everyone leaves) will be taken up with cases that have previously been adjourned, and hence moved to the top of that day's calendar. The second time around he makes his motion for an adjournment; if the claimant objects vigorously, the judge marks the new date "final against defendant", alerting the judge who sits that date that another easy adjournment should not be granted.

Many cases are settled soon after the defendant receives his notice to appear.<sup>29</sup> If, however, the case is neither settled nor adjourned before the hearing day, the claimant arrives at the court, typically with at least one other member of the family as a witness or for moral support, sometime before 6:30 on the appointed day.<sup>30</sup> In Brooklyn, a sign sends her up a flight of stairs to a smoky lobby, where another sign on a door indicates "Small Claims Courtroom". By 6:30 there are usually more than 200 people sitting in the courtroom on wooden benches, while another 40 or 50 stand in the back. These include claimants and defendants, their spouses, grown children, and friendly witnesses (subpoenas are rare). A half dozen attorneys, usually representing insurance companies that will be liable if the defendant loses in motor vehicle property damage cases, stand in the

front or the aisles of the courtroom shouting out the names of their clients (whom they frequently have not met before). A senior court clerk takes a seat at the bench, next to where the judge will sit. Two other clerks, a stenographer, and two uniformed court officers mill around or settle down at desks on the other side of the railing from the people on the benches.

Between 6:30 and 6:45 the judge enters, the court officer orders people to rise and to put away newspapers and stop talking, and when those with seats have sat down the senior clerk begins the calendar call. First he instructs the litigants that they waive their right to appeal if they go before an arbitrator, but usually adds that the judge only gets through two or three cases each night whereas the arbitrators generally finish their calendars.

Litigants are told to call out their names when their case is called. They are sometimes also told to say "By the court!" if they want the judge to hear the case, or "Application!" if they want an adjournment. Other times they are left to figure this out for themselves. The cases are called by name rather than number. If only the claimant responds the clerk says "Inquest, go to the other room". An inquest is a brief hearing at which the arbitrator considers a claimant's evidence before issuing her a default judgment. Since there is no reason why a claimant should know what "inquest" means, she often looks bewildered when the clerk makes this statement, but the clerk is on to the next case before she can collect her wits and ask him what it means. Generally, someone sitting near the claimant who knows the ropes directs her next door, and assures her it is o.k. If both sides respond they are also sent to the next

room, unless one or both say "By the court!" or "Application!" in which case they are both instructed to wait until the end of the calendar call. If only the defendant responds he is told to go home, that he has won his case. If neither party responds the clerk mumbles "Dismissed" and states the time, which a junior clerk enters on the file card. Claimants may also be told that their case is dismissed because service was not completed, or because their affidavit of service was defective, or perhaps for some even more arcane reason; they are told if they have any questions about the disposition they should see the clerk during business hours.

After the calendar has been called (generally about 7:00), the clerk goes through it again, picking up the "Applications" (generally for adjournments or to reopen default judgments) which the judge proceeds to dispose of. Once they have been sorted through the judge begins to hear cases. If there is a second judge on that evening he can begin hearing cases earlier, even before the first calendar call is completed.

Meanwhile, the room next door, which seats about 100 people, has begun to fill up. About 10 minutes into the calendar call a clerk takes the file cards of the parties who had been sent to "the room next door", the arbitration and "inquest" cases, and sets up shop behind a railing in the front of that room. She checks how many arbitrators have shown up and been sworn in by the judge, makes sure they are each settled into a small hearing room (with a small judicial bench at one end, and a table with six or seven chairs facing it), makes each party address an envelope to himself (in which a copy of the arbitrator's decision will be sent the next day), and

then directs the parties to the various hearing rooms. People wait outside the hearing rooms until the arbitrator has finished the previous case; the clerk or a court officer checks the backlog every once in a while to keep the hall from getting too crowded. While the calendar call is continuing in the courtroom batches of file cards are brought from there to the next-door assignment room. The back-up in the assignment room can last until about 9:00, and in the hallway outside the hearing rooms until about 9:30.

The arbitrators in Brooklyn are generally older, and sometimes semi-retired, attorneys, unpaid volunteers who serve about one evening per month. On a typical evening there are about five arbitrators, and each one hears perhaps four or five inquests and as many trials.

At an inquest the arbitrator asks the claimant to explain her claim and show him whatever evidence she has. He will then award the claimant as large a judgment (up to \$1000) as her evidence -- documentary, oral, and/or expert -- will support. This is subject, at least in Brooklyn, to the rule that property damage must be demonstrated by a paid bill or the testimony of an expert as to the value of the damage:<sup>31</sup> I observed two cases, both of which had already been adjourned once on other grounds, in which a judgment was denied and another adjournment ordered because the consumer had brought neither a paid bill nor an expert. Most inquests are very brief, with the claimant standing at the bench giving the facts to the arbitrator, who is in turn busy filling out the "Inquest" card (which gets stapled to the file card) giving her the default judgment.

At a trial, on the other hand, both parties sit down along with



any family members and witnesses they may have brought, and with their lawyer (if any). The arbitrator begins the hearing with an explanation that he cannot hear the case unless both sides waive their right to appeal. The arbitrators always go through this waiver ritual with great solemnity, in an effort to guarantee that the parties are fully aware of the consequences of what they are doing.<sup>32</sup> This careful warning frequently (several times in my personal observation) makes one or the other party bolt, refusing to sign so as to preserve his or her newly discovered right of appeal. The parties then return to the clerk who assigned them the arbitrator, who must now give them a new trial date several weeks later (since the judge or judges assigned for the evening are fully booked with cases for that evening at this point in the proceedings).

Further complications and frustrations follow from the refusal to waive. First, if either party felt the need to bring family members, witnesses, or a lawyer the first evening, he or she will probably do the same the second evening, producing additional inconvenience and expense. Secondly, there is no guarantee that the defendant will return on the adjourned date (I encountered several cases in my evenings at the court, and in calling consumers in my sample, in which he did not). The second date may turn out to be inconvenient for him, or he may simply decide that one wasted evening is enough. While the consumer will then get an inquest, and likely a default judgment, this is not necessarily the victory it appears to be since about half of all small claims court judgments are never collected.<sup>33</sup> In contrast, where a trial proceeds

past the waiver point, settlement negotiations may take place, and practically all settlements reached in small claims court are carried out.<sup>34</sup> Finally, even if both parties appear at the adjourned trial date, and one of them remembers to say "By the Court!" when the case is called, and the case is in fact heard by a judge that day (the latter assumption is a realistic one, since adjourned cases are put at the beginning of the calendar), and the judge decides the case against the party who refused to waive his or her right of appeal, an appeal is most unlikely, since the party taking the appeal must pay for a transcript and an attorney.<sup>35</sup>

Once both parties have given the written consent to arbitration on the "Arbitration" card, the arbitrator swears in everyone who intends to testify, and the testimony begins. The claimant begins to tell her story. The arbitrator may interrupt for clarification. The defendant or his witnesses sometimes interrupt with impromptu rebuttal or cross-examination, but they are generally told by the arbitrator to wait their turn. If the defendant has an attorney -- typically, only in "fender-bender" cases, where he has been retained by defendant's insurer -- the attorney may make evidentiary objections such as "That's just hearsay!", which the arbitrator usually overrules with a comment like, "This is small claims court, you know". After the claimant concludes, defendant is permitted to cross-examine. Next, the claimant's witness if any (who may have been sent out of the room when the claimant gave her testimony) goes through his or her story, followed by cross-examination. Then the same thing happens with the defendant and any witness he may have. After the testimony is complete the arbitrator dismisses the parties,

telling them they will hear of his decision in a couple of days. The arbitrator writes out his "award" on the Arbitration card, filling in the blanks on "\_\_\_\_\_ is entitled to recover from \_\_\_\_\_ the sum of \$ \_\_\_\_\_", signs the card in five places, and calls in the parties waiting for the next case. The process usually takes about 20 minutes, but cases where the testimony is complicated can extend beyond an hour.

At any point in the hearing, but most likely at the beginning, the arbitrator may try to negotiate a settlement. Many of the cases originally scheduled for hearing that day have, of course, been settled prior to the calendar call. If the clerk has been so informed, the senior clerk will intone "Marked settled" after he calls the name of the case, while if he has not been so informed there will be no response to the call of the case, and it will be marked "dismissed -- no appearance either side". Additional cases are settled as the parties stand around together waiting for the case to be heard. But there is still room for a skillful or persistent arbitrator to obtain a settlement at the hearing from parties who have not done so on their own. He may do this by developing the areas of agreement between them and emphasizing the narrowness of the remaining differences, by warning each party that he stands to lose the whole amount of the claim if the arbitration proceeds whereas he can cut his potential losses by settling, or by requesting each party (and his entourage) to leave the room in turn while obtaining a "last offer" from the other party, in the hope that these last offers will at least match.

If a settlement is reached, the parties are asked to sign a

"Stipulation of Settlement" form unless payment is made on the spot. The form has a place for them to state when and how the agreed sum is to be paid. It provides that upon 15 days default in payment, the claimant, by filing an affidavit, "shall be entitled to enter judgment without further notice to the defendant, for the amount sued for, together with interest, costs, and disbursements". While the settlement form contemplates cash settlements, it can be used for other types of settlements. Examples of the latter include "Defendant pays \$900 by 12/10/78 unless defendant completes aluminum installation on the rear wall at Claimant's address" and "\$508 to be paid to defendant upon completion of installation of overhead doors by defendant (height of door to remain at 6'1" and door shall not roll down)".<sup>36</sup>

If the case goes to judgment, either after an inquest or after a trial before an arbitrator or a judge, both parties are notified by mail. The defendant is instructed to pay the claimant any amount awarded her, but as often as not he ignores the instruction.<sup>37</sup> The claimant, in turn, is informed by the notice that if the defendant fails to pay the judgment she should go to a sheriff or marshall for help. When she does, they inform her that she must supply them with the information as to where property belonging to the defendant can be found, or where he is employed.

This is often the end of the road for the claimant, and especially so for the consumer who has a judgment against a home improvement contractor. Most home improvement contractors are either self-employed or only sporadically employed, so an "income execution" (of 10% of his salary, if his salary is above \$85/week)

will not work. While the contractor may have a bank account or own a truck, for example, it may be in his own name or his spouse's name, while the consumer's judgment is against his corporate name. In any case, the consumer, with no one to help her, may have no idea how to track these assets down. Thus, only 46% of the small claim property executions received by the sheriff's offices in New York City in 1975 resulted in the satisfaction of the claimants' judgments,<sup>38</sup> and since the sheriff requires a \$10 "mileage" deposit from the claimant (returned to the claimant if the judgment is satisfied) as well as the information on the location of defendant's assets before he even attempts an execution, the actual proportion of "successful" claimants (also known as "judgment creditors") who ever collect from unwilling defendants is actually much less than 46%.<sup>39</sup>

One other collection device, available if the defendant is a DCA licensee and the judgment has not been satisfied within 30 days of its issuance, is to file a complaint with DCA. DCA will inform the licensee of his obligation to pay the judgment under its General Regulation 7 (See Appendix C), hold a consumer redress hearing if he fails to do so, issue an order following the hearing requiring him to pay within a short additional time, and suspend and, if necessary, revoke his license if he continues not to comply. The difficulty with this device is that most judgment creditors do not know of its existence and would not know which categories of businesses are supposed to be licensed. Efforts at providing claimants with this and similar information useful in collecting their judgments, such as one sponsored by DCA and another run by NYPIRG and sponsored by

Citibank, have lost their funding and lapsed. Furthermore, if my small sample is any indication,<sup>40</sup> this device is not necessary (except perhaps as an unspoken goad or deterrent) in the case of licensees, while it is necessary but not applicable in the case of non-licensees.

### C. DCA Structure

The Department of Consumer Affairs (DCA) of the City of New York had 325 employees and a budget of about \$4.4 million in 1979. Established in 1968, it is the successor to the City's Departments of Markets and Licenses and retains much of their respective jurisdictions over weights and measures and many categories of regulated businesses. It is however, also responsible for enforcing a series of more modern consumer protection laws (which its officials past and present had a hand in drafting), handling consumer complaints, contributing to consumer education (as by researching consumer abuses and publicizing the results), proposing legislation, and generally doing whatever it can by way of public relations to enhance the incumbent Mayor's image (any incumbent Mayor's image) as a committed and powerful champion of the City's consumers. DCA is housed on the first four floors of an older office building in downtown Manhattan, but has small field offices for handling consumer complaints in Queens, Brooklyn, and Staten Island.

Only about 95 of DCA employees are directly involved with any stage of the processes by which home improvement contractors and salesmen get licensed, and by which consumers' complaints against such contractors and salesmen (whether licensed or unlicensed) are dealt with.

This includes in the latter the process by which unresolved complaints against licensees are submitted to consumer redress hearings for resolution. Sixty of these employees work in the Licensing Division, and 13% of the licenses they issue are for home improvement contractors or salesmen.

The Home Improvement Business Law,<sup>41</sup> adopted in 1968, provides "No person shall solicit, canvass, sell, perform or obtain a home improvement contract as a contractor or salesman from an owner without a license therefor."<sup>42</sup> As DCA licenses go, these two types are fairly easy to obtain. A salesman must pay \$50 (\$25/year for a two-year license), get himself fingerprinted at a police station, submit a letter from his employer attesting to his employment as a salesman and three passport-size photographs of himself. He must fill out an application form which asks about previous licenses held, whether any such license has been denied, cancelled, suspended or revoked, and about past criminal convictions. A contractor must pay \$100 (\$50/year for a two-year license), submit the fingerprints and photos, a copy of any trade name or partnership certificate or corporate papers, a copy of his workman's compensation insurance certificate, and his state sales tax identification numbers. He must fill out an application form listing partners or corporate officers, salesmen and their license numbers, prior licenses held (stating whether they were ever denied, cancelled, suspended or revoked), prior criminal convictions, and any relevant prior experience or education of the owner(s) of the business, as well as stating whether any small claims judgments have been outstanding against the applicant for more than 30 days.

DCA's discretion to deny a license once the required items are submitted is quite limited. DCA's General Regulation 7 requires it to deny a license to an applicant who admits to having an outstanding 30-day old small claims judgment against him which has not been stayed or appealed, and which he is not in the process of paying off pursuant to an arrangement with the judgment creditor.<sup>43</sup> It must also deny either type of license if the applicant is not "over 18 years of age and of good character".<sup>44</sup> Doubts as to his good character may be occasioned by admissions on his application form as to criminal convictions or problems with earlier licenses, or police information about the former and departmental records as to the latter. Where such doubts are raised, DCA must offer the applicant a hearing (before the same group of hearing officers who conduct consumer redress hearings) as to the accuracy of the adverse information and its relevance to the license sought prior to denying the license on this ground.

The principal practical importance of this character requirement is that it gives DCA some leverage against non-licensees and ex-licensees who are applying for licenses and who have outstanding complaints against them. If a prior license was revoked for failure to comply with a DCA consumer redress order, or if the Licensing Division has been alerted by another division to hold any future license application,<sup>45</sup> the Advocacy Division (an office with about eight lawyers, whose principal responsibility is bringing civil litigation under DCA's general Consumer Protection Law) is brought into the case to oppose the application or, if possible, to negotiate



a settlement with the applicant under which the Advocacy Division will withdraw its opposition once he satisfies the outstanding complaints.

What is most striking about the rules under which DCA licenses home improvement contractors and salesmen is that, while the DCA asks the applicant about prior education or experience, it has no authority to deny a license on the basis of lack of relevant education or experience. What this means is that the strongest bite of DCA's home improvement licensing is not in the conditions for obtaining a license but in the conditions for retaining it.

The Home Improvement Business Law of 1968 (Appendix A) sets out a series of 12 "Prohibited Acts",<sup>46</sup> and the regulations promulgated by DCA (Appendix B) pursuant to authority given it in 1973 sets out an additional seven requirements for home improvement contractors, some of them quite complex.<sup>47</sup> These are supplemented by six "General Regulations" applicable to all DCA licensees (Appendix C). Broadly speaking, these require contractors to complete their contracts as agreed, refrain from deceptive practices, put particular information and assurances in their contracts (including three-day consumer's option cancellation clauses), obtain necessary governmental permits for their jobs, pay their small claims court judgments, and comply with various regulatory bookkeeping requirements.

The DCA derives its authority to hold consumer redress hearings from sec. 773-4.0(e) of the License Enforcement Act of 1973 (Appendix D). This Act became Title A of Chapter 32 of the Administrative Code of the City of New York -- the same Chapter in which the Home Improvement Business Law (and the other licensing laws administered by DCA) appears. This paragraph provides:

e. The commissioner shall be authorized, upon due notice and hearing, to suspend, revoke or cancel any license issued by him in accordance with the provisions of this chapter and... the commissioner or the commissioner's designee may impose or institute fines of not more than three hundred and fifty dollars nor less than five dollars for each violation of this chapter and regulations and rules promulgated under it; the commissioner may arrange for the redress of injuries caused by such violations, and may otherwise provide for compliance with the provisions and purposes of this chapter and with regulations and rules promulgated under this chapter. The commissioner or the commissioner's designee shall be authorized to suspend the license of any person pending payment of such fine or to suspend a license or both for a failure to appear at a hearing at the department after due notice of such hearing. If a license has been suspended, it shall be returned to the department forthwith upon receipt of the order of suspension. Failure to surrender the license shall be grounds for a fine or revocation of the license. (Emphasis supplied.)

Even without this explicit authority DCA might have been able to hold consumer redress hearings under the guise of disciplinary hearings under the Home Improvement Business Law, by simply adopting a policy of aborting such hearings whenever the consumer is satisfied, and of issuing disciplinary orders conditioned on the failure of the licensee to provide the consumer with a specific remedy mentioned in the order. The explicit authority obviates the need for such "bootstrapping", and protects DCA from the attacks (political and judicial) which might follow from such a practice.<sup>48</sup>

The major limitation on DCA's authority to hold consumer redress hearings is that it does not extend to businesses that do not in fact obtain licenses -- even where the law requires them to do so. Under sec. 773-5.0 of the License Enforcement Act of 1973, such businesses are subject to fines of between \$25 and \$2000. Their owners are subject to imprisonment for up to 60 days, and they are also subject to civil penalties, as are those who aid and abet them, even

including their landlords. The penalties specified by the Home Improvement Business Law sec. B32-365.0 (which was not repealed, even in this respect, by the 1973 law) are even stiffer: the unlicensed businessman is guilty of a misdemeanor, and may be imprisoned for up to six months and fined up to \$1000. Both of these provisions also apply to ex-licensees and to some extent to licensees who violate some requirement or prohibition applicable to them. Both laws also permit the corporation counsel to seek injunctions against anyone (licensee, ex-licensee, or non-licensee) who violates the law.<sup>49</sup>

Despite all the legal firepower which could be directed at non-licensees, very little of it actually is so directed. Nor are other restrictions on non-licensees, such as their inability to make a truthful claim that they are licensed, show a valid license when asked, obtain a building permit, or (in theory at least) sue on their contracts, significant impediments to smaller unlicensed operators. The result is that perhaps half of all home improvement contracts in New York City are carried out by non-licensees.<sup>50</sup>

DCA GLOSSARY OF TERMS

Before embarking on an analysis of DCA's procedures, it is necessary for the reader to have working definitions of the terms used by that organization to refer to those of its forms and procedures which are relevant to the consumer redress process. What follows is a brief glossary of such terms.

1. "Inspection". Visit by a DCA inspector to the address of an unlicensed contractor, in an effort to serve him with a criminal court summons or a citation to appear before an informal DCA hearing, or to leave him a letter asking him to call Harold Goodman, Director of DCA's Home Improvement Division.
2. "Special Inspection". This is a visit to the consumer's home in an effort to determine impartially and expertly whether the contract has been properly completed (and if not, what must be done). The visit is ordered by either Harold Goodman or a hearing officer, and conducted by the special inspector, Frank Sendyka.
3. "NL letter". (A) Upon receiving the consumer's complaint, Harold Goodman sends a letter to the contractor telling him of the complaint, noting that DCA records indicate that he has no license, warning him that operating without a license is a misdemeanor for which he could receive "a fine of up to \$1000.00 and/or six months in jail", and requesting that he call Goodman's office "regarding this matter".  
(B) A letter is sent at the same time to the consumer, stating that the contractor is not licensed, that the matter has been forwarded to the Enforcement Division (in reality, to one of the inspectors who

work for Goodman) "for investigation, and such action as may be necessary". The letter also requests the consumer to send in a copy of the contract (if she has not already done so), and tells her that "this does not preclude you from seeking redress in Civil Court".

4. "L letter". (A) A letter from Goodman to the contractor, stating:

A letter of complaint has been received by this Department complaining of the manner in which you executed a recent home improvement contract.

Please contact the consumer with regard to the issue raised and notify us within ten days as to your disposition of these charges. If we have not been notified by you within the time stated that this matter has been satisfactorily resolved, we shall schedule a Hearing at the Department.

(B) A letter to the consumer informing her that the contractor has been notified of her dissatisfaction and advised to take corrective action. She is requested to allow him 15 days from the date of this letter to take appropriate measures. DCA states that if they do not hear from the consumer thereafter, they will assume the complaint has been resolved and will close the case.

5. "Exhaustion letter". Either of two form letters, one of which states that DCA is unable to act because "Departmental procedures exhausted against the above-named unlicensed contractor", while the other states that "We found the Contractor was operating without the required license. A summons was issued to the owner for this violation of the City's Administrative Code B32-352.0": both go on to suggest the consumer seek redress in Civil or Small Claims Court.

6. "Seven-day letter". A letter sent to the consumer, after the contractor has called in response to the L letter (or NL letter) to say that the complaint has been resolved and after Goodman has been

unsuccessful in attempts to contact the consumer by telephone. The letter requests that she call him and informs the consumer that if Goodman does not hear from her within seven days he will assume the complaint has been resolved and will close the case file.

7. "Notice of Hearing". (A) A formal-looking printed summons sent by the Calendar Division to the licensee once Goodman has referred the file to them on the basis that the complaint is unresolved. Written in legalese, this requires the contractor to appear at 9:30 a.m. (or at 2p.m.) "to answer the following complaint of the above-named complainant:

What follows is mimeographed, and appears on almost all notices of hearings sent to home improvement contractors.  
 The licensee operating as a Home Improvement Contractor in the City of New York, violated Section B32-358.0 Subdivision 1 of the Administrative Code, in that on or about \_\_\_\_\_ the licensee induced the complainant to enter into a Home Improvement Contract and the complainant agreed to pay \_\_\_\_\_. That the licensee without justification abandoned or wilfully failed to perform the contract; or wilfully deviated from the plans or specifications without the consent of the owner.

This language is sufficiently broad to encompass most major categories of consumer complaints involving home improvements, including failure to begin work, complete work, do the work right, or later breach of warranty (the warranty is part of the original contract). The notice of hearing may also include Departmental charges, such as the failure of the contractor to include on his contract forms his license number, agreement to furnish the consumer with a certificate of Workmen's Compensation Insurance, agreement to procure all permits required by local law, and a three-day cancellation clause in the specified form. See DCA, Amended Regulations Relating to Home Improvement Business 1(a) - (e) (1975), set out in Appendix B. The printed form concludes:

"In case of your failure to obey this summons you will be liable to a fine or suspension or revocation of your license or licenses, in accordance with the provisions of the Administrative Code for the City of New York, or statutes, in such case provided. YOU HAVE THE RIGHT TO BE REPRESENTED BY COUNSEL."

(B) A mimeographed form letter is also sent to the consumer at the same time telling her when and where the hearing will be held and requesting that she attend.

8. "Departmental charges". Allegations included in the "Notice of hearing" seeking punishment of the licensee rather than redress for the consumer. They may be heard as a separate part of the "consumer redress hearing", or at a separate "disciplinary hearing".

9. "Disciplinary hearing". Any hearing in which DCA is the complainant. While such hearings are more common in non-home improvement contexts, they can occur in home improvement cases. Typically, they follow the failure of the contractor to appear at a consumer redress hearing, and their purpose is to evaluate the contractor's excuse and if necessary to assess a fine.

10. "Consumer redress hearing". A term created for this study to fit the following: A hearing held to determine whether a dissatisfied consumer has a right to obtain "redress of injuries", pursuant to sec. 773-4.0(e) of the License Enforcement Law of 1973 (Appendix C), from a licensed home improvement contractor or salesman. This is not a "disciplinary hearing". DCA is not the complainant. The only parties are the consumer and the contractor. If "Departmental charges" are included in the notice of hearing, they are dealt with at a separate

part of the hearing, without the consumer's presence, either immediately before or immediately after the issues between the consumer and the contractor have been heard.

11. "Decision". While the hearing officer drafts a decision following each hearing, this does not become official until it has been approved by a higher-up (which during the period of my study was Deputy Commissioner Douglas White through April, 1979, and Director of Adjudication Shelley Sherman thereafter). Since the decisions are rarely changed substantially, I will speak as if the final decision were made by the hearing officer, except in those cases where the file makes clear that it was not.

12. "Article 78 proceeding". The method by which a licensee obtains judicial review of an adverse DCA decision. He brings a proceeding in New York State's Supreme Court (its court of general jurisdiction!) under Article 78 of the CPLR (New York's procedural code). If DCA's decision is being attacked on the ground that it is not "on the entire record, supported by substantial evidence", the court transfers the case to the Appellate Division of the Supreme Court.<sup>51</sup> Since DCA, not the consumer, is the respondent in Article 78 proceedings, the City pays the costs. Unfortunately, DCA's order in the case, and hence any relief to the consumer, is normally stayed pending the final determination of the proceeding. In these proceedings DCA is not represented by its own Counsel or the Advocacy Division, but by the City Corporation Counsel.



#### D. DCA Procedures

(NOTE: Each term included in the preceding glossary is asterisked the first time it appears in the present section.)

The processing of consumer complaints against home improvement contractors involves personnel from DCA's Complaints Division, Neighborhood Offices Division, Home Improvement Division, Enforcement Division, Calendar Division, Adjudication Division, and its Counsel's office, as well as from the New York City Corporation Counsel's office. As the following account makes clear, the great bulk of this work is done by three small offices, the Home Improvement Division, the Calendar Division, and the Adjudication Division.<sup>52</sup>

The Complaints Division runs a well-publicized consumer complaint telephone, with volunteers manning several lines. Consumers who call in with complaints against home improvement contractors are instructed to mail a written complaint, together with a copy of the contract, to the Complaints Division. When the written complaint comes in, a clerk in the Complaints Division immediately makes up a case file for it. This involves a number of steps. The vendor's name and address, the vendee's name and address, and a code for the type of complaint are entered on a serially numbered multiple copy form. Three index cards are torn off from the form. Each index card contains the docket number. Additionally one of the cards contains the vendor's name, one the vendee's name, and one the type of complaint. These are stapled to the consumer's letter and the copy of her contract to the remainder of the docket form. The case files containing home improvement complaints are left on a pile to be picked up by someone from the Home Improvement

Division, and all the "vendor", "vendee", and "type of complaint" cards are made into neat piles, to be filed later in "vendor", "vendee", and "type of complaint" card files. Occasionally consumers arrive in person with their complaints. Once their complaints have been reduced to writing they are handled the same way as complaints which are mailed in.<sup>53</sup>

Complaints may also come in through walk-ins at the "Neighborhood Offices" in Queens, Brooklyn, and Staten Island. These complaints are handled somewhat differently. They are docketed at the field office, and a DCA employee there will in each case (including home improvement cases) attempt to effect a settlement by phone calls and/or letters to both parties. If a settlement is reached at the field office the case file remains there, and no information (other than gross statistical information) makes its way back to the main office. If a settlement cannot be effected there the case file is sent, along with cover letter, to the Complaint Division, where it is redocketed (with a new number, and with the cover letter and the original field office case file, including papers gathered by the field office, stapled underneath) and treated the same way as a newly-filed complaint.

The Home Improvement Division (which is administratively part of the Enforcement Division) is run by Harold Goodman, a former small businessman who is paid on an "inspector's" line. He is assisted in the office by an inspector and by a CETA worker. Another inspector performs most of the "inspections\*" (asterisked phrases in this section are defined in the glossary which precedes this section). Frank Sendyka, a former construction supervisor for a large company, performs

all the "special inspections\*" under a three-day/week contract with DCA. Wednesday is his day to be at DCA headquarters in case his testimony is needed at a "consumer redress hearing\*", and he will help out with the telephone at the Home Improvement Division when he is not so needed.<sup>54</sup>

When a case file reaches the Home Improvement Division the first step involves checking a computer print-out from the Licensing Division to determine if the contractor is licensed. If the contractor is not licensed, "NL letters\*" go out to the contractor and the consumer. A few days later an "inspection" is attempted in an effort to serve the contractor with a summons or citation if the contractor has not responded to the letter and if he has an address in New York City. None is attempted if he does not, since while all contractors performing work in the City are required to be licensed by DCA, the jurisdictional rules of the New York Criminal Court require that defendants be personally served within the City limits, an almost impossible task if the contractor has neither a residential nor a business address there. Often, however, a "non-licensee" will call Goodman in response to the NL letter and/or the inspector's visit, sometimes to tell him that he has a license (possibly because the computer print-outs are not completely up-to-date or because the license may be in his individual name but the consumer may have filed her complaint under some trade name he was using) in which case the process recycles with "L letters\*" or to make an excuse for not having a license and/or to promise to apply for one. He will also discuss the consumer's complaint, either disputing it, and/or insisting that he

corrected it upon receiving Goodman's letter, and/or offering to do something about it. He may also ask for Goodman's help in mediating with the consumer. Sometimes a similar process occurs when an inspector visits the contractor pursuant to an "inspection". Many complaints are resolved by these processes (which may include some more calls between Goodman or the inspector and one or both parties).

If Goodman believes the contractor is proceeding in good faith, and if the criminal court summons has not yet been served, he will send the consumer a "seven-day letter\*" and then close the file (rather than taking further enforcement action) if he does not hear from the consumer. On the other hand, if the NL letter and any enforcement efforts do not quickly produce settlement negotiations, an "exhaustion letter\*" is sent to the consumer.

Where a criminal court summons has been served, an employee of the Enforcement Division who has the responsibility for all criminal court summonses issued by DCA inspectors goes into court on the return date of the summons in the hope that the contractor will appear (if like 40% of those summoned he does not appear a bench warrant for him is issued, but never executed!) and that the judge will be tough (in which case the contractor will be fined \$50 rather than the usual \$25). If a non-licensee has five unresolved complaints pending against him, and if Goodman is convinced that he is not proceeding in good faith to resolve this, he will request the Counsel's Office to enlist the aid of the City Corporation Counsel in seeking an injunction against the contractor. Such injunction proceedings are brought infrequently and are drawn-out, formalistic, and only sporadically effective.

If , on the other hand, when the Home Improvement Division receives a docket from the Complaints Division it determines that the contractor (or, if not the contractor, the salesman) is licensed, it mails "L letters\*" to the licensee and to the consumer. In the unusual case where the salesman is licensed but the contractor is not, the case is bifurcated, with the salesman receiving an L letter, the contractor an NL letter, and the two parts of the case then proceeding each in its own fashion. In the more usual case in which the contractor is licensed, no attempt is made to determine if the salesman is licensed or to involve his license in the proceedings if he is already involved. The L letter generally elicits some response, written or telephoned, from the contractor.

If the contractor either disputes the claim, asserts that he has since satisfied the consumer, or requests Goodman's help in mediating, Goodman tries to call the consumer to attempt to ascertain the truth of the contractor's assertions and, if necessary, to work out a settlement. If she is not in, he mails her a copy of the contractor's response and requests her comment. If the contractor stated that the matter was settled after the consumer's complaint was filed, and if Goodman cannot contact the consumer by telephone to confirm this, he mails her a seven-day letter\*! If the consumer at any point agrees that her complaint has been resolved, or if she fails to respond to a "seven-day letter", Goodman marks the file "closed" and returns it to the Complaints Division, which places it in numerical order in the Complaints file.

In some cases Goodman, after speaking with both the consumer and the contractor, decides that a "special inspection" may help the parties to resolve their differences and, with their consent, arranges one. If a settlement does not result, or if the consumer later complains that it was not carried out, Sendyka's report and testimony are available for use at a subsequent consumer redress hearing.

If the contractor has not responded to the "L letter", or if the consumer disagrees with his assertion that the complaint has been settled, or if Goodman's attempts to negotiate a settlement (with or without Sendyka's assistance) have been unsuccessful, he sends the case file on to the Calendar Division in order for them to schedule a consumer redress hearing. If in the process of doing so he notices that the contractor has committed some violation of which the consumer is not complaining (typically, the failure to put his license number or the three-day cancellation clause on his contract form, or his failure to notify DCA of a change of address), he will mention this in his covering note to the Calendar Division, thus triggering some "Departmental charges\*" in the "notice of hearing\*".

The Calendar Division prepares a formal "notice of hearing\*" which it sends to the licensee; the consumer gets a simple form letter telling her when and where the hearing will be held. Hearings are scheduled for Monday through Thursday (but only on Wednesday if a "special inspection" has taken place and Frank Sendyka's presence at the hearing might be needed). The parties are told to arrive at either 9:30 a.m. for the morning hearings, or at 2 p.m., for the afternoon ones. The notice of hearing is usually sent out about three weeks

after the Home Improvement Division first becomes aware of the impasse. The notice itself generally precedes the hearing by three to four weeks. The notice contains a statement that "an Application for an Adjournment will be entertained only for good cause and only if submitted in writing and received by the Deputy Commissioner for Adjudication, Department of Consumer Affairs at least three days before the return date of the Hearing." Indeed, such nonconsensual adjournments are rare. Consensual adjournments, typically while the consumer waits to see if the contractor carries out a promised settlement, are quite frequent and are granted automatically by the Calendar Division.

There are normally two hearing officers, both lawyers, who hear cases involving licensees. The week prior to the scheduled hearing the Calendar Division makes up a weekly calendar indicating when each complaint will be heard and before which hearing officer. The morning before the hearing is scheduled the Calendar Division delivers the case file to the hearing officer.

As the parties arrive for the hearing they check in with a DCA employee who sits in a booth in front of a 30-person waiting room. He tells them to wait and that they will be called. Each hearing officer has three or four cases scheduled for each morning and for each afternoon on a typical day. The cases are called in the order in which they are ready (both sides present). People can therefore be kept in the waiting room up to about two hours, though the average wait is much less. If the consumer appears but the contractor does not show within one hour of the scheduled time, the case is called but the consumer is told by the hearing officer that the case will have to be rescheduled.

She is assured, however, that the contractor's license will be suspended in the meantime and that he will be fined for his failure to appear. The contractor is then notified of the impending suspension; when he calls to protest a "disciplinary hearing\*" is scheduled at which he has a chance to explain his earlier non-appearance. If he does not do a persuasive job of it, he is fined at least \$50, the suspension is called off upon the payment of the fine, and the consumer redress hearing is rescheduled (on the theory that the properly chastened contractor will now appear) If, however, the contractor does not appear at the disciplinary hearing his license is suspended immediately.

The "consumer redress hearing\*" is conducted by a hearing officer, usually in his own hearing room. He sits at his desk, while the consumer, the contractor, their witnesses, spouses, friends and family, and/or advocates, and (if a special inspection was done) Frank Sendyka sit around a small table. There is a microphone at the hearing officer's desk, and three around the table; a tape recorder operator (who works for a transcription agency which is under contract with DCA) sits at a small desk to the side, operating his machine.

The parties and their witnesses then tell their stories, beginning with the consumer and her witnesses, with considerable questioning from the hearing officer and liberal amounts of interjections from the other party usually permitted. An attorney, if present, will be allowed to question the witnesses, but not to control the manner in which the hearing proceeds.

The hearings last from 20 minutes (if the parties quickly agree on a settlement, or if the hearing officer immediately sees the need for a "special inspection"), to more than an hour (where both sides slog



through the details of a complicated contract, arguing over what was or was not done, and whose fault it was in each instance). One of the hearing officers was quite deft at obtaining settlements, and would order the proceeding to be "off the record" whenever he saw an opportunity to turn the parties from testimony to settlement negotiations. On the other hand, a single case might include several hearings, separated by "adjournments", while Sendyka was doing a special inspection or while the parties were trying (with incomplete success) to work out some kind of adjustment of the complaint.<sup>55</sup>

Following the consumer redress hearing, the hearing officer may fill out a single page "case disposition form". The form permits the hearing officer to check one of the following: "Licensee's license to be suspended for failure to appear -- consumer to be notified"; "Complaint to be dismissed -- Consumer failed to appear -- advise both sides"; "Complaint to be dismissed -- for failure of both sides to appear -- Licensee to be fined \$ \_\_\_\_\_ for willful failure to attend a hearing"; "Matter to be adjourned to \_\_\_\_\_ (date)" or "Reset to first available date"; "S.I. requested (see attached)";<sup>56</sup> "Complaint settled -- see settlement attached -- copy to be sent to both sides"; "Matter adjourned pending judicial action not to be reset unless consumer requests it -- Copy of order to go to both sides"; or, finally, "Other (State)", followed by three short lines. If the hearing officer uses this form, he forwards it to the Calendar Division along with the case file.

If none of the spaces on the case disposition form applies, the hearing officer drafts a formal "decision" and submits it for approval

(which is usually forthcoming) to the Director of Adjudication. The decision describes the consumer's complaint, sets out the relevant facts as "found" by the hearing officer from the testimony and other items (such as the contract) in the record, comes to a conclusion as to the licensee's liability in light of these facts and the relevant law, and finishes with an "order". The order typically provides either that the complaint is dismissed, that the licensee is to refund some or all of the amounts he received from the consumer within 30 days of the date of the order, or that the licensee is to complete or redo specific portions of the job according to specified standards within 30 days of the date of the order. If the order takes the latter form, it may condition the licensee's responsibility to perform on the consumer's paying him some or all of any outstanding balance on the contract, or may embody some other remedial provision agreed to at the hearing, such as one contemplating that the consumer will pay once Special Inspector Sendyka inspects the completed or redone work and pronounces it satisfactory.<sup>57</sup>

The Director of Adjudication has the power to alter the decision before promulgating it, but rarely does so unless convinced it is mistaken as to the law. Promulgating the decision involves sending copies to the parties, attaching several copies to the case file, and inserting a copy in a looseleaf book of that month's decisions (which book is kept in the DCA library as a public record). At the same time the licensee is also sent a letter (copy to the consumer) which repeats the "order" portion of the decision and concludes, "The licensee is directed to comply with this order within thirty days of

the date hereof, unless otherwise specified. Failure to comply will result in the suspension of the license." This form letter is also used to remind the licensee of any settlement he agreed to, and to inform him of any fine which might have been imposed as a result of Departmental charges, including one for failure to appear at prior hearings.

The licensee's practical options upon receiving an order to do work, make a refund, and/or pay a fine, along with the proportion of licensees in my samples pursuing each option,<sup>58</sup> are: (1) to comply within the time specified, (47%); (2) to write the Director of Adjudication, arguing that there was some gross error in the decision and requesting that she reconsider it and/or order a new hearing, (12%); (3) to file an "Article 78 proceeding\*" in New York State Supreme Court, (6%); (4) to begin the required work, or otherwise demonstrate an intention to comply, (12%); or (5) not to comply (with or without offering an explanation to DCA) (24%).

Option (1) requires no comment. Options (2) and (3) are not mentioned in the decision or order. They are discussed in the GUIDE FOR HEARING OFFICERS which is available to licensees from the DCA (though I doubt many licensees even know of its existence), but more importantly they would occur to any lawyer whom the licensee might consult. Option (2) requires a written petition "confined to new questions raised by the decision or final order and which the petitioner had no opportunity to argue before the Department".<sup>59</sup> Filing such a petition does not automatically stay the effective date of the order. However, in practice it does give the licensee a few week's grace.

In theory option (3) does not produce an automatic stay either, but in practice it can gum up the works for months or even years, since the DCA will generally not take action to enforce an order which may ultimately be reversed. Exercising this option is difficult in that it requires hiring an attorney to file the petition and to defend it against motions to dismiss filed by the City Corporation Counsel's office, which represents DCA. The cost to the licensee is such that I encountered only two cases in which Article 78 proceedings had been brought.<sup>60</sup> These were also the only two cases in which DCA had ordered the contractor to make monetary refunds of over \$1000.

Exercising option (4) is likely to have the practical result that the consumer will hold off complaining to DCA. Consumer complaints are the only device DCA has which alert it to possible non-compliance with its remedial orders. If consumer complaints do not come in, DCA will have no notice of the technical violation of its orders.

Even if the consumer does complain that the work has not been done or the ordered refund paid within the prescribed time the contractor gets another chance. Before Lillian Maglino, the head of the Calendar Division, schedules another hearing to determine whether the order was or was not complied with she usually calls the contractor and gives him an opportunity to make an informal explanation and to promise swift compliance. If he appears to be preparing in good faith to comply, Maglino will so inform the consumer and will delay rescheduling the hearing for a few weeks to give the contractor a chance to make good on his new promises.

Option (5) may produce a cheap victory for the contractor. The

consumer may never complain that the work was not done, either because she is unaware that DCA can do anything further for her or because she does not want to waste more time and effort on a project which she thinks will probably be futile. Additionally, the consumer may fear some physical reprisal from the contractor if she takes any further steps to deprive him of his license. If the consumer does complain, the contractor can then obtain at least a few weeks' grace (more, if the consumer gives up, the file gets lost, etc.) by making false protestations and promises of "good faith" over the telephone. If a hearing on the contractor's alleged non-compliance is then scheduled, he has a crack at convincing the hearing officer that he had some excuse for not complying. The likely result of the hearing is that he will be fined \$50 and given another 15 days or so to carry out the original order or face the suspension or revocation of his license.

Failure to appear at the second hearing, or a report by the consumer that the contractor has failed to comply within the time specified in the second order, will quickly produce a DCA order suspending or revoking his license. The contractor can, as a matter of practice, get a suspension or revocation stopped or rescinded at any point before it becomes effective by complying with all DCA orders then outstanding against him. Once his license is revoked, he will have to make a deal with the Advocacy Division (which normally involves satisfying any existing orders and any newly-arrived consumer complaints, as well as paying a penalty to the DCA) before he will be permitted to have another license.<sup>61</sup>

### III. Data Collection: The Four Samples

In order to determine the characteristic progress and resolution of complaints filed against home improvement businesses in small claims court and at DCA, I needed roughly comparable samples of complaints filed in each forum. The "small claims court" sample and the DCA "complaints" sample were drawn with this criterion in mind. These two samples provide the grist for the quantitative analyses and comparisons in Chapter IV.

The "small claims court" sample was drawn from cases filed in the Brooklyn (King's County) small claims court. Since all of the small claims courts in New York City are in theory subject to the same jurisdictional and procedural rules,<sup>62</sup> I felt free to choose the Brooklyn court for the sample simply because it was the one most accessible to me (once I excluded the Manhattan court on the basis that home improvement cases filed there were likely to be few and far between).

Additional samples, of DCA "decisions" and of DCA "hearings", were needed to obtain a representative sampling of cases going through DCA's formal adjudicative processes, since few such cases were uncovered in the "complaints" sample. For the reasons explained in the next section, I was not able to take analogous samples of small claims court decisions or hearings. The "decisions" and "hearings" samples will therefore be used primarily to supplement cases from the first two samples in providing illustrations for the qualitative discussions in Chapter V. However, information which I have gleaned from the complaint records which I read and the interviews with consumers which I did in the course of compiling all four samples, along with all that I learned from extensive discussions with and observations of

DCA and small claims court personnel, observations of actual hearings, and conversations with contractors, form the basis for most of the descriptions and analyses contained in this study.<sup>63</sup>

A. Small Claims Court

I wanted filed cases that had run their course (if need be, through adjournments, hearings, and executions) but which were recent enough that the clerk's office would not have thrown out the "Requests for Information". When I began my search of the Brooklyn small claims court's files on March 2, 1979, the chief clerk of that office suggested I start by looking at the file cards from August 1978. Starting from there, working mostly forward but occasionally backwards in time, I eventually looked at 4500 file cards covering the three-month period from July 24, 1978 through October 24, 1978.<sup>64</sup>

My procedure was to look through the cards, turning over each card in which the "defendant" was either identified as a business of a type which frequently does home improvements,<sup>65</sup> or the nature of which was uncertain or ambiguous, or as a private individual. On each card I turned over I checked the "Cause of Action". I rejected cards in which the cause of action clearly arose from (1) an automobile accident, (2) the failure of the defendant to pay the claimant for work allegedly done or materials allegedly supplied by claimant, (3) work which the defendant was supposed to have done for the claimant's business, (4) problems with goods supplied by the defendant on the understanding that he was not also obligated to install them, or (5) (in the case of the individual defendants) one of the infinite number of other reasons A might sue B, other than that B had failed to properly perform a home improvement contract for A.

With respect to each of the cards that were still in the running as possible home improvement cases, I dug up the original "Request for Information" for whatever light the claimant's original statement (usually, much fuller than the "Cause of Action") would cast on the question of whether this was really a home improvement case. If I decided it was, I copied all the information about the case on both the file card and the Request for Information, and gave the case a serial number, beginning with SC1, and eventually running through SC55. There was even a sorting stage after this point. I later deleted two of the serial numbered cases from the sample on the basis of information which I acquired when I called the consumer to find out whether the desired result was ever achieved. Neither was a "home improvement contract" within the meaning of the Home Improvement Business Law.<sup>66</sup> I used the Home Improvement Business Law criteria in selecting cases for my small claims court sample, since they were as good as any and were the ones in use at DCA. Using them therefore guaranteed that the cases in my small claims court sample were as comparable as possible with those that I would collect in my DCA samples.

For each case in my small claims court sample I checked (using the computer printout supplied by DCA's Licensing Division) whether the contractor was licensed and (using the "vendee" file at the DCA Complaints Division) whether there were any complaints against him in 1978. Where there were complaints, I went through the case file on each of them and made notes about what I found. This latter process sometimes provided me with more information about the licensing history



of a particular contractor than I could get from the printout (e.g. that he was or was not licensed until recently, or that he is presently licensed, but under a different name than the one under which he is being sued). It was also my first foray into the DCA case files, allowing me an opportunity to familiarize myself with them and with DCA procedures prior to beginning the formal collection of data for my DCA samples, as well as providing some insight into typical modus operandi of both licensed and unlicensed home improvement contractors.

The final stage in the development of my small claims court sample involved telephoning the claimants to obtain the final results of their claims. I succeeded in contacting 31 out of the 55 claimants originally in the sample. The remainder had no listed telephone number. One of the latter group obtained an execution from the court, which the sheriff had marked "satisfied". As for the remaining 23, while I cannot be sure what the fate of their claims were, some reasonable assumptions can be made on the basis of what happened with the claims of people in the same apparent situation whom I was able to contact. This will be done in the quantitative analysis, Chapter IV.

I did not attempt to contact the contractors involved in any of these cases, or those involved in cases from my DCA samples, for the purpose of confirming whether work was done or money paid in individual cases (though I did speak with several about other matters). My fear was that, like the Truth-tellers and the Liars in the popular riddle, the honest ones would tell me they had performed (because they had), while the less honest ones, if they would speak with me at all, would also tell me they had performed, but regardless of whether or not they

had (to avoid any hassles which might flow from admitting failures to carry out their duties).<sup>67</sup> On the other hand, the consumers involved in my samples had no obvious reasons to lie to me about whether the contractor had performed.

I could not do a sample of written decisions of small claims court arbitrators similar to the sample I was doing of DCA decisions, since the arbitrators do not write decisions but simply issue judgments either for the claimant (in some dollar amount) or for the defendant. I did, however, attempt to do a sample of actual small claims court hearings in home improvement cases, analogous to the sample I was doing of DCA hearings.

At first it looked like it would be simple. Since all of the cases filed on a given day are assigned the same trial date (about a month later), looking through a day's cards for home improvement cases enabled me to know a month in advance on which evenings one or more such cases would be scheduled. Hence, I arrived at the Brooklyn small claims court on Monday, April 23 at 6:30 p.m. ready for the hearing in my first such case (having previously obtained permission from Judge Smith to attend arbitrations). However, when the case was called, no one responded, and the clerk intoned "Dismissed -- no appearance either side." With the exception of one contested case and one short inquest, I encountered similar frustrations the other eight evenings I attended court sessions in Brooklyn and the one evening I attended a session in Queens (hoping to change my luck). Two variations on this frustration were where the defendant appeared but the claimant did not (still producing a dismissal), or where both parties appeared but the

case turned out not to involve a home improvement contract. These results are only slightly worse than would be predicted from the results of my small claims court sample. Out of 53 cases filed both sides appeared for the scheduled hearing in only 12 (23%). The claimant alone appeared in an additional 11 (21%), leaving more than half in which a would-be observer would not even witness an inquest. My problem was that I had no possibility of developing a system analogous to the one I had at DCA which would alert me only when a hearing in a home improvement case was actually about to take place.<sup>68</sup> Rather, I was stuck with having to show up for the calendar call each evening such a case was scheduled. I simply did not have enough evenings to devote to this wasteful procedure, and called it quits after ten.

This is not to say that my evenings at small claims court were a total loss. My statements about small claims court procedures are based in part on this experience,<sup>69</sup> as are my observations on the costs to the consumer of obtaining relief through this process,<sup>70</sup> and my comparison throughout this paper of small claims court hearings with DCA consumer redress hearings. I did in fact attend at least 20 arbitrations in Brooklyn small claims court and two in Queens, and watched at least that many inquests take place. Even though only one of the arbitrations and one of the inquests was in a home improvement case, I am sure that many of my observations would also be applicable if the hearing had involved home improvement contracts.<sup>71</sup> I have tried to be careful not to generalize from my observations of non-home-improvement cases if I could think of any reason why they would not be applicable in the home improvement context.

## B. Complaints

The closest analogue at DCA to a sample of small claims court claims is a sample of docketed complaints. A complaint is not docketed unless the consumer (1) walks into a DCA office with a complaint against a "vendor", (2) mails one in to DCA, or (3) in a similar manner complains to another government agency such as the New York City Attorney General's office, which sends all its New York City home improvement contractor complaints to DCA as soon as it receives them. In contrast, telephoned complaints, or mere inquiries (e.g. as to whether a particular contractor is licensed or has many complaints against him, or whether a particular practice is legal), are not docketed. Occasional docketed complaints are simply filed for the purpose of seeking information or of informing DCA of an abusive practice (there was one of each among the 92 cases in my complaints sample). The overwhelming majority of complainants, however, seek some sort of relief from the vendor. Following through on a sample of docketed complaints, in the same way I had done with the sample of small claims, would therefore provide a valid statistical comparison of the likely results in the two forums for a consumer with a complaint about a home improvement contractor.

I obtained my complaints sample by going through every home improvement contractor case among docket numbers 134000 through 134999. All of these cases were docketed between July 31, 1978 and September 6, 1978, well within the period included in my small claims court sample. The selection of home improvement contractor cases within this series was much simpler than the corresponding task at small claims court had been, since all such cases at DCA were clearly marked "HIC" in a

docket ledger.<sup>72</sup>

I noted the docket numbers of all such home improvement cases in order on a pad of paper, and proceeded to try to locate them in the files. I gave each file a serial number (from 1 to 92) in the order in which I located it. This is not entirely the same as the order of the docket numbers, since many of the files were not in the file drawers when I began my research. Some drifted back in as my research continued. I located others in the various file drawers ("awaiting hearings", "awaiting special inspections", etc.) at the Calendar Division. I had to hunt down the rest detective-fashion in a number of other DCA offices -- but in the end I found them all.

I prefixed the serial number with an "L" if the contractor was licensed at all relevant times, and "NL" if he was unlicensed at all relevant times, an "L-NL" if he was licensed at the time the contract was signed but was no longer licensed at the time the complaint was filed (because it had been suspended or revoked, or simply because he had not bothered to renew it), and with an "NL-L" if he was not licensed at the time of the complaint but obtained a license thereafter.

I assigned the serial number before determining the appropriate prefix. The prefixes appear at random in the series, e.g. L8, NL9, and L-NL10 are three consecutive cases in the complaints sample. In determining the status of the contractor and hence the appropriate prefix, I had no problem figuring out what his status was at the time the complaint was filed, because Harold Goodman had made that determination in each case upon receiving the file, and his conclusion was reflected in whether the file contained an L letter or an NL letter.

Occasionally, a contractor would reply to an NL letter by filing his license number (which Goodman might have missed as a result of a discrepancy between the name on the contractor's forms and the name under which he is licensed). In such a case, the corrected status of course determined the prefix. If the copy of the contract which the consumer submitted had a license number on it but the computer print-out indicated no current license, Goodman would send out an NL letter and would note in the file any information which his records revealed as to whether the contractor was in fact ever licensed (some contractors simply make up a license number) and, if so, what happened to his license. Those cases in which the file reflected the existence of a license at the time of the contract were accordingly marked "L-NL". Finally, I checked the computer print-outs through June, 1979 (nine months after the most recent NL letter in my sample had been sent out) to determine which of the contractors who had received NL letters thereafter obtained a license. Those cases in which they had were prefixed "NL-L".

As to each of the 92 cases in my complaints sample, I drew from the file the name of the contractor, a description of the complaint, the amount of the contract, a thorough chronology of the case from the time DCA was first contacted through the time the file was closed, and summaries of any correspondence and of any DCA decisions reached in the case. I then tried to determine the final result to the consumer of the complaint. Where the file indicated unambiguously that the consumer got nothing,<sup>73</sup> I treated that as conclusive. Similarly, I treated any type of written indication from the consumer that the work had been done (whether a copy of the contractor's service slip on which

the consumer signed her agreement that the work had been done, or a separate letter to DCA by the consumer to the same effect), and any notation by a DCA employee of a conversation held with the consumer in which she acknowledge performance as establishing that fact.<sup>74</sup>

There were also a few miscellaneous situations in which I concluded that the possibility that I would learn something more by calling the consumer than I could infer from the case file was so small that I could not justify disturbing her with a phone call.<sup>75</sup>

In general I did not assume either that the failure of the contractor to respond to DCA letters meant that nothing was done, or conversely that a plausible-sounding letter from a contractor, detailing all the work he had supposedly done in response to DCA's letters, phone calls, or formal decisions, was in fact truthful. In all, I attempted to contact 60 of the 92 consumers in question, and succeeded in contacting 50 of them. In the process, I contacted every one of the 60 whose telephone was either listed in a telephone directory or discoverable from the DCA case file. I made a judgment as to each of the remaining 10 as to whether I had enough information to be reasonably certain of what happened, or whether I had to place the results in the "unknown" category. Of the people I contacted, none refused to give me the information I was seeking. In some cases the information I got was not sufficient to convince me that I knew what had happened, but in the end I acquired enough information to categorize the results in all but five cases with reasonable confidence.

### C. Decisions

The purpose of my research was to study all aspects of the consumer redress hearing process. Out of the 92 cases in my complaints sample

only 21 were ever scheduled for a hearing. In only 16 of these did at least one party appear. In only 10 of those 16 did both parties appear, and only eight of the ten produced a resolution on the merits (as opposed to an order for a special inspection). Only in two of the last group did the resolution reflect the hearing officer's judgment between the conflicting claims of the parties (as opposed to a negotiated settlement).

These figures reflect no discredit to DCA, since a negotiated settlement (whether provoked by the L letters, a phone call from Goodman, a notice of hearing, a special inspection report, or by the hearing officer) is normally preferable to a decision imposed from above. Furthermore, the complaints sample reveals the consumer redress hearing process in its most interesting aspects statistically. It demonstrates not only the probabilities facing a consumer who complains to DCA about a problem with a home improvement contractor on each level of involvement with the hearing process, but more importantly provides a basis for comparing the results such a consumer would be likely to achieve at DCA with those attainable in small claims court.

However, a sample of two completely adjudicated cases is hardly enough to explore some structural issues raised by DCA's jurisdiction to order its home improvement licensees to make redress to consumers, such as (1) the types of problems amenable to solution by use of such orders, (2) the methods by which the hearing officers acquire the evidence upon which they act, (3) the specific forms of redress which they order in different types of cases, (4) the ways DCA goes about enforcing its orders and the efficacy of these techniques, and (5) a



comparison on each of these dimensions both with "normal" judicial adjudication and with small claims courts.<sup>76</sup> Fortunately, there was an easier way for me to uncover a substantial lode of adjudicated home improvement cases than going through a few hundred more random home improvement complaints. DCA compiles each month's collection of formal decisions (as opposed to those made on "case disposition forms"), placing the resulting booklet in the DCA library as a "public record". The collections of decisions for October, November, and December of 1978 provided the high-grade ore I needed.

Of the 184 decisions in disciplinary consumer redress cases which DCA issued in these three months, 39, or 21%, were in home improvement consumer redress cases. For two of the cases in the sample there were two decisions (reflecting two different hearings in the case). Thus, there were 39 decisions, but only 37 cases, in my decisions sample. The decisions are numbered D1 through D39; where there were two decisions in one case, these are referred to as D6/D20 or D7/D31. Of the 37, eight were the result of negotiated settlements.<sup>77</sup> Twenty-six were decisions on the merits, 17 giving the consumer at least part of what she wanted, and nine dismissing the complaint entirely. The three remaining cases were, for one reason or another, never decided on the merits. For each case in the sample I noted the same information as I had with the cases in the complaints sample. In 13 of the cases, where the file did not demonstrate the extent to which a DCA order had been carried out, I called the consumer to verify this.

As expected, the cases in this sample reflected a variety and complexity of DCA procedures that were barely revealed (if at all) in

the complaints sample. Some involved a special inspection (before or after an initial hearing), some a disciplinary hearing (followed by a fine and/or license suspension and/or revocation), some more than one hearing on the merits (with part, but perhaps not all, of the necessary work having been done in the meantime), and two Article 78 proceedings (both unresolved). The presence of written decisions which analyzed the consumers' claims on the merits provided a basis for distinguishing what the consumer wanted from what she was entitled to. It allowed me to compare the relief the consumer was officially awarded with the relief she actually received.<sup>78</sup>

#### D. Hearings

While the complaints sample provided statistical information about the consumer redress hearing process, and the decisions sample provided insights into the structure of this process, neither sample cast any light on what the hearings themselves were like. For this I had to sit in on hearings, and between March 20 and July 9, 1979 I did, for a total of 43 hearings in 41 cases. I have numbered these H1 through H41; the second hearings which I attended in two cases are numbered H11A and H23A, respectively. While I did not sit in on all home improvement hearings during this period, I tried to attend any hearing that was held while I was in the building. To do this, I checked the calendar at the beginning of each week, marking off the times when home improvement hearings were scheduled. Prior to the beginning of any morning or afternoon session at which such a hearing was scheduled, I would check with the waiting room receptionist that the hearing had not been canceled or adjourned. If it was still on, I would either go into the

hearing room (if it was expected to begin soon) or ask the receptionist to phone me at my desk near the complaints files as soon as the case was called (which he generally did). The hearing officer or the tape machine operator would generally fill me in if I had missed part of a case, but for the great majority of the cases in this sample I sat through substantially the entire hearing. I took notes as each hearing proceeded, recording the names of the parties, the gravamen of the complaint, a summary of the testimony of the parties and their witnesses, choice bits of dialogue, and anything that seemed interesting about the behavior or attitudes of the participants (including the hearing officer).

A month or more after each hearing, I searched out the case file to determine the decision or order which had resulted from the hearing, as well as any other entries in the file, before or after the date of the hearing, which might help elucidate what went on at the hearing or indicate what the final resolution of the complaint might be. In this, as in the previous two samples, I continued checking through mid-August all case files in which I had reason to expect that further entries would be made. However, unlike the previous two samples, I made no effort here to call the consumers to verify the final resolution on the theory that so many of these cases were still at an intermediate stage (e.g. a special inspection had been ordered) that I could not hope to obtain a reasonably complete view of how the cases finally turned out by phoning at that time. Nonetheless, by mid-August I was reasonably sure from evidence in the files how 36 of the 41 cases would be resolved. These 36 cases are particularly useful to this study for the light they cast on the relationship between the evidence adduced at the

hearing and the relief which the hearing officer orders.<sup>79</sup> My experience in sitting in on these hearings is also relevant to my discussions of the costs to the consumer and the contractor of participating in this process,<sup>80</sup> and of the appropriateness of extending this process to other contexts and other jurisdictions.<sup>81</sup>

#### IV. Statistical Analysis of Results in the Two Forums

This chapter will present in tabular form, analyze, and then compare the results achieved for the consumer in the cases which comprise the small claims court sample and the DCA complaints sample.

##### A. Small Claims Court

On the following pages: Table 1: Results of Cases in Small Claims Court Sample

Table 1A: Cases Where Contractor is Licensed

Table 1B: Cases Where Contractor is Not Licensed

Table 1C: All Cases Combined

TABLE 1: Results of Cases in Small Claims Court Sample

TABLE 1A: Cases Where Contractor is Licensed

Did the Consumer Receive Redress?	Legal Disposition of the Case							Total
	<u>Inquest</u>	<u>Notice Returned --Undelivered, Unclaimed</u>	<u>Dismissed --No Appearance Either side</u>	<u>Settled in Court</u>	<u>Dismissed -- No Appearance Claimant</u>	<u>Judgment for Claimant</u>	<u>Other</u>	
<u>Received Substantial Redress, due to Filing Claim <sup>a</sup></u>	2		4	3		1		10
<u>Received No Redress, though Presumably <sup>b</sup> Entitled <u>    </u></u>					1			1
<u>No Information</u>	1	1	3	1		1		7
<u>Other <sup>c</sup></u>	<u>    </u>	<u>    </u>	<u>1<sup>d</sup></u>	<u>    </u>	<u>1<sup>e</sup></u>	<u>1<sup>f</sup></u>	<u>1<sup>g</sup></u>	<u>4</u>
<u>Total</u>	3	1	8	4	2	3	1	22

TABLE 1B: Cases Where Contractor is Not Licensed

<u>Did the Consumer Receive Redress?</u>	<u>Legal Disposition of the Case</u>							<u>Total</u>
	<u>Inquest</u>	<u>Notice Returned --Undelivered, Unclaimed</u>	<u>Dismissed -- No Appearance Either Side</u>	<u>Settled in Court</u>	<u>Dismissed --No Appearance Claimant</u>	<u>Judgment for Claimant</u>	<u>Other</u>	
<u>Received Substantial Redress, due to Filing Claim</u> <u>a</u>			1	1				2
<u>Received No Redress, though Presumably Entitled</u> <u>b</u>	3	5				1	1 <sup>h</sup>	10
<u>No Information</u>	5	6	1	2			2	16
<u>Other</u> <u>c</u>		2 <sup>i</sup>			1 <sup>j</sup>			3
<u>Total</u>	8	13	2	3	1	1	3	31

TABLE 1C: All Cases Combined

Did the Consumer Receive Redress?	Legal Disposition of the Case							
	<u>Inquest</u>	<u>Notice Returned --Undelivered, Unclaimed</u>	<u>Dismissed --No Appearance Either Side</u>	<u>Settled in Court</u>	<u>Dismissed --No Appearance Claimant</u>	<u>Judgment for Claimant</u>	<u>Other</u>	<u>Total</u>
<u>Received Substantial Redress, due to Filing Claim <sup>a</sup></u>	2		5	4		1		12
<u>Received No Redress, though Presumably Entitled <sup>b</sup></u>	3	5			1	1	1	11
<u>No Information</u>	6	7	4	3		1	2	23
<u>Other <sup>c</sup></u>		2	1		2	1	1	7
<u>Total</u>	11	14	10	7 <sup>k</sup>	3	4	4	53



Notes to Table 1:

a. The criteria which I have used for this category are (1) that the consumer received something more than a temporary patch job as a result of bringing her claim, so long as (2) she did not insist to me that whatever she received did not even come close to being a fair measure of redress for her grievance.<sup>82</sup>

b. This classification includes only cases where the consumer received nothing, and only where there was no adjudication adverse to the consumer.<sup>83</sup>

c. This "OTHER" category includes cases in which the consumer obtained redress independent of the small claims court proceedings, as well as miscellaneous cases and cases which have been ejected from the "YES" and "NO" categories for reasons explained in the previous two notes.

d. In this case, SC15, the consumer sought compensation for damage to her family's property, including a painting, as a result of the defendant's allegedly incompetent and incomplete installation of sheet-rock. After filing suit in small claims court for \$1000, the maximum possible amount, she decided that her claim was worth more and that she did not want to sacrifice the excess to stay within the court's jurisdiction. She therefore hired a lawyer and sued in Civil Court, thus ousting the small claims court's jurisdiction.<sup>84</sup>

e. This case, SC29, is similar to SC15 in that the consumer also hired a lawyer who brought suit in Civil Court. Here, the contractor had not submitted plans to the Building Department or obtained a building permit for work on the consumer's basement. The consumer had been cited for a building code violation. At a hearing in Civil Court (six months after

his small claims court complaint was filed), the consumer's lawyer obtained a settlement whereby the contractor agreed to correct the violation and obtain a building permit within 120 days.<sup>85</sup>

f. The consumer in SC34 was awarded \$400 by an arbitrator. The contractor paid, but, the consumer thought "the judgment was asinine" and the "the arbitrator is a dope". She had paid more than \$100 for a cement job, which was cracking in numerous places. The contractor admitted the cement he used might have been defective, and had offered her \$300 in settlement. The best price she could get on a patchwork repair was \$650, which she did not think would do the job.<sup>86</sup>

g. This case, SC18, is the one in which the consumer lost on the merits. She wanted a refund on an alarm system that began malfunctioning about five months after it was installed. The problem was that she only had a 30 day warranty. The judge urged her to settle for \$54 (what she had paid the company for two futile service calls) but she wanted her money back.

h. This case, SC51, involved a breach of warranty on a \$110 porch roof. The claimant went to court five times: once to file the claim, twice for the calendar call (to be told that the notice of hearing had twice been returned undelivered), once to pick up a copy of the notice in order to have someone serve it on the defendant personally, and finally for another calendar call to learn that the process server had not filed an affidavit of service and the case would therefore have to be dismissed (though he was free to refile it for another \$2.00 and try again). He may do that (he told me, six months after he first filed the claim), or he may get a lawyer, or he may just give up.

i. One of these cases, SC38, the consumer voluntarily decided not to

pursue for personal reasons. The other one, SC3, was completed, but "not satisfactorily".<sup>87</sup>

j. In SC53 the contractor returned in response to the court summons and did some more work on the house (a frequent scenario). However, whatever it was that the contractor was putting up later fell off, making the question of whether the consumer received substantial satisfaction a nice one.

k. In five of the seven cases the arbitrator signed the "settlement" card. In one of these, SC46, the settlement -- to redo a waterproofing job -- did not work out. The consumer went back to court, this time before a judge who worked out a cash settlement, which he received. Of the remaining two, one was settled before a judge; the other, SC55, was settled courtesy of the clerk, who when the contractor decided he did not want an arbitrator and went to the clerk to get the case re-scheduled before a judge, persuaded both parties of the greater wisdom of settling.

#### Analysis of Table 1:

Out of the total of 53 cases in the sample (Table 1C) the information in 23 of them was inadequate. I could not determine whether the consumer ever received substantial redress. In seven more of the cases (detailed in notes d,e,f,g,i and j of the Table), no determination which would reflect on the efficacy of small claims court could be made. In 12 (52%) of the remaining 23 cases the consumer received substantial redress, while in 11 (48%) she did not.

The denominator of these ratios could be increased by redistributing some of the "NO INFORMATION" cases between the first two categories, on the basis that all "Notice returned, undelivered" cases are

placed in the "Received no redress" category and all the "Dismissed, no appearance either side" cases and all the "Settled in court" cases are placed in the "Received substantial redress" category. These redistributions can be justified by logic (an undelivered notice is unlikely to produce contractor compliance), by the experience of others,<sup>88</sup> and by induction from the cases in this sample in which the results are known (there are no examples to the contrary with respect to any of the three redistributions). There would then be 37 cases for which the question "Did the consumer receive substantial redress?" could be answered in a way that would reflect on the efficacy of the small claims process. Of these, 19 (51%) would be "YES", and 18 (49%) "NO", thus confirming the proportions originally obtained.

My purpose in studying the fate of claims against home improvement contractors in small claims court was to provide a baseline for comparing the fate of similar claims submitted to DCA. Given this, since the DCA processes for dealing with licensees and non-licensees are distinct, I worked out separate tables for cases where the contractor is licensed (Table 1A) and cases where he is not (Table 1B). The variable of whether the contractor is licensed turns out to be of critical importance. Of the 11 licensee cases in which I could determine whether the consumer received substantial redress and in which this determination was relevant to appraising the process, 10 (91%) were "YES" and only one (9%) was "NO", whereas the corresponding figures for the 12 non-licensee cases were 2 "YES" (17%) and 10 "NO" (83%). Making the same redistribution of "NO INFORMATION" cases as I did with respect to the combined results: out of 16 licensee cases 14 (88%) were "YES" and two

(13%) were "NO", while out of 21 non-licensee cases five (24%) were "YES" and 16 (76%) were "NO". The results of these computations are set out in Table 2.

TABLE 2: Analysis of Table 1 by Proportion Receiving Substantial Redress (Excluding "NO INFORMATION" and "OTHER"), With and Without Redistribution of "NO INFORMATION"

<u>Did the Consumer Receive Substantial Redress?</u>	<u>Proportion*Receiving Substantial Redress, Without Redistribution</u>	<u>Proportion*Receiving Substantial Redress, With Redistribution</u>
(CASES WHERE CONTRACTOR IS LICENSED) (TABLE 2A)		
YES	91% (10/11)	88% (14/16)
NO	9% (1/11)	13% (2/16)
(CASES WHERE CONTRACTOR IS NOT LICENSED) (TABLE 2B)		
YES	17% (2/12)	24% (5/21)
NO	83% (10/12)	76% (16/21)
(ALL CASES COMBINED) (TABLE 2C)		
YES	52% (12/23)	51% (19/37)
NO	48% (11/23)	49% (18/37)

\*Note to Table 2: Proportions have been rounded to the nearest %.

The same pattern clearly emerges with or without the redistributed "NO INFORMATION" cases. As a whole, consumers had indifferent success suing home improvement contractors in small claims court. They achieved substantial redress only half the time, but consumers did extraordinarily well when they sued licensees, getting what they wanted seven-eighths of the time. Conversely, they did extraordinarily badly when they sued non-licensees, obtaining satisfaction no more than a quarter of the time.

B. DCATABLE 3: Results of Cases in Complaints Sample<sup>b</sup>  
Contractor's Status

<u>Did the Consumer Receive Redress?</u> <sup>a</sup>	<u>(Total of NL, NL-L, and L-NL)</u>					<u>TOTAL</u>
	<u>NL</u>	<u>NL-L</u>	<u>L-NL</u>	<u>L</u>		
<u>(RECEIVED SUBSTANTIAL REDRESS, DUE TO FILING COMPLAINT)</u>						
<u>Hearing Not Involved</u>	6	0	1	(7)	16	23
<u>After Notice of Hearing, but Before Hearing</u>	n.a. <sup>c</sup>	n.a.	n.a.	(n.a.)	5	5
<u>At, or Subsequent to, Hearing</u>	n.a.	n.a.	n.a.	(n.a.)	5 <sup>d</sup>	5
<u>(Total)</u>	<u>(6)</u>	<u>(0)</u>	<u>(1)</u>	<u>((7))</u>	<u>(26)</u>	<u>(35)</u>
<u>(RECEIVED NO REDRESS, THOUGH PRESUMABLY ENTITLED)</u> <sup>e</sup>						
<u>Contractor Out- of-Business</u>	9	0	1	(10)	3	13
<u>Remainder</u>	14	1	3	(18)	2	20
<u>(Total)</u>	<u>(13)</u>	<u>(1)</u>	<u>(4)</u>	<u>((28))</u>	<u>(5)</u>	<u>(33)</u>
<u>(OTHER)</u>						
<u>No Information</u>	0	0	2	(2)	2	4
<u>Consumer not Seeking Redress</u>	0	2	0	(2)	1	3 <sup>f</sup>
<u>Resolved Independ- ently of DCA</u> <sup>g</sup>	2	1	0	(3)	2	5
<u>Complaint Dismissed</u>	n.a.	n.a.	n.a.	(n.a.)	4 <sup>h</sup>	4
<u>Complaint Apparent- ly Without Merit</u> <sup>i</sup>	1	0	0	(1)	2	3
<u>Partial Redress</u>	2	0	0	(2)	5	7
<u>(Total)</u>	<u>(5)</u>	<u>(3)</u>	<u>(2)</u>	<u>((10))</u>	<u>(16)</u>	<u>(26)</u>
<u>TOTAL</u>	34	4	7	(45)	47	92

Notes to Table 3:

a. This has the same meaning as it did in Table 1. Here, there was somewhat less need to rely on consumers' reports of what happened because DCA records are much more thorough than small claims court records, and frequently contain "objective" evidence of whether work had been done.<sup>89</sup>

b. The criteria for the four categories of "contractor's status" are set out in Section III B, above.

c. "n.a." = "not applicable".

d. This included three cases (L38, L58, and L65) which were settled at the hearing, and two cases (L70 and L92) in which the hearing officer decided for the consumer.

e. I have separated out the "contractor out-of-business" category since a different set of reforms (e.g. bonding requirements) would be needed to attempt to make this group of contractors amenable to DCA or other dispute resolution processes than might theoretically suffice in the case of people still in the home improvement business in New York City. I have included in the "contractor out-of-business" category only those cases where a DCA inspector ascertained that the contractor had actually moved without forwarding address or gone entirely out of this business. Those who had merely adopted a new trade or corporate name have been placed in the "remainder" category since there is no reason in principle (though there might be in law) why they could not or should not still be pressured into honoring their earlier contracts.

f. The three cases in this category were NL-L5, in which the

consumer wanted, and obtained, a special inspection report for use in defending a claim brought against her in small claims court; L43, in which the consumer had written DCA requesting information about his rights vis a vis a contractor, and was angered to discover that this had been metamorphosized into a complaint and then a notice of hearing (which, at his request, the Department cancelled); and NL-L78, in which the elderly consumer's daughter wrote DCA to inform them that she had called another contractor to work on her mother's roof. This contractor arrived instead, and did more work than necessary, in a slipshod manner -- she was not, however, seeking any relief.

g. Of these five cases, three (L16, NL46, and L55) were resolved by the parties before DCA had a chance to act. The remaining two (NL-L73 and NL74), both of which involved contractors who were beyond the effective jurisdiction of DCA (because they were located outside New York City limits and were not licensed at the time of the complaint), were settled (the former by a small claims court judgment, the latter by the threat of judicial action) after DCA had communicated to the consumers its inability to obtain any relief for them.

h. Three of these (L17, L21, and L90) may well have been situations in which the consumer was trying to cheat the contractor out of the last payment due him. In each of these cases the contractor readily agreed, in response to the L letter, to do the remaining work if the consumer would pay the amounts owed. The consumer not agreeing, hearings were scheduled. The consumers did not appear at the hearings called in L17 and L21, resulting in dismissals. The consumer did appear at the hearing in L90, at which a "settlement" was worked out in which "within five days after the receipt of \$250 from



the consumer, the licensee is ordered to (do four minor finishing items)". As a result of further correspondence between them the contractor thereafter agreed to do a fifth item for the consumer for the same price. The consumer never paid up, and upon the contractor's request Deputy Commissioner White wrote the consumer that the case would be dismissed if he did not carry out his responsibilities under the settlement. When I could not reach the consumer I called the contractor, who told me that he never received the money, and insisted that the consumer's purpose all along was to build a record to support withholding his last payment.

There is, however, no suspicion of improper consumer motivation in L81, the remaining case. The consumer complained that her newly installed awning leaked. The contractor came back several times to fix it, both before and after receiving the L letter, but the consumer still insisted it leaked, and was now ugly from the excessive caulking as well. Goodman sent Sendyka to check, and his report confirmed both parts of the consumer's complaint. The consumer, perhaps finally tiring of this process, did not appear at the hearing, resulting in the dismissal of her complaint.

i. The three cases were NL35, L45, and L63. NL35 involved a home improvement job, done in November, 1976, which included painting. The contract provided for a 10-year warranty on the paint and a one-year warranty on the labor. In June, 1978, the consumer complained to the contractor that the paint was chipping. The contractor quite properly offered to provide the paint but not the labor. The consumer refused and complained to DCA. DCA sent the consumer an

exhaustion letter (there being no opportunity for it to adjudicate cases where the contractor is unlicensed), but the consumer's claim seemed invalid on its face.

In L45 the consumer complained about a bad roofing job. The contractor replied promptly to the L letter, stating that the leak was not coming from the repaired area and that the consumer still owed them \$1350 on a \$2150 job. A copy of this reply was sent to the consumer, who was not heard from again. Goodman made two efforts to contact her by telephone and then closed the file. The failure of the consumer to reply seems sufficiently damning in this context.

Finally, in L63 the consumer complained that the contractor had not completed a \$5000 basement renovation, leaving two or three panels and the doorbells uninstalled. The contractor responded to the first letter from the Jamaica field office that he had made two appointments with the consumer and had waited for him for two and a half hours -- please advise! Another letter from the field office elicited a story of a further such incident. Jamaica then referred the case to the main office, and an L letter produced a copy of a letter sent to the consumer by the contractor asking the consumer to "please contact us."

DCA sent the consumer a seven-day letter three weeks later and, receiving no response, closed the file three weeks after that. The consumer told me when I called him six months later that he had called them four or five times, that they never appeared for their appointments, and that "I can't stay home every day waiting for them". While there is a dispute on this record as to who is responsible for the missed appointments, the consumer did not in his conversation

with me cast any doubt on the contractor's good faith, which suggests that the contractor was telling the truth at least about the fact of his efforts (if not also about the time he arrived). Given that, and the contractor's apparent willingness to try again, the consumer's failure to obtain redress seems to be at least as much the result of his own unwillingness to make the necessary arrangements and accommodations as it is the contractor's.

Analysis of Table 3:

Of the total of 66 cases as to which the question whether the consumer received substantial redress could be answered in a way which is indicative of the effectiveness of DCA processes (that is, of those cases in the first two rows on Table 1), the answer in 33 (50%) was "YES" and the other 33 (50%) was "NO". Out of the 31 licensee cases in this group, the answer in 26 (84%) was "YES" and in five (16%) was "NO". Out of the 29 non-licensee cases in the group, the answer in six (21%) was "YES" and in 23 (79%) was "NO". If the contractors in the "NL-L" status and the "L-NL" status are added to those in the "NL" status, on the basis that the members of all three groups were not licensed at the time of the complaint and therefore had to be handled by DCA's non-licensee procedures, there were a total of 35 cases in this "not licensed at the time of complaint" category as to which the question of whether the consumer received substantial redress could be significantly answered. Of these, the answer in 7 (20%) was "YES" and in 28 (80%) was "NO". The results of these computations are set out in Table 4. Since this question can be significantly answered in 72% of the cases in the complaints

sample (as opposed to only 43% of those in small claims court sample), and since there were only four 'NO INFORMATION' cases in the complaints sample (as opposed to 23 in the small claims court sample), no attempt will be made to increase the subsample size by redistributing the 'NO INFORMATION' cases.

TABLE 4: Analysis of Table 3 by Proportion Receiving Substantial Redress (excluding 'OTHER')

<u>Did the Consumer Receive Substantial Redress</u>	<u>Proportion Receiving Substantial Redress</u>
(CASES WHERE CONTRACTOR IS LICENSED) (TABLE 4A)	
YES	84% (26/31)
NO	16% (5/31)
(CASES WHERE CONTRACTOR IS NOT LICENSED --'NL' ONLY) (TABLE 4B)	
YES	21% (6/29)
NO	79% (23/29)
(CASES WHERE CONTRACTOR IS NOT LICENSED--'NL','NL-L',&'L-NL') (TABLE 4B*)	
YES	20% (7/35)
NO	80% (28/35)
(ALL CASES COMBINED) (TABLE 4C)	
YES	50% (33/66)
NO	50% (33/66)

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The same pattern clearly emerges whichever definition of 'not licensed' (Table 4B's or Table 4B\*'s) is used. As a whole, consumers had indifferent success bringing complaints against home improvement contractors to DCA, achieving substantial redress only half of

the time. However, consumers did extraordinarily well when they sued licensees, getting what they wanted five-sixths of the time. Conversely, they did extraordinarily badly when they sued non-licensees, obtaining redress only a fifth of the time.

C. Comparison of Results Obtained in the Two Forums

Comparing Table 2 with Table 4, there is no significant difference between the results obtained in the two forums, whether one focuses on cases involving licensees, non-licensees, or both. This conclusion is not affected by my attempt to increase the sample size in Table 2, or by my ambivalence about which contractors to include as non-licensees in Table 4.

The fact that two quite different processes could produce such similar results suggests that they are pressing asymptotically against some externally imposed limits. Furthermore, the fact that both forums do equally well in dealing with DCA licensees, and equally badly in dealing with non-licensees, suggests that these limits derive from characteristics of the contractor population. It also implies that the licensee and non-licensee sub-populations differ greatly from each other with respect to these characteristics. That is, unless the fact of having a license is causative of a greater willingness to settle or comply when faced with small claims court proceedings, the differential success of small claims brought against licensees would demonstrate that the possession of a license is an indicator of some more basic characteristics, which largely determine the contractor's response to either type of

dispute settlement process.

The only possible causal connection between having a license and demonstrating a greater willingness to settle or comply (hereinafter referred to as a "differential amenability") when faced with small claims court proceedings would derive from DCA's General Rule 7 (Appendix C), which requires licensees to either pay, arrange for payment of, or appeal small claims court judgments within 30 days from their entry.

This rule is enforced in two ways. First, licensees applying for their biennial renewals must certify that they are not "at the time of filing" in violation of this rule, and must therefore either lie on their certifications or pay their judgments at least every two years. Second, if a consumer's judgment remains unpaid and unappealed after 30 days, she may bring a complaint to DCA alleging violation of this rule, which will trigger a consumer redress hearing, a DCA order that the contractor pay the judgment and, if the contractor remains intransigent, follow-up orders suspending and then revoking his license. One could therefore try to explain the differential amenability of licensees to small claims court procedures (in terms of settling as well as of paying judgments) by arguing that, since the licensee knows that DCA will eventually make him pay his outstanding small claims court judgments, his motivation to fight small claims which he knows to be justified will be eliminated or at least greatly reduced. Under this argument, the fear of DCA sanctions applied against their licenses is the cause of the licensees' differential amenability to small claims court procedures.

The argument has several important weaknesses. It gives too much credibility to the potential DCA sanctions. Consumers may never learn about the availability of the DCA process to enforce their judgments. They may be so disgusted with the fact that their judgment has not gotten them any money that they do not bother to file a DCA complaint, or if they do, they may then not bother coming to the consumer redress hearing. If the consumers do not complain to DCA within a couple of months of getting their judgments, the licensees would probably be safe from discovery if they "neglect to mention" the outstanding judgments when applying for renewals.

Another major complaint that consumers have with contractors is delay. Contractors frequently bridle at deadlines, and develop a wide variety of stratagem for "buying time". The assumption of the argument that a contractor who knows that he will have to pay up eventually would just as soon pay up now contradicts experience, particularly if he is the sort of contractor who would seriously contemplate defying a judicial judgment.

Also, the motivational analysis implied in the argument simply seems wrong, at least as applied to licensees. My strong impression after talking with many consumers who have received redress from licensees is that the principal reason the licensees either settled or complied with an order is that they were law-abiding and reasonably responsible people who would never seriously contemplate behaving differently. This impression was buttressed by the unanimous opinion of DCA employees involved in the complaint, enforcement, and adjudication processes with whom I spoke; by the response of licensees whom I interviewed; as well as by my own

response to observing licensees in the 43 DCA hearings I attended; and to reading the correspondence in the 82 additional case files I examined which involved licensees. Thus, the argument that fear of DCA sanctions, rather than internalized standards, keeps the great majority of licensees in line even when faced with small claims court proceedings, is simply not persuasive.

The question then becomes, "What characteristics which would tend to produce amenability to dispute-resolution processes are present to a significantly greater degree among licensees than among non-licensees?" Conversely, "What characteristics which would tend to produce recalcitrance in the face of dispute resolution processes are present to a significantly greater degree among non-licensees than among licensees?" I have already mentioned that licensees tend to be law-abiding and reasonably responsible people. This is hardly surprising. It is possible though illegal to do business as a home improvement contractor in New York City without a DCA license, a fact attested to by the fifty-fifty distribution of licensees and non-licensees in the combined small claims court and complaints samples.<sup>90</sup> While there are some sanctions against performing home improvement contracts without a license,<sup>91</sup> and for some types of home improvement businesses (such as those specializing in jobs that require building permits) these sanctions would make it quite difficult to avoid getting a license, for a wide range of specialties it is not a practical necessity. For example, in the complaints sample both licensees and non-licensees had been involved in contracts for roofing and gutters (L14 & NL11), aluminum siding (L56 & NL74), storm windows (L27 & NL53), awning installation (L58 & NL1), bathroom



modernization (L83 & NL42), and both major (L67 & NL66) and minor (L79 & NL36) kitchen renovations.<sup>92</sup> Since both the contractors who apply for a license and those who do not at least frequently appear to be facing similar objective circumstances, the difference in their behavior must at least frequently reflect differences in their respect for the law (the belief that the law should be obeyed, a habit of actually obeying it, and perhaps a belief that one is a good person for believing and acting this way). Their respect for the law, shown in their obtaining the required license, would also tend to result in their carrying out formal DCA and small claims court orders, and perhaps also in their carrying out informal suggestions by DCA officials, such as Goodman, Sendyka, and the hearing officers.

Furthermore, while a sense of personal responsibility for their undertakings (a belief that people are entitled to receive what was promised them, a habit of carrying out one's promises, especially when called to task, and perhaps a certain degree of pride about behaving this way) is not logically entailed by their demonstrated respect for the law, it is psychologically consistent in the sense that both attitudes follow from a willingness to pay a price in terms of self-interest (narrowly defined) in order to meet the just demands of others. While in none of the cases in which a presumably justified complaint (to DCA or small claims court) was filed was this sense of contractor responsibility so strong that he took care before the complaint was filed that the consumer would have no cause for filing one, it should not be discounted as a motivation for settlement even after the consumer has made a formal complaint. Such a

complaint is an unambiguous indication of the extent of the consumer's unhappiness with the contractor's performance. This may frequently be the decisive factor in triggering the contractor's sense of responsibility and energizing him to do something about the problem.

There is reason to believe that non-licensees are relatively deficient in the characteristics of respect for the law and sense of personal responsibility for their undertakings. Non-licensees are distinguished by the fact that they have violated one legal requirement, while some may not know about the licensing requirement, and some others may have violated it not out of disrespect but out of lethargy (a need to be prodded before they do anything), probably most of them have made a conscious decision weighing their legal obligation against the \$100 out-of-pocket cost and the bother of filling out forms. This conclusion is supported by the fact (from Table 3) that out of 38 cases in the complaints sample in which contractors received NL letters only four resulted in the contractor obtaining a license as of nine months later. This demonstrates that attempts to increase contractor awareness of the licensing requirement, including prods specifically addressed to individual violators, produce only marginal increases in compliance with this requirement, and strongly suggests that only infrequently is the absence of notice or of specifically aimed prods the true cause of contractor non-compliance.

If avoiding inconvenience and saving \$100 are sufficient to outweigh any qualms non-licensees may have about violating a legal requirement, the legal obligation to comply with small claims court

judgments is not likely to fare any better. Similarly, the moral force of DCA's implicit request in the NL letter that the contractor satisfy the consumer's grievance (which accompanies the generally ignored explicit instruction that the contractor obtain a license) is unlikely to have much effect.

True, it would be logically consistent for a contractor to have little or no respect for the law (and hence not obtain a license when it is not in his personal interest to do so) yet to feel a sense of personal responsibility for his undertakings, and some of the non-licensees probably fit this description. Non-licensees may, for example, lump the licensing requirement with a lot of other "bureaucratic" regulations which they regard as "impractical", that is, as too expensive, complicated, and time-consuming for a small businessman to comply with and still make a living. But a similar (if less politically respectable) argument could be made for not finishing, or repairing, their undertakings, or appearing in court when their performance of these undertakings has been challenged, or paying judgments which the court might award: such "responsible" behavior is likely to be financially unrewarding, time-consuming, and distracting from their current activities in their pursuit of earning a living. Since licenses are not very expensive and getting them is not very difficult, I would think that most contractors who do not carry out their obligation to get them (whatever their rationalization) would also likely not carry out their obligations under their contracts, once these obligations became onerous.<sup>93</sup>

V. Qualitative Analysis of Remedies Available to the Home Improvement Consumer

The previous chapter demonstrated that a consumer in New York City who has a grievance against a home improvement contractor has an equal chance of obtaining substantial redress whether she goes to small claims court or to the Department of Consumer Affairs. Nonetheless, it is quite possible that within the broad category of "received substantial redress" lie significant differences in the quality of relief typically received by consumers, which differences may consistently favor those consumers who went to one or the other forum. This possibility will be explored in the present chapter. The quality of the remedies which these forums offer will also be evaluated.

The methodological issues involved in determining the quality of redress which a forum offers are more complex than those involved in determining the extent to which it offers significant redress at all. The question of which remedy is "best" in a given situation depends both on which remedy is most "just" in that situation, and which one is most "feasible". Neither of these criteria can itself be completely defined. The "justice" of the situation turns on a number of factors including but not limited to: the nature of the contract; the reasonable expectations of both parties at the time of the signing and at various critical times thereafter; what was or was not done; who was responsible for any eventual defects in performance; and the present desires of the consumer (e.g. to cancel the contract, to require the contractor to complete it, or to be

paid the cost of having someone else complete the contract). The definition of these factors, and the weight to be given each one, may come from common-sense notions of what is "unfair", from analogical reasoning based on legal and other precedents, from statutes and administrative regulations, and/or from more abstract ethical reasoning.

The ingredients of feasibility are no more easily defined. The following are all clearly relevant: general readiness of the contractor to settle or to carry out the tribunal's orders, his differing degrees of readiness to concur in different types of settlements or of orders he may be given; what the consumer really wants and what she will settle for; and the history and depth of the misunderstanding and/or antagonism between the parties. This list is also clearly incomplete. The analysis of feasibility is the analysis of opportunities for effective action, and nuances of variations along unpredictable dimensions may produce vastly different opportunities.

Standards for judging the remedies offered by these "alternative" dispute resolution forums might arguably be obtained by examining the remedies offered by a "regular" dispute resolution forum -- a court of general jurisdiction. Therefore, the analysis of the appropriate remedies for contractors' breaches of home improvement contracts will begin by examining in Section A the remedies that could be offered by such a court. With this as a background, the remedial principles applied by New York's small claims courts and by DCA will be discussed in Sections B and C respectively.

However, the components of justice and feasibility are too complex to permit a fair evaluation of the remedies administered by small claims courts and DCA simply by comparing them with those administered by courts of general jurisdiction and commenting in the abstract on the range and limitations of each set of remedies. Therefore, Section D will provide a close analysis of the remedies actually offered by DCA or by small claims court, supporting the analysis with reference to the facts presented in a number of cases from the four samples. The focus will be on the extent to which the remedies are adapted to the problems which they address. Finally, Section E will consider ways of improving the remedies and the remedial processes in both forums.

A. Remedies Available in a Court of General Jurisdiction

In a court of general jurisdiction, the lawyer for the plaintiff in a civil action would have the initial responsibility for describing and characterizing the relevant facts and for indicating the relief to which his or her client is thereby entitled. The attorney for the contractor would then respond to the allegations and requests for relief in the "complaint" with an "answer". Usually the answer consists of a denial or profession of ignorance as to most of the allegations, and frequently adds the argument that even if the allegations were true, the plaintiff would not be entitled to the relief she requested, or perhaps to any relief at all. If the case is not settled or dropped, or lost "on the merits" after a failure to prove that facts entitling the plaintiff to some relief exist (this failure could occur either at trial or in the course of some pre-trial procedure), a judge (sometimes assisted by a jury) has to

decide whether the law of contract remedies entitles the plaintiff to the relief requested or, if not, to some lesser or different type of relief.

The law of contract remedies was essentially developed by common law and equity courts in England and the United States by the end of the nineteenth century. Briefly, today, if the complaint is that the contractor accepted a deposit but never did the work, the plaintiff may, if she wishes, get her deposit back, either on the theory that the contractor's conduct manifests his decision to scrap the contract (regardless of whether he continues to protest his intention to perform), or that his failure to begin performance within a reasonable time ought in fairness to let her off the hook. She may, however, choose instead to seek "contract damages" measured by the excess of what it will cost her to have someone else perform the contract over the balance she would have had to pay the defendant to complete the job, plus any demonstrable losses she may have suffered as a result of the delay. Interest from the time of her loss is added to this recovery, as it is to all restitutionary or compensatory monetary judgments. Also added to all civil judgments are court costs, such as filing, service of process, jury, and statutory witness fees. Attorneys fees are not included in these costs, which is the reason why courts of general jurisdiction are usually not practical forums in home improvement or most other consumer cases.

If a substantial beginning was made on the work (equal to at least the deposit), but the work was abandoned before completion,

the consumer's only option is to seek damages (measured by the cost of having someone else complete it less any amount she still owes the contractor, plus any provable losses resulting from the delay). As was the case with the "work-not-started" situation, she will not be entitled to any relief (i.e. not have a "cause of action") if the delay has not been "unreasonable", unless the contractor has otherwise communicated his intention not to complete the contract. Courts will defer to deadlines specified in the contract in determining whether a delay is unreasonable, and intangible losses from delays become provable if the contract has a "liquidated damages" clause (setting a figure for the damages which would result from a breach) addressed to this issue. Of course, contractors do not ordinarily volunteer to insert either enforceable deadlines or liquidated damages clauses in their contracts, and it is only the most knowledgeable and careful consumers who insist on such contract language.

If the contract has been completed, but completed improperly, damages measured by the cost of having someone else fix the bad work, plus any consequential damages (such as the cost of repairing water damage from a roof leak, and perhaps of a hotel room while the house dries out) are the consumer's only alternative. Similarly, if all work was apparently done properly and on schedule, but defects appeared during the contractor's warranty period, the consumer's damages are again measured by the cost of having someone else do the repairs, plus any consequential damages. If no warranty period is specified, so long as warranties are not specifically disclaimed, a court will imply a warranty for a reasonable period, based on a minimum life



expectancy of a workmanlike job.

What is peculiar about the law of contract remedies in each of these situations is that, regardless of whether the consumer's complaint was that the work was not begun, not completed, or was done improperly, the court will order the contractor to pay the consumer money rather than to do the necessary work. That is, the consumer does not have the option of obtaining, as all or part of the relief to which she is entitled, an order requiring the contractor to "specifically perform the contract" to do the work, complete it, or come back and fix it. A judge would remind a consumer's attorney who pressed for such an order that an order of "specific performance" is an "equitable remedy" (that is, among the remedies previously given by courts of equity), that equitable remedies were not available if there was an adequate remedy "at law" (that is, available from a court of law), and that this restriction on the availability of equitable remedies remains despite the demise of separate law and equity courts. Monetary damages -- the sole remedy "at law" in all these cases -- are generally considered adequate because some amount of money will be sufficient to induce another contractor to do the required work.

The extent to which the limitations on a court of general jurisdiction's remedial powers would preclude the award by such a tribunal of the optimal form of relief in a home improvement case will be discussed in detail in Section D, below. The fact is that such a tribunal is not free to choose between awarding damages or specific performance in a particular case on the basis of which

remedy is preferable, and that this constraint on a judge's freedom to choose specific performance is not itself historically the result of a reasoned policy decision that damages are the preferable remedy wherever they are a possible remedy. This suggests that the orthodox legal remedy will at least sometimes be suboptimal.<sup>94</sup>

An even more important limitation on the relief afforded by courts of general jurisdiction is the exclusion of the consumer's attorney's fee from the court costs which the consumer can recover from the contractor if she prevails on the merits. Unlike the restriction on specific performance, this exclusionary policy is the creation of American legislatures and courts, and is contrary to the English rule. The justification generally given for this exclusion is that it avoids the discouragement of possibly meritorious but chancy lawsuits which would result from requiring unsuccessful plaintiffs to pay defendants' attorneys' fees. The underlying assumption is that the consumer-wins and the consumer-loses situations must be treated equally, at least unless the legislature intervenes to make a policy choice to treat the situations differently.<sup>95</sup>

The policy of refusing to compensate consumers for their attorneys' fees also applies in small claims courts and before the DCA, but its sting is much less in both these "alternative" tribunals since consumers can generally navigate quite well through either one without the aid of an attorney.<sup>96</sup>

Courts of general jurisdiction, on the contrary, are designed to be used by lawyers rather than laymen, and a lay consumer who brought a case "pro se" in such a tribunal would stand little chance,

at least if the contractor retained a lawyer to contest the suit rather than settling directly upon receiving the summons. The prohibitive cost of retaining an attorney to bring such a case, in light of both the limited resources of most consumers and the moderate amounts at stake (in most cases), is the principal reason why courts of general jurisdiction are impractical forums for these cases.<sup>97</sup>

#### B. Remedies Available in Small Claims Court

The basic principle of small claims court remedies is that the same rules apply as in a court of general jurisdiction except that the judge or arbitrator hearing the case can award "money only" up to \$1000 plus court costs. If the claim is worth more than \$1000 the consumer must, as a practical matter, either write off the amount above \$1000 or find a lawyer to bring the case in Civil Court.<sup>99</sup> If there is really no adequate remedy at law, the consumer must sue elsewhere.

While the act creating New York City's small claims courts instructs them to do "substantial justice",<sup>100</sup> any implication that this empowers these courts to decide for themselves the meaning and requirements of "justice" is negated by the qualifying phrase, "according to the rules of substantive law".<sup>101</sup> This provision has been interpreted by the courts to authorize informality in procedure but no loosening of substantive rules.<sup>102</sup>

Small claims court arbitrators are free as a practical matter to use whatever guides they think best in reaching their decisions. This is because no transcript is made of the hearing before them,

no statement of reasons is included with their decisions, and their decisions are in any case by statute nearly unreviewable so long as they stay within the \$1000 jurisdictional limit.<sup>103</sup> Nonetheless, they seem to do their best to apply the law rather than do rough justice, even in cases where they appear to understand that law and justice have diverged.

I witnessed a repeated example of this in the application of the rule applied in the Brooklyn small claims court forbidding recovery on a property damage claim unless the complainant either brings in a paid bill for the repair or an expert witness to testify to the value of the loss.<sup>104</sup> There were several instances where credible complainants appeared sometimes with non-expert witnesses at "inquests" -- the defendant having not appeared -- only to be told that the case must be adjourned or dismissed for failure to produce the proper evidence. Given the difficulties the claimants would face even if the default judgment were to issue,<sup>105</sup> this added burden of replacing the damaged item or hiring an expert, and in either case returning again to court, seems unnecessarily harsh. It seemed so to two different arbitrators on one evening, each of whom went to the arbitrator assignment room to double-check with the clerk that that was really the rule, before returning to his hearing room to give the claimant in the case before him the bad news.

It is not surprising that arbitrators act this way, since lawyers are trained from the first week of law school that the "equities" of a particular case must often be sacrificed in the interest of maintaining a legal rule which, in the general run of cases, will supposedly produce a better result.

A spirit of compromise and common sense does enter into the proceeding, but only in the areas of procedure, pre-trial encouragement of settlements (which frequently require the defendant to do work rather than pay money),<sup>106</sup> appraisal of conflicting testimony and discount of possibly inflated damage claims. Judges in courts of general jurisdiction also encourage settlements (often with what seems to many lawyers an excessively heavy hand). Judges and juries also regularly evaluate and discount testimony, so that the special flexibility of small claims courts really resides entirely in its procedures.

C. Remedies Available at the Department of Consumer Affairs

The Commissioner of Consumer Affairs is empowered by the New York City License Enforcement Law of 1973 "upon due notice and hearing" not merely to invoke disciplinary sanctions for violations of the City's licensing laws and regulations, but also to "arrange for the redress of injuries caused by such violations."<sup>107</sup> Home improvement contractors are prohibited by the applicable licensing law from:

"Abandonment or willful failure to perform, without justification, any home improvement contract or project engaged in or undertaken by a contractor; or willful deviation from or disregard of plans or specifications in any material respect without the consent of the owner."<sup>108</sup>

There is no definition of "redress of injuries" in the statute, the regulations, or the Guide for Hearing Officers recently issued by DCA. Nor is "redress of injuries" a legal term of art, so no inference can be drawn of an intent by the City Council to incorporate legal or equitable remedial doctrines by reference. Nonetheless,

there is a firm belief among DCA hearing officers that they have no authority to award "damages". This belief reflects the difficulty which lawyers (at DCA as well as elsewhere) have with the notion of an official non-judicial tribunal adjudicating cases between private parties in the manner of common law courts.<sup>109</sup> However, while avoiding "damages", the characteristic remedy of common law courts in contracts cases, the hearing officers feel free to give other forms of relief, especially restitution and specific performance. The result is that DCA's jurisdiction in these cases, as actually exercised, ends up greatly resembling that of the former equity courts but (since the hearing officers and their supervisors do not think of themselves in these terms) without any restrictions for cases in which there would be an adequate remedy at law.<sup>110</sup>

Typical consumer relief ordered by the DCA includes ordering the licensee to finish the job or make repairs within a given time from the date of the order (sometimes conditioned upon the consumer making provision for paying the contractor amounts due him under the contract), or make restitution to the consumer of a deposit or of part or all of the contract price paid (the recovery sometimes being measured by the cost incurred by the consumer in having someone else do the job). The restriction against awarding "damages" prevents any awards measured on the basis of the harm to other property of the consumer resulting from the contractor's breach ("consequential damages"). It also stops awards based on wages lost or frustration incurred while waiting futilely for the contractor to appear ("incidental damages"), or based upon an agreed-upon penalty

for missing a deadline ("liquidated damages"), even if the amount so awarded would be less than the total amount the contractor has received from the consumer.

Restitution of a deposit paid but not earned, or of amounts up to the contract price paid but not completely earned looks similar to a damage remedy. It has however always been treated by the law as a different, less dignified remedy, based as it is on ignoring the promises and comparing the values of the performances actually exchanged. Even the cases where the relief was measured by the cost of having someone else redo the job (cases D6 and D11 in my decision sample -- the only two cases in my samples which were on appeal to the courts!) arguably conformed to the restitutionary model, in that the contractors were ordered to disgorge that part of payment they received from the consumer (in D6, the whole thing) that did not represent work done by the contractor that was of any value to the consumer. The fact that a damage (benefit of the bargain) theory would have produced the same dollar amount does not detract from the restitutionary character of the remedy, since the two remedies will generally produce the same result in this situation unless the cost of redoing the job exceeds the total amount paid to the original contractor for the job, as might well happen as a result of inflation or of a below-market contract price by the original contractor. It is only if DCA were to award the consumer the full cost of having the job done right in the latter case that it would have left the realm of restitution and entered solidly into the supposedly forbidden territory of damages. This they have not yet done. On the

other hand, DCA does the economic equivalent of this when they order a contractor to complete, redo, or repair a job that has become unprofitable to him because of inflation, misestimate, or assorted mix-ups.

D. Analysis and Comparison of Remedies at DCA and in Small Claims Court

Some of the cases I studied appeared -- with benefit of hindsight -- to have resulted from simple mistakes and misunderstandings. The contractor's receipt of notice from small claims court of the consumer's claim against him,<sup>111</sup> or of an L letter or an NL letter from DCA,<sup>112</sup> may be sufficient impetus for him to reestablish communications with the consumer and to resolve the problem.<sup>113</sup> Occasionally, however, the intervention of a third party may be needed to unblock the dialogue.<sup>114</sup> This function can be performed equally well by a DCA hearing officer or a small claims arbitrator.

Where the consumer has paid a deposit but the contractor refuses to begin work within a reasonable time, she is entitled to the restitution of her deposit and the cancellation of the contract. While both remedies are available from DCA,<sup>115</sup> small claims court, limited as it is to claims for "money only", can give only restitution. If the contractor (or a finance company to whom he had assigned the contract) were then to sue the consumer for failure to carry out her part of the bargain, she would have to reassert the claim on which she had prevailed in small claims court in order to defeat the action against her.<sup>116</sup> This is not, however, likely to be a major problem.



Where the contractor has not started work and the consumer has arranged with a second contractor to do the job, DCA's policy of not awarding damages prevents the consumer from recovering in this forum the amount (if any) by which the price of the second contract exceeded that of the first. While such damages are theoretically available from small claims court, they are difficult to obtain in practice. The consumer must show that the price charged by the second contractor was "reasonable" and that she had "mitigated her damages". Since estimates of home improvement jobs frequently vary by more than 2:1, this requirement leaves plenty of room for argument (e.g., "You did not obtain enough estimates." or "Your contract with us was implicitly for a minimal workmanlike job, whereas your second contract was with someone who caters to the 'carriage', or decorator trade; therefore, your second contract was for a substantially different job!"). Furthermore, this remedy, unlike restitution, is unlikely to be offered by the contractor as a quick settlement.

On the other hand, where the contractor has not started work and the consumer still wants him to do it, DCA has the theoretical advantage in being able to order the contractor to perform the job. Normally, however, it is imprudent to force someone to start a job on one's house after he has refused -- better to get someone else, even at a higher price.<sup>118</sup> Furthermore, the ethical argument that the consumer is entitled to something more than restitution in this situation is less than overwhelming.<sup>119</sup> At all events in the three sample cases in which I ascertained that the consumer obtained a remedy in these circumstances, the remedy was limited to return of

the deposit and (in one instance) an order to cancel the contract.<sup>120</sup>

Where the shoe is on the other foot, with the contractor pressing to do the job (or at least to collect his profit) while the consumer wants to cancel, the principal problem is locating a legal privilege enabling her to escape her apparent obligation. The common law gives the consumer no such privilege unless she can demonstrate an appropriate fault (fraud, anticipatory breach, etc.) on the part of the contractor. DCA regulations, on the other hand, do give the consumer the unrestricted right to cancel and retrieve her deposit within three business days after she signed the agreement.<sup>121</sup>

As it happened, in each of the five cases in the samples in which the consumer "wanted out" and the contractor "wanted in" and in which I could determine the outcome DCA was the chosen forum. The DCA regulation provided the sole legal basis for cancellation, and the case turned on the factual question, "Did the consumer cancel in time?"<sup>122</sup> While the consumer's right to the return of her deposit under the DCA regulation (though not her right to the cancellation of the contract) could in theory be asserted just as well in small claims court, she is likely to do better at DCA where the hearing officers are doubtless more familiar with this DCA-created right than most small claims arbitrators and judges.

Where the contractor has: completed part of the work but shows no sign of coming back to do the rest; completed the job but not entirely satisfactorily; or even completed the job in a satisfactory manner but it ceased to function properly in the course of the warranty period,<sup>123</sup> the search for the best possible remedy is likely to be more complicated. Important factors which must be

considered in this search include the present habitability of the consumer's home, the possibility of calculating under the contract a definite price for the work that was done, that was done right, or that remains in satisfactory condition, and the feelings of each party about the other party and the job.

In many cases in which more work needs to be done on a job, the contractor renders an extended remedial search unnecessary by doing the needed work promptly upon receiving from either forum the initial notice of the complaint.<sup>124</sup> In other cases the work so undertaken is not itself satisfactory, yet is sufficient to dissuade the consumer from pressing her complaint further.<sup>125</sup> Another possible result of the initial notice is that the contractor returns the consumer's money, though this may not have been what she wanted.<sup>126</sup> Where the initial notice does not inspire contractor action, DCA is capable of applying additional pressure short of actually holding a hearing, while small claims court has no such capability. The DCA pressure may take the form of a phone call from an employee of the Home Improvement Division, a visit by an inspector (to an unlicensed contractor), or a formal notice of hearing (to a licensee). Such pressure sometimes provided the impetus for the contractor to get the job done.<sup>127</sup>

Where the consumer's home, or an important part of it, is presently uninhabitable, the consumer needs to get the work done promptly. Neither DCA nor small claims court can move quickly enough with a mandatory remedy, forcing the contractor to do the necessary work or to pay the consumer enough to enable her to hire someone

else to do it, to satisfy her needs. If a voluntary response from the contractor to the pleas of the consumer or the initial communications from the court or DCA is not forthcoming, the consumer will have to lay out more of her own money to obtain the necessary services from another contractor. Her remedy then is to seek to recoup from the original contractor the excess of what she had to pay for the second contract over the amount she still owed (if any) on the first.

Where habitability is not a problem the consumer is still entitled to make another contract now and seek reimbursement later, but she has other options as well. These include seeking to compel the original contractor to do the necessary work, doing nothing until she obtains restitution for money paid the contractor for work not done (or not done right) or contract damages based on the anticipated cost of having another contractor do the work, or else dropping the whole matter.

Where the consumer has not paid the contractor more than the value of the work he has done (or done right), she usually has no need for further relief. If she has paid more than this value and can establish the amount of the excess, her remedy is similar to what it would have been had the contractor done no work and she was seeking the return of her deposit. Since restitution is an ordinary judicial remedy it would definitely be available in small claims court. Although I did not encounter any cases in which restitution was awarded by DCA where the contractor had done some work, the fact that it is available there in return-of-deposit situations makes its

availability in this analogous situation likely.

If (assuming that a price for the incomplete or unsatisfactory portion of the work can be found in the first contract) the consumer has had the work done by a second contractor who has charged her more than the amount specified in the original contract for the same work, or if the consumer has not yet had the work done but can produce expert testimony to how much more it would cost, she can recover the difference (her "contract damages") only in a court, including a small claims court. As in the analogous situation where no work had been done by the original contractor, her need to prove mitigation of damages may make pursuing this relief more trouble than it is worth.

Where separate prices for the incomplete or unsatisfactory work cannot be identified in the original contract, it is difficult to determine which party (if either) owes the other money. Even if the consumer believes that she has paid for more than she has received, she may have difficulty proving this in a court action or DCA proceeding seeking restitution. She can have someone else complete the job and then seek contract damages in small claims court if she is willing to lay out her own money and take the risk of not being (fully) reimbursed later. Full reimbursement might not be attained if the consumer cannot serve the contractor, convince the court that her interpretation of the first contractor's responsibility for the work was accurate, convince the court that the amount she spent on the second contract was "reasonable", or collect on her judgment. Otherwise, she can hold off on doing the

work, and hire an expert to testify in small claims court as to either the difference between the amount she paid and the value of the work that was done (restitutionary claim) or the difference between the amount she owed on the first contract and the cost of completing the work (contract damage claim).

In most cases in which more work needs to be done on a job, seeking an order that requires the contractor-defendant to pay the cost of having a second contractor do the work is unnecessarily indirect, expensive and/or risky. The simpler, cheaper, and safer remedy would usually be to seek an order requiring the original contractor to complete or repair the job, while holding off making arrangements for another contractor to do it. The three principal problems with this remedy are that, for reasons already discussed, it will not work if the house is uninhabitable, it is not available in every forum, and it may not appear attractive where the parties are strongly antagonistic.

The absence of a specific performance remedy in small claims court often leaves the consumer who does not live in New York City, who has dealt with an unlicensed contractor, or simply does not know about DCA, without the best possible remedy, or sometimes without any effective remedy at all.<sup>128</sup> Specific performance may, however, be the result of a settlement worked out at small claims court. Three of the six settlements in my 53-case small claims court sample were of this type.<sup>129</sup>

Specific performance is, of course, available at DCA. It was the usual relief granted in the DCA cases which I studied, the typical settlement agreed to by the parties at DCA hearings, and was

usually carried out<sup>130</sup> (sometimes with,<sup>131</sup> and sometimes without,<sup>132</sup> further prodding by the consumer and/or DCA). Except in cases in which the contractor had reason to doubt the consumer's readiness to pay once the work was completed, the contractors I observed at the hearings appeared to regard such orders as fair.<sup>133</sup>

A contractor is better off with this remedy than with contract damages, since the latter requires that he pay another contractor's retail price. An order to complete or to repair can be satisfied for the cost to the trade of labor and materials, or perhaps even less, as where his personal efforts are involved and he is less than fully employed. The contractor also has the advantage over another contractor of already knowing the job requirements, thus eliminating for him a time-consuming step.

DCA handles the problem of a contractor's worries over whether the now-alienated consumer will pay in a number of ways. One such method, described below, involves reducing the level of antagonism between the parties. If, however, the hearing officer shares the contractor's concern that the consumer may still not pay, he may make the order that requires the contractor to perform conditional upon the consumer placing the remainder of the price in an escrow account,<sup>134</sup> or upon the consumer simply paying the contractor in advance.<sup>135</sup> A requirement that DCA's special inspector certify the completion may also figure into the resolution.<sup>136</sup> Finally, DCA may deny relief entirely where it is convinced of the bad faith of the consumer.<sup>137</sup>

The antagonism between the parties is, nonetheless, the principal deterrent to seeking an order for specific performance, and a

major impediment to obtaining the benefit of such an order where one is issued. The problem goes beyond the contractor's worries about getting paid when he finishes. One or both parties may be irritated, frustrated, disappointed, perhaps even frightened,<sup>138</sup> as a result of the other party's performance to date. Typical consumer complaints include missed appointments, unanswered phone calls, and sloppy work. Typical contractor complaints include belated changes of mind, unreasonable interpretations of the contract specifications, as well as tardy payments. At the beginning of the hearings I attended, consumers' attitudes towards their contractors ranged from ever-hopeful, through skeptical, to adamant. Contractors' attitudes ranged from sheepish or eagerly cooperative, through wary, to incredulous.

The consumer who is awarded specific performance but who is not reassured about the intentions of the contractor is unlikely to feel as though she is getting much relief. Similarly, settlements are unlikely where mutual suspicion is high,<sup>139</sup> and an order to the contractor to resume a relationship with someone whom he distrusts is likely to be viewed as foolish or unfair, tempting him to ignore, evade, or subvert it.

The remedial problems posed by continued antagonism between the parties are greater where specific relief is ordered than where legal damages are involved. The former requires that the parties once more deal directly with each other, usually face-to-face, whereas the latter can be satisfied with a check in the mail (or if not, then through the intervention of a third party, like a sheriff or a



marshall). It is therefore important that DCA hearing officers do their best to reduce the antagonism between the parties.

While this seems a tall order where the hearing officer only sees the parties for about one hour, a surprising amount of effective conciliation actually went on at the hearings I witnessed. One hearing officer was a particularly deft mediator and conciliator.<sup>140</sup> In at least five instances I observed parties who had entered his hearing room tense and glowering at each other leave looking greatly relieved and discussing amiably with each other the arrangements for doing the necessary work. He accomplished this result by patiently eliciting points of agreement, by stating and restating any inference of good faith by either party which could be drawn from the evidence at the hearing, and by refusing to let either party dwell on the slights and insults which he or she suffered in the course of their relationship.

The contribution of appropriate procedures toward making a given "paper" remedy effective is not limited to making the parties feel better about each other. Many disputes involve good faith disagreements about "facts", such as whether the quality of the materials and the contractor's work was up to the industry standard, the cause of a leak or a draft, or the extent of the responsibility for subsequent problems which the contractor assumed in the contract. Where official determinations are based on accurate factual perceptions expertly evaluated, they are likely to be viewed as fair and accurate by the parties, form the basis of settlements, and even help solve the underlying problem (as well as help resolve the disputes).

To the extent that the "fact" in question depends on legal knowledge and analysis (as it does where all questions of what has occurred on the job site have been answered and only the issue of the contractor's legal responsibility remains), the decision-makers in both DCA and small claims court have direct access to the contract document. Their expertise in evaluating it is generally equal and adequate. Where the issue concerns the extent or sufficiency of the work that was done or the cause of any subsequent problems, however, the nature and quality of the fact-finding process is very different in the two forums. Small claims court judges and arbitrators must rely on the testimony of the two parties, and that of lay and occasional expert witnesses brought by the consumer, and of employees of the contractor. Even if the lay witnesses testify in perfectly good faith, they may not be able to offer more than a guess as to the industry standard for materials or workmanship, or as to the cause of any problems occurring after the job was completed. The contractor, his employees, and any experts whom the parties might produce may have accurate knowledge, but it is frequently difficult for the fact-finder to assess that accuracy. Usually it is impossible to know whether they are telling the truth.

DCA, on the other hand, has the benefit of its special inspector, an employee experienced and knowledgeable in construction matters, who can visit the job site and report what he has seen, his judgment as to whether the work conforms to contract specifications, and his judgments as to the cause of any subsequent problems.<sup>141</sup>

In a number of cases in my samples the critical factor in the

success of DCA's mediation efforts<sup>142</sup> and its mandatory remedial processes appeared to be the availability of the special inspector.<sup>143</sup> At those hearings in which the inspector testified or his reports were accepted into evidence without objection, the special inspector's judgments as to causation and the conformance of the work to the contract specifications, though not always undisputed,<sup>144</sup> were always the best evidence available on these issues.<sup>145</sup> In the one case in my samples in which the special inspector's judgment was not accepted by the hearing officer, the disagreement was not over these issues but rather over the "legal" question of the appropriateness of a remedy in a given factual situation.<sup>146</sup>

In practice, the enforcement mechanisms available to each agency cast their shadows forward, accounting for at least some of the "voluntary" settlements and compliance with orders which were described earlier in this section. Sometimes, however, the contractor holds out until some sanction is actually imposed. Thus, in some of the cases in the samples, DCA's ability to fine licensees, and to suspend, revoke, and refuse to reinstate licenses, seems the difference between the consumer's obtaining a remedy and her doing without.<sup>147</sup>

In other cases DCA's saber-rattling apparently did no good.<sup>148</sup> The truly unscrupulous contractor often has the upper hand over DCA.<sup>149</sup> In still other cases the contractors appear to calculate carefully how little they can do and still avoid sanctions.<sup>150</sup> Finally, a contractor may bring an Article 78 proceeding to obtain judicial review of an adverse order, which may result in each party ending up as badly or worse off than if s/he had settled on the other party's

terms at the beginning.<sup>151</sup>

The attempts to apply sanctions to enforce small claims court judgments also produced mixed results. Sheriffs' executions were responsible for recovering in two of the 53 cases in the small claims court sample. Attempts to collect through this process were, however, definitely unsuccessful in four more.<sup>152</sup> Also, DCA will attempt, under its General Regulation 7,<sup>153</sup> to enforce unpaid small claims court judgments issued against its licensees.<sup>154</sup>

The most efficacious remedy against obdurate contractors is provided by neither DCA nor small claims court. Rather, it is self-help, accomplished by rigidly refusing to let the contractor ever have significantly more in payments than the value of the work which he has already completed.<sup>155</sup>

One situation where even this sort of care will not necessarily protect the consumer is one in which the contractor has, by action or inaction, caused damage to property not the subject of the contract. "Consequential damages", like "contract damages", are not awarded by DCA.<sup>156</sup> The consumer must absorb them, persuade the contractor or his liability carrier (if any) to pay them, or go to court. Relief can, in principle, be had at small claims court up to its \$1000 limit.<sup>157</sup>

One class of consumer for whom there is rarely an adequate remedy in any forum is the consumer who is frightened of the contractor. Such people occasionally venture an initial complaint, but their fear, whether or not justified, makes it difficult for them to follow through if they do not quickly obtain satisfaction.<sup>158</sup>

E. Recommended Changes in DCA and Small Claims Court Powers and Procedures

Many of the consumers in my samples had only the vaguest notions of what the relief mechanism they were invoking was equipped to do. This theme came through clearly in my reading of small claims court "Request for Information" forms and of the consumers' complaint letters to DCA. The accuracy of their notions about the alternative avenues of relief which they have not invoked is surely in general even less.<sup>159</sup> While the level of public knowledge about relief mechanisms could be significantly increased by a massive public education campaign, the same could be said for the level of public knowledge about other, more important, matters as to which the citizenry should be well informed, but is not. Since most consumers cannot be expected to become experts on remedial processes, the more promising approach would be to increase the flexibility and efficacy of each major consumer relief mechanism.

For the largest category of home improvement complaints, the optimal remedy would normally be a sequenced combination of DCA's characteristic "Go back and finish (or fix) it!" followed by the small claims court's "Pay the consumer the cost of having someone finish (or fix) it!". The first part of the sequence alone would usually be adequate.<sup>160</sup> The latter part of the remedy would need to be invoked only where the contractor had proven himself either incompetent or unwilling to do the required work.<sup>161</sup> The proof of incompetence or unwillingness might be adduced at the first hearing either by the position which the contractor takes at the hearing

("I absolutely can't do it", or "I absolutely won't do it"), or by a very strong showing based on his previous behavior. In my judgment, this remedy is so much more preferable to damages, and the possibilities for conciliation at a properly run hearing are so great, that a tribunal should be very sure that specific performance will not work before ordering a monetary remedy at the initial hearing. However any substantial evidence of incompetence or unwillingness following an initial order of specific performance should, at the consumer's option, result in a prompt judgment for damages. It is unfair to a consumer who has already been wronged by a contractor's initial breach to make her endure more of the same conduct once it becomes clear that the tribunal's order has not provided sufficient impetus for change.

Although both small claims court and DCA have on occasion jerryrigged this sequenced remedy,<sup>162</sup> neither tribunal has the clear power to order both parts of it. Granting both forums the requisite authority would not require providing either one with additional enforcement mechanisms. The initial order in small claims court could provide that:

Defendant shall take the following steps within \_\_\_ days:

Claimant may any time thereafter notify the Clerk of this Court if the specified work has not been properly done. The Clerk shall schedule the case for a rehearing at the earliest date convenient to the claimant, and shall notify both parties. If at the rehearing the claimant proves that the specified work was not properly done, judgment shall be entered for the claimant in the sum of \$ \_\_\_\_\_ /the best estimate of the cost of procuring the specified work and materials, plus \$200 penalty, plus normal court costs, should be entered here as part of the initial order7.



## VI. Cost/Benefit Analyses of the Two Forums

The purpose of DCA's home improvement contractor consumer redress hearing procedure is to provide an instrument for consumers with legitimate grievances against contractors to obtain an appropriate remedy from them. One function of small claims court -- the function which I have studied here -- is to do the same thing. The extent to which these forums actually provide such remedies for these consumers was the subject of the two preceding chapters. This chapter will consider the costs to the consumers, the contractors and the taxpaying public of obtaining relief in these forums. I will also attempt to compare the costs and benefits of each forum in an effort to determine whether they are worth maintaining and emulating.

### A. Costs v. Benefits to Individual Consumers Using Each Forum

#### (1) Small Claims Court

The price of suing a contractor in small claims court is small: a \$2.00 filing fee, plus \$1.40 for a certified mail notice to the defendant, which the defendant will be ordered to reimburse if the claimant prevails on the merits. However, the total cost to the consumer of obtaining this service (her "procedural cost") is of course higher than the price which she must pay for it. A physical appearance at the clerk's office (by the claimant or a friend) is necessary in order to file the claim: this will typically involve a dollar's worth of public transportation. Since this trip can ordinarily be accomplished during lunch hour, or otherwise fitted into one's schedule (if necessary, during the one evening each



week that the clerk's office is open), it need not result in lost wages. If the matter is not settled before the hearing date, a courtroom appearance (usually with at least one family member, friend or witness in tow) becomes necessary. The consumer will not normally lose wages, since the court meets in the evening, but at a minimum she will have to spend two or three more dollars in transportation. A settlement or judgment at this point, if carried out without further ado, will still have been obtained at an out-of-pocket cost under \$10.

In fact, out of the 50 small claims court cases in my sample in which the claimant did not voluntarily remove the case from small claims court, the consumer never appeared for a court session in 22, appeared only once in another 20, while in six she appeared twice and in two more thrice. Perhaps more significantly, of the eleven cases pursued through small claims court in which the consumer definitely received substantial satisfaction, four involved out-of-court settlements, six required one court appearance, and only one required two such appearances. Thus, the average number of court appearances, both for all claimants and for the subclass of successful ones, is somewhat less than one.

In six of the cases a sheriff's execution was issued, which cost the claimant \$10. In two of these the executions were definitely successful, with the result that the claimant received from the contractor -- in addition to the amount awarded on her claim -- \$10 for the execution plus the \$3.40 for filing fee and notice. In two more of these cases the executions were unsuccessful, leaving

the plaintiff to bear the \$13.40 in addition to her losses on the underlying claim, and any incidental expenses in attempting to collect. I do not know the claimant's success in the two remaining cases. Other than the first two cases mentioned, there were only two cases in which she realized on a judgment awarded her in a contested arbitration and therefore recovered her \$3.40. The remaining eight cases in which the consumer definitely received substantial redress all resulted from in-court or out-of-court settlements, none of which included an allowance for court costs.

One case in which I do not know whether the consumer eventually recovered on her inquest judgment, she had to hire a professional process server. He served process on the defendants twice, the first time mistakenly addressing it to their corporate name, but charging \$20 per service, nonetheless. The \$40 was added to the costs by the arbitrator, and will be recovered by the consumer if the sheriff is successful in his execution. In five other cases the claimant mentioned to me that she or he had attempted to serve process after the clerk's office's mailed notice was returned unclaimed. I do not know whether any of these cases involved the use of a paid process server (in New York any adult other than the claimant is permitted to attempt service), but in any case none of these efforts was successful, and hence any such cost would not be recovered.

I do not know whether any claimant reimbursed her witness for any expenses beyond transportation. I assume the claimants generally paid for the subway tokens, and may frequently have felt obliged to pay for dinner as well. The most valuable witnesses are often

licensed home improvement contractors. Unless such a person has done the repair work and given the consumer a paid bill, or is willing to come into court to testify that the defendant-contractor botched the job to the claimant's injury of X dollars, the consumer may not be permitted to recover in a case in which the competence of the defendant or the cost of repairing inadequate work is at issue.<sup>163</sup> There is normally no reason why such an "expert" would testify on a consumer's behalf without compensation, though the compensation might sometimes come in the form of an agreement by the consumer to hire him to do the work once the defendant-contractor loses and pays. Yet, the issue must sometimes resolve into the dilemma of pay-the-witness-or-lose-the-case.

None of the consumers were represented by lawyers. In the two cases originally filed in small claims court in which the claimants later retained lawyers, the lawyers filed claims in day court for over \$1000, thus removing the cases from small court jurisdiction. I doubt any consumer in the 50 cases which remained in small claims court (after one other case was voluntarily dropped) ever paid a lawyer's fee with respect to the case.

I have not attempted to monetize the value of the consumer's own time and inconvenience in coming to court to file the claim and then perhaps again for the scheduled hearing. Some consumers doubtless relish this experience: only two out of 86 people questioned in a Consumer Reports survey of small claims court consumer-plaintiffs responded that they would not use the court again, and several seemed delighted at discovering their competence to vindicate their own rights.<sup>164</sup> Some others, especially among those for whom it

proved futile, may have ended up resenting the entire process. Most of the people I spoke with who did not succeed in collecting, blamed this on the inadequacy of their evidence or on the shiftiness of the defendant-contractor in avoiding service or execution. Very few spoke bitterly of the court or its processes, or mentioned wasting their time. While an argument could therefore be made that the time consumers spent at the court should be treated more as a form of civic education (a benefit) than as part of the investment they were required to make in their attempt to obtain redress (and hence by itself a detriment), most people would probably see it as a net "aggravation". Nonetheless, the problems of monetizing the benefits, the detriments, or the resulting "net detriment", in a convincing manner are probably not solvable.

The total procedural cost to the typical consumer, to the extent that this cost can be monetized, ranges from \$4.40 where the case never goes to hearing (for filing and notice fees and one round-trip on the subway) to perhaps \$20 where the case goes to hearing and an unsatisfied execution issues (for filing and notice fees, three round-trips, a modest supper for the witness or friend, and the fee for the sheriff). A rough estimate of the average cost would be based on the 22 cases not voluntarily removed or discontinued in which the consumer never appeared for a hearing (at \$4.40 per case), four cases in which the fees were definitely recouped, but only after the consumer (perhaps accompanied by a friend or witness) had appeared for a hearing (at \$6.00 per case, \$1.00 for transportation to file the claim and \$5.00 to cover estimated average costs of attending the hearing), the 16 other cases in which the consumer

appeared at one hearing ( $\$4.40 + \$5.00 = \$9.40$  per case), the six cases which required two appearances (at  $\$14.40$  per case), and the two cases requiring three appearances (at  $\$19.40$  per case), plus  $\$40$  in unrecouped sheriff's costs and  $\$40$  in so-far-unrecouped process-server costs for the entire sample. The total,  $\$476.40$ , divided by the 50 cases, yields an average cost to the consumer of  $\$9.35$  per case. By way of contrast, in the 11 cases in my sample in which the consumer definitely received either monetary redress or redress which I can easily monetize, the average recovery was  $\$401$  and the median recovery  $\$270$ . Even considering the fact that about half of all claimants probably receive nothing from this process, the monetary cost of going through it was a good investment. Furthermore, when compared to the costs which taxpayers have to bear to support the small claims courts (see section C(1), below), the share of the costs allocated to the claimants does not seem unreasonable.

(2) DCA

The price of bringing a complaint against a home improvement contractor before the DCA is zero: this is true regardless of whether the complaint results in nothing more than an "exhaustion" letter (at one extreme), or in a special inspection, a contested hearing, a remedial order, and an article 78 proceeding going up to the Appellate Division of the Supreme Court (at the other). The minimum cost of bringing such a complaint is not much larger, since a single letter to DCA suffices to get the complaint docketed and sent to the Home Improvement Division. If this letter contains a copy of the contract, an L or NL letter will be sent forthwith to

the contractor, who may in turn provide the necessary relief. Usually, if a copy of the contract is enclosed, it is only because the consumer learned of this requirement upon calling the DCA consumer complaint line. If it is not, DCA will send the consumer a form letter requesting the copy which necessitates that the consumer send a follow-up letter enclosing it. In any event, the cost of postage on the initial letter, plus a phone call or postage on a follow-up letter, plus xeroxing both sides of the contract, is no more than \$0.50.

Thirty-six of the 92 cases in the complaints sample actually began not with a letter to DCA but with a personal visit to either the main office in lower Manhattan or one of four field offices in other boroughs. The cost of filing these complaints is probably two subway tokens (\$1.00) but some consumers may live within walking distance of an office. Since a consumer filing a complaint in person would probably take her original contract with her, the cost of xeroxing this (which DCA then picks up) and of mailing it in is eliminated. Also included in this sample were four cases referred by the New York State Attorney General's office and three by the Nassau County Consumer Protection Division. These were handled by DCA the same way as complaints mailed directly to DCA. Most of them probably began as letters to one or the other of these agencies, but some may also be "walk-ins". Either way, the cost to the consumer of filing these complaints is probably not much more than the cost of approaching DCA directly.

An actual DCA hearing could be more expensive for a consumer with a daytime job than a small claims court hearing, since DCA

hearings are held only during the day, only on week-days, and (what with waiting for the case to be called) take up a full morning or afternoon. But this is not as serious a problem as might appear. Out of 92 cases in my complaints sample, in only twelve did the consumer ever attend a hearing, and in only three of these cases did the consumer have to attend two hearings. Of the 33 cases in which the consumer definitely received substantial satisfaction, in five of them the consumer attended a hearing: these five include one case in which the consumer attended two hearings. Thus, the average number of hearings per complaint filed is .163; the average number of hearings per complaint successfully resolved is .18. But my impression from the 43 hearings I sat in on in compiling my hearings sample is that in only about half the hearings is the consumer -- or someone in his or her entourage -- employed on a full-time basis. If we assume that those who are missing a half day's work lose a net of \$40 in docked wages, the total of wages foregone in the complaints sample is \$300, the average wage lost per complaint filed is \$3.26, and the average wage lost per complaint successfully resolved is \$3.64. However, the prospect of losing a half day's wages keeps some consumers from pursuing their complaints through a hearing: one consumer in my complaints sample who did not appear at a scheduled hearing gave me this as her reason.

As happened in small claims court, consumers who appeared at DCA hearings frequently brought along spouses, relatives, and/or neighbors. I believe it is quite unlikely that in any of these cases more than one person on the consumer's side was foregoing income to attend. The company served primarily as moral support,

occasionally as witnesses to what happened, somewhat more often as spokesmen or translators. Indeed, three times in my hearings sample the consumers themselves did not even appear: once the daughter came instead, once the son, and once a neighbor who had been involved in negotiating the original contract. DCA permits this practice which further reduces the inconvenience and likelihood of lost wages attendant upon the hearings. In only one case in this sample did the consumer bring along a paid witness (a plumber). Unlike at small claims court, the absence of expert witnesses at DCA is no impediment to recovery by the consumers, since a special inspection is ordered-- and paid for at the City's expense -- wherever the quality of what was done or the extent of necessary repairs is at issue: that is, in those cases where small claims court might require the claimant to furnish an expert witness.

Attorneys, like expert witnesses, are unnecessary at the hearings, and end up acting (and doubtless feeling) like fifth wheels. In only three of the 41 cases in the hearings sample were the consumers represented by lawyers or paralegals. Of these, only one consumer (a well-to-do Manhattan matron) actually paid for her attorney. The second consumer (a municipal employee) was represented by an attorney provided by his union under a *judicare* (legal insurance) program. The third consumer (a Spanish-speaking woman) appeared with a paralegal, doubtless supplied by a legal services office, whose function at the hearing was principally to translate. While the attorney in the first case expressed outrage that the hearing officer ordered a special inspection rather than disciplining the



contractor or ordering relief, and the attorney in the second case did her best to examine and cross-examine the witnesses and to make careful opening and closing arguments (and expressed outrage that the hearing officer was not keeping the proceeding "orderly"), their exercise of legal talent in no way affected the results of the hearings.

To calculate the average out-of-pocket cost to a consumer pursuing a complaint against a home improvement contractor before DCA, one adds the \$36 expenses of the 36 consumers in the complaints sample who filed their complaints by walking in to a DCA office, the \$28 spent by the 56 consumers who filed their complaints by mail, \$30 transportation costs (for the consumer and one accompanying person) for those who attended hearings, \$300 in lost wages due to the hearings, \$40 for the plumber whom one consumer brought with her, and \$100 for the attorney whom another consumer brought along. The total, \$534 divided by the 92 complaints, yields an average cost per complaint of \$5.80. This is about 60% of the \$9.53 average cost of pursuing a small claims court case against a similar defendant.

While the benefits are rarely directly in cash, and therefore are more difficult to monetize than those from going to small claims court, both the statistical (chapter IV) and qualitative (chapter V) comparisons of the two forums indicate that consumers are at least as satisfied by the results in DCA as they are with the results from small claims court. This conclusion is reinforced when the non-monetizable costs of attending hearings are added. The average number of hearings per case at DCA ( $15/92 = .163$ ) is less than one-

third of that at small claims court ( $30/50 = .6$ ). Since there is no reason to believe that sitting in the waiting room at DCA is more annoying than sitting in the courtroom or waiting room at small claims court, that participating in the hearings at DCA is any more upsetting, or that the DCA process is less "educational", the average non-monetary costs per consumer associated with such hearings are therefore less at DCA.

B. Costs to Contractors of Responding in Each Forum

(1) Small Claims Court

While the defendant is supposed to pay the claimant's court costs if the claimant prevails (filing fee, notification postage, and sheriff's fee, if any), this only happened four times in the 28 cases in which I could be sure of the final result. Of these, two were inquests followed by sheriff's executions, resulting in costs of \$13.40; the other two were arbitrators' judgments voluntarily paid by defendants, thus limiting the costs to \$3.40. The average court costs paid by defendants in the 28 cases was therefore \$1.20, and any defendant could most probably have cut his procedural cost to zero by settling before judgment (settlements never -- in my experience -- included court costs).

The one required court visit by the claimant, to file the claim, has no analogue for the defendant. Furthermore, while defendants ought in theory attend as many hearings as the claimants, in fact they do not: out of the 52 cases in which the record was adequate to determine whether the defendant appeared, he appeared in only 16 (31%), compared with appearances in 28 (54%) by the consumer. In two of these cases the defendant appeared twice, and in

one he may have appeared three times. Still, that is only 20 appearances in all for 52 cases, for an average of .39 appearances per case. Cases in which they did appear in court were, however, more expensive on the average for defendants than for claimants.

While none of the claimants who remained in small claims court were represented by lawyers, in five of the cases appearances by an attorney for the defendant was noted on the file card. Strikingly, four of these cases resulted in settlements (out of the seven settlements in the entire sample), while the fifth resulted in an arbitrator's judgment for the consumer, but only for one quarter of the amount she requested. Since these cases all involved courtroom appearances (however brief), it is doubtful that the defendants got by with less than a \$100 lawyer's bill. At this rate, this comes to \$31.25 on the average for the sixteen cases in which defendant appeared in court, though only \$10 per case when spread over the 50 cases in the entire sample (excluding those voluntarily removed or discontinued by the consumer). If the defendant's incidental expenses (fares, possible compensation to anyone he might bring along to testify) averaged \$15 per appearance (probably high), this could come to \$18.75 per defendant who appeared (since some came to court more than once), but only \$6.00 over the 50 cases. Defendants' time might also be reasonably monetizable, since appearing in court is one of the costs of doing business. At \$15/hour over an average of two hours per court visit (including their transportation time), defendants could reasonably view their 20 visits as costing themselves a total of \$600, or \$37.50 per defendant appearing in court, though only \$12.00 when spread over the 50 cases.

In summary, if a defendant appears (\$30) along with an employee-witness (say, another \$30) and an attorney (\$100), and the case goes to judgment for the consumer (shifting the \$3.40 court costs to the contractor), his procedural costs might be \$163.40. This figure includes no allowance for a second court visit, since a second appearance was unnecessary in all the cases where defendant had retained an attorney. The average defendant who appeared would spend \$31.25 for his (fractional) attorney, \$18.75 for incidental expenses, and \$1.20 for court costs, and could charge up \$37.50 for his own time, for a total of \$88.70. Neither this average figure, nor the maximum figure of \$163.40, is so large compared to the average (\$401) or the median (\$270) recovery,<sup>166</sup> or to the average (\$2091) or the median (\$1536) contract size,<sup>167</sup> as to be a serious obstacle to a contractor's defense. However, those who settled before the hearing and those who evaded either notice or execution did not have to incur any costs with respect to the small claims court proceeding. The average defendant, including those who settled before hearing and those who successfully evaded either notice or execution, paid \$10 attorney's fees, \$6.00 for incidental expenses, \$1.20 for court costs, and could reasonably have charged himself \$12.00 for his own time, for a total of \$29.20.

(2) DCA

Home improvement contractors pay the City \$50/year for their license. In section C(2), below, the extent to which this fee should be attributed to the cost of operating DCA's dispute resolution procedures (versus its licensing procedures) will be considered.

Whether a larger fee covering a greater proportion of the cost of DCA's home improvement contractor dispute resolution procedures would be justified will also be discussed. Since DCA's consumer redress procedures could be replicated in a jurisdiction in which the license fees recoup none of the costs of these procedures, the present discussion will focus on the marginal costs to the contractor of having to respond to a DCA complaint.

The minimum costs to the contractor occur if he can end the case with a letter or phone call to the Home Improvement Division. This will usually not do the trick unless he has also done something to assuage the consumer, such as doing the work she requested or explaining the nature of the misunderstanding (if any). Assuming the consumer is entitled under a fair interpretation of the underlying contract to the work she requested, if the contractor does that work under DCA prodding this will not be treated as a procedural cost. This is a cost the contractor should incur regardless of the procedure. The minimum cost is therefore two phone calls or letters (one to DCA, the other to the consumer) --under \$1.00. Even if the contractor does not react until he receives a notice of hearing, his costs need not be any greater so long as he settles the controversy before the actual hearing. Out of the 44 licensees in the sample who were still in business at the time the complaint was filed, 29 (66%) did not, so far as I can tell, incur greater procedural costs than that.

Actually, 17 of the 25 non-licensees in the sample (excluding those who were out of business) did not even bother responding to DCA's NL letter. For them the costs of responding to the consumer's

complaint came close to zero, with the exception of the solitary contractor who ended up paying a fine of \$25 for doing business without a license (though still doing nothing with respect to the consumer's complaint). Based on this sample, the average cost of doing business without a license is slightly more than \$1 per complaint.

Procedural costs were somewhat greater for licensees where the Home Improvement Division arranged a special inspection, the contractor attended along with the special inspector, and the case was settled on the spot. The cost involved here is merely that of meeting Inspector Sendyka at the consumer's home, involving perhaps an hour-and-a-half, or \$22.50 of the contractor's time. There was only one such case in the complaints sample.

Substantial procedural costs were incurred in only 14 of the cases in the sample (32% of the cases in which licensees were still in business) in which the licensee appeared for a hearing. In four of these cases the licensee actually had to appear for two hearings, a total of 18 hearings for the group. While the hearings rarely took more than an hour, and often much less, there was frequently an hour or more wait before the case was called. When this is combined with (say) a half-hour subway ride either way to and from the hearing, they probably consume an average of two-and-a-half hours of the contractor's working day, which at \$15/hour comes to \$37.50. Add to this the \$1 in subway fares.

Of course, contractors do not always come to these hearings unaccompanied. I took careful notes of who arrived for each side

in compiling my hearings sample. Out of the 41 hearings in which the contractor (or someone on his behalf) arrived, in five the company's principal representative brought a partner or employee with him, in a sixth case he brought a partner, an employee, and a lawyer, and in three he brought his wife (apparently just for moral support). Assuming that the partners' and employees' time was also worth \$37.50,<sup>168</sup> that the lawyer billed \$100, and that the opportunity cost of the wives' time was not directly monetizable, the total cost of the entourage comes to \$362.50 + \$10 subway fares = \$372.50. In one other case, an attorney appeared as the only representative of the contractor to contest DCA jurisdiction over the case. Averaged out over the 41 hearings, allowing \$26 for the principal representative in each case (except \$100 for the attorney in the last mentioned case), this comes to \$36.89 per hearing.

The average cost per contractor who appeared at a hearing was actually \$47.43 rather than \$36.89, since out of 14 cases in the complaints sample in which the contractor came to at least one hearing, in four he came to two hearings at an average cost of \$36.89 each. Furthermore, in six of these cases (the four in which a second hearing was necessary, plus two more that were settled at the subsequent special inspection) a special inspection was ordered at the initial hearing, adding perhaps \$22.50 to each contractor's costs, and raising the average cost to the contractor who appears at a hearing to \$57.50.

This latter figure is still substantially lower than the \$88.70 cost to the average defendant who appeared in small claims court.

The difference is fully accounted for by the fact that in five of the sixteen cases in which the contractor appeared in small claims court he did so accompanied by his lawyer, whereas in only two of the 41 cases in the hearings sample did a lawyer for the contractor appear. The most expensive case for the contractor in the hearings sample was one in which the lawyer, two partners, and an employee-witness appeared at a presumed cost of \$215.50. This was an example of naivete on the part of the partners and their lawyer. They came prepared to win a major testimonial battle when the form and language of the written contract spoke so tellingly in their favor that the hearing officer bothered to hear their oral testimony only to save their attorney from embarrassment.

I doubt that attorneys were any more necessary in the five small claims court cases in which defendants retained them (except the two cases in which plaintiffs' retained attorneys who removed the cases to day court). It appears that a substantial proportion of people sued in small claims court feel uncomfortable defending themselves without the aid of an attorney, while the great majority of licensed contractors feel that they can navigate a DCA hearing without professional assistance.

On the other hand, the rough analogue of the removal to day court in small claims court practice is the appeal (in the form of an Article 78 proceeding) to the state Supreme Court of a DCA decision. No such appeals occurred in any of the 92 cases in the complaints sample. Indeed, the only two cases in any of my samples in which Article 78 proceedings were definitely brought, D11 and D6/20,



involved highly unusual DCA orders requiring the contractors to pay their respective consumers over \$1000 each for breaches of warranty. While I have no way to estimate accurately the attorneys' fees in these cases, I doubt they were under \$1,000 each. However, since no Article 78 proceedings were involved in the complaints sample, and since the two that were brought were very unusual and were apparently triggered only by DCA orders for monetary compensation greater than the \$1000 small claims court limit, I will not make any allowance for bringing such an appeal in calculating the contractors' costs of responding in the DCA forum. This parallels the exclusion of the two cases transferred to day court from the calculation of costs in small claims court proceedings.

To summarize, adding the \$1/complaint average cost of responding (or not responding) to DCA's initial L or NL letter (multiplied by 92 complaints), plus the \$22.50 cost of attending a special inspection in one case, to the \$799.02 total hearing costs for the fourteen contractors who attended such a hearing, divided by the 92 complaints in the sample, yields an average procedural cost to the contractor of \$9.93 -- substantially below the \$29.50 of the average contractor-defendant in small claims court. This includes, as did the corresponding small claims court figure, cases involving both licensees and non-licensees, as well as cases resolved at all stages of the proceedings, independently of the proceedings, or not at all.

C. Costs to the Taxpayer of Maintaining Each Forum

(1) Small Claims Court

The cost data on which the calculations in this section are based was obtained from interviews with Phoenix Ingraham, Chief Clerk of the Civil Court of the City of New York, and with people in his office. The data are for June, 1979, as are the comparable data for DCA which will be considered in the next section. The data are for the city as a whole. The entire costs of the Civil Court, with the exception of the small contribution from filing fees, were formerly picked up by the City. This responsibility is in the process of being transferred to the State. The details of this transition will not be considered.

There are presently 44 staff people working in the Manhattan, Harlem, Bronx, Brooklyn, and Queens small claims courts, excluding judges, their law assistants, and court reporters. These staff people (principally clerks and uniformed court officers) earn a total of \$912,014, including fringe benefits, per year. The Staten Island small claims court, which holds hearings only every other week and handled only 3,202 cases out of the city-wide total of 62,463 in 1978, makes use of the regular Civil Court staff in that borough. Assuming it takes the same manpower to handle a given small claims caseload in Staten Island as it does in the other boroughs, the equivalent of 2.38 people would have to be assigned to this task,<sup>169</sup> adding \$49,278 to the figure previously arrived at, for a total of \$961,272.

The Manhattan, Brooklyn, and Queens courts sit four nights per

week, the Bronx court three nights, the Harlem court one night, and the Staten Island court an equivalent of one-half night for a total of  $16\frac{1}{2}$  nights per week. A second judge sits two nights each week in the Manhattan, Brooklyn, and Queens courts, raising the total of judicial sittings to  $22\frac{1}{2}$  nights per week. While I could not get precise information on judicial workloads, my understanding is that four nights per week would be considered a full load. This means that when allowance is made for extra staff to provide coverage during vacations (since the courts are open throughout the year), the equivalent of six full-time judges are needed to man the small claims courts. Each judge earns about \$46,000 and has a law assistant who earns \$17,500. Adding 28% fringe benefits, these 12 extra people add \$487,680. Furthermore, five court reporters, working five nights per week, are needed to cover the judicial hearings: at approximately \$25,000 each, including fringes (exact salaries were not available), this adds another \$125,000 to the personnel costs at the six courts, for a total of \$1,573,972.

To this must be added a share of the expenses of the central administrative office of the Civil Court. To determine the appropriate share of the time of the central office staff to be allocated to administering the small claims courts, it will be assumed that this is the same as the proportion of the total number of Civil Court personnel (excluding the central office staff) which is devoted to the small claims courts. The total number of Civil Court personnel in June 1979 was 746; less 46 central office staff, this comes to 700 people. Of these, an equivalent of 63.38 did small claims work, for a proportion of 9.054%. Applied to the central

office staff, this suggests that the equivalent of 4.16 of them worked exclusively on small claims court matters. At an average salary, including fringes, of \$20,728 (derived from the average salary of the 44 staff people actually assigned to the small claims courts), this comes to \$86,166. The same proportion of the Chief Judge's salary (approximately \$64,000, including fringes), adds \$5,784 to this amount, for a total central office cost of \$91,950. Added to the personnel costs at the six courts, this produces a total personnel cost for the New York City small claims courts of \$1,665,922.

The entire non-personnel costs for the Civil Court, excluding only rent, for the 1978-79 fiscal year was \$640,000. On the assumption that the same proportion of this (9.054%) should be assigned to small claims court functions, this cost (for supplies, unreimbursed postage, telephone calls, etc.) amounts to \$57,946. At the present time New York City owns most or all of the courthouses, and pays for their maintenance (plus any rents) on a budget line separate from the Civil Court's. The Civil Court administrative staff had no estimate of the rental expense which should be imputed to it. However, it is possible to estimate an imputed rental in the following manner. DCA pays \$264,000 per year for less ample space across the street from Manhattan's Civil Courthouse, where the central administration of the Court is also located. DCA houses approximately 300 employees in this space, for an annual rental of \$880 per employee. On the assumption that the lower density of small claims courts would be balanced out by the lower rental costs in the area

surrounding the courthouses in the other boroughs, this would be an appropriate per employee rental charge for Civil Court space. With the equivalent of 67.54 employees devoted to small claims court functions, an appropriate imputed rental charge would then be \$59,435.

When the non-personnel costs, including imputed rental charges, are added to the personnel costs for the small claims courts, the total comes to \$1,783,302. There were 62,463 claims filed in New York City small claims courts in 1978. Assuming approximately the same rate of filings in June 1979, the total cost per claim was \$28.55. With the claimant paying \$2.00 of that in the form of a filing fee, the amount picked up by the taxpayers was \$26.55.

Upon examining 4500 consecutive cases filed in the Brooklyn small claims court, I found 53 consumer claims filed against home improvement contractors. Such claims therefore constitute 1.178% of the total in that sample. While Brooklyn may not be typical of all boroughs in this respect, I have no strong reason to believe it to be atypical.<sup>170</sup> If this proportion holds for the city-wide 1978 caseload of 62,463, approximately 736 cases were of this variety. If each one cost the taxpayers \$26.55, the total public subsidy for small claims brought in 1978 by consumers against home improvement contractors was \$19,541. While higher filing fees would reduce this subsidy, substantially higher fees would tend to defeat the purpose of small claims courts.

The foregoing analysis has been based on the assumption that overhead should be distributed evenly among all claims. This assumption makes sense unless the concern is with the marginal cost of

handling the cases involving home improvement contractors, assuming that the small claims courts are otherwise in place and functioning just as they are. If all or part of the flow of claims against home improvement contractors could be shifted between small claims court and some other forum (such as DCA), then concern with the marginal cost would indeed be the appropriate one. The marginal cost of a typical case is no more than about \$0.30, and even this expense is not incurred unless a hearing has been held, in which case two postage stamps are needed for the notices to the parties of the decision.

Even if the entire load of cases brought against home improvement contractors was removed from the courts' dockets, the resultant drop in caseload would not be sufficient to cause a reduction (or delay an increase) in the number of personnel assigned to these courts. Moreover, if even 75% of the \$57,946 in non-personnel costs was directly related to the size of the caseload, the savings in that category from dropping the home improvement cases would only be \$512 ( $\$57,946 \times 75\% \times 1.178\%$ ), while the court would lose \$1472 in filing fees. Conversely if, instead of dropping the existing home improvement caseload, the 1841 home improvement complaints handled by DCA in 1978 were somehow shifted to the small claims court caseload, this would only cause a 2.95% increase in the latter -- probably not enough by itself to require any increase in small claims court staff, and only a \$1282 increase in the non-personnel costs (as compared to a \$3682 increase in filing fees). This conclusion is, however, very sensitive to the assumption that the increased caseload would have no effect on personnel costs. If just one more clerk had to be added,

as might well be the case in an overloaded court,<sup>171</sup> the marginal cost of the shift would increase by an average of \$20,728. Whether a shift of the home improvement contractor caseload in either direction is possible or desirable will be discussed in the final section of this chapter.

(2) DCA

Except where otherwise indicated, the data in this section were obtained during an interview on June 21, 1979 with Mr. Paul Cooper, Assistant to the Commissioner of Consumer Affairs for Management and Budget.

The cost analysis of the DCA dispute resolution procedure is complicated by the presence of a licensing process which is a prerequisite for the operation of the dispute resolution procedure but not really part of it. Another complication is the significant contribution which is made by the license fees paid by home improvement contractors and salesmen toward covering both sets of procedural costs. The total and per complaint costs of the procedures exclusive of licensing costs will be considered first. Next, the total costs, including those for licensing will be calculated. Finally, the effect of the contribution presently made by the licensing fees, the possibility and appropriateness of increasing these fees, and the likely effect of doing so upon the costs borne by the public will be examined.

As of June, 1979 DCA had a total of 325 employees. Personnel costs for the various functions -- licensing, docketing, calendar, etc. -- can be determined quite precisely by totalling the salaries

of the employees assigned to each function, then adding 38% for fringe benefits and an additional 2½% for municipal services with respect to personnel and payroll provided by agencies other than DCA. The total other-than-personal-services ("OTPS") costs, excluding computer costs and the cost of the hearing transcription service contract, was \$750,000. In the following analysis the assumption will be that OTPS costs (with the two exclusions already noted) are distributed among different departmental functions in the same ratio as are the number of employees.

There are approximately 20 DCA employees who perform functions analogous to those of the central staff of the Civil Court. At approximately \$100,000 for the Commissioner plus his two Deputies, and an average of \$12,000 for the 17 remaining employees, plus 40.5% in fringes and payroll costs, this "departmental overhead" comes to \$427,120. This overhead will be distributed among the various functions in the same proportion as personnel costs and OTPS.

DCA's home improvement contractor dispute resolution procedure normally begins in the Complaints Division. Employees there docket the written complaints received at DCA headquarters. Four people, earning a total salary of \$45,000, perform this docketing function. Out of the 20,337 complaints docketed by DCA in 1978, 1841 (9.05%) involved home improvement contracts.

The DCA's efforts to resolve these complaints informally are handled by the Home Improvement Division, which also has four employees earning a total of \$45,000. Though it is difficult to divide the consumer redress functions of this Division from its license enforcement functions, a rough estimate of each may be obtained by



reference to the complaints sample. All of the cases from the complaints sample which involve licensees (47) made use of only the complaint resolution functions of the Division, while in the remaining cases (45) some effort was made both to resolve the complaint and to press the contractor to obtain (or renew) a license. If the latter cases are therefore treated as half complaint resolution cases and half license enforcement cases, the Division's complaint resolution functions constitute roughly 75% of its workload.

A home improvement complaint, like any other complaint to the DCA, may instead originate with a personal visit by a consumer to one of the field offices. If so, a DCA employee assigned to that office will make an effort to resolve the complaint informally before referring it to headquarters. There are an equivalent of 11.5 employees assigned to these offices. They earn approximately \$115,000. Since there is no reason to believe that the proportion of home improvement cases in their caseload is any different from the proportion of such cases docketed at headquarters, it will be assumed that 9.05% of the time of these employees is devoted to such cases.

Any complaint against any DCA licensee which the department cannot resolve informally is eventually referred to the Calendar Division to schedule a hearing. Seven people work in the Division, earning total salaries of \$82,000. Since the purposes of this Division are to schedule hearings, maintain the records of the cases scheduled for hearing, and provide various follow-up services on cases which have been heard, the composition of their workload is closely reflected in the calendars of hearings which they prepare. I counted the number of home improvement contractor cases (which

are clearly marked as such) and the total number of cases in the calendars for 10 weeks.<sup>172</sup> Out of 618 cases in total, 182 (29.45%) were home improvement cases. I therefore assume that about 30% of the Division's work is devoted to such cases.

Two hearing officers, who earn a total of about \$40,000, hear the cases on this calendar. The same proportion (30%) of their caseload therefore consists of home improvement cases.

The Director of Adjudication and her staff consists of the equivalent of 4.5 people, earning a total of \$58,000. About half of their work involves supervising the work of the Calendar Division and of the two hearing officers who hear cases involving licensees (the other half involves supervising other hearing officers who hear other types of cases). Therefore, the proportion of home improvement cases which they handle is only half that which the Calendar Division handles, or 15%.

Table 5A will present, for each function (docketing, Home Improvement Division, field offices, Calendar, hearing officers, and Office of the Director of Adjudication), the following annual cost data:

(1) personnel costs (including an additional 40.5% for fringe benefits and municipal personnel services); (2) a figure for OTPS costs plus departmental overhead, based on the fraction of the 325 DCA employees assigned to that function multiplied by \$1,177,120 (\$750,000 OTPS + \$427,120 overhead); (3) the numerator of the forementioned fraction which will be indicated in parentheses; (4) total yearly costs; (5) proportion of these costs attributable to home improvement consumer redress functions; and (6) amount of costs so attributable.

Table 5B will compute the cost of DCA's consumer redress process by adding: (1) the sum of the portion of the costs of the six functions attributable to home improvement consumer redress functions from Table 5A; (2) 30% of the cost of the transcription contract (\$30,000); (3) the entire cost of the contract with the special inspector (\$17,000); plus (4) an amount representing a rough estimate of the costs of the efforts of the City Corporation Counsel's Office, of DCA's Consumer Advocate's Office, and of the person at DCA who works as liaison with the Corporation Counsel's Office, which are devoted to home improvement consumer redress cases (\$12,000). This figure, the total yearly cost of home improvement consumer redress functions (excluding licensing costs), will then be divided by the number of complaints against home improvement contractors in 1978 (1841) to produce a figure for average cost to the taxpayer of DCA's handling this type of complaint.

If the cost per complaint in Table 5B were compared with the cost to the taxpayers per claim in small claims courts (\$26.55), it would appear that the DCA process is much more expensive. Such a comparison would, however, be premature. The license fees paid by home improvement contractors and salesmen make a substantial contribution to this cost (even after subtracting DCA's licensing costs), and a strong argument can be made that these fees could and should be increased to cover virtually the entire cost of DCA's consumer redress process.

TABLE 5: DCA Costs of Handling Home Improvement Consumer Redress Cases

Table 5A: Cost Components (In Dollars per Year)

<u>Function</u>	<u>(1) Personnel</u>	<u>(2) OTPS + DCA Overhead</u>	<u>(3) (# of Employees)</u>	<u>(4) Total Costs</u>	<u>(5) Portion Attributable</u>	<u>(6) Amount Attributable</u>
Docketing	63,225	14,488	(4)	77,713	9.05%	7,033
Home Improvement Division	63,225	14,488	(4)	77,713	75%	58,284
Field Offices	161,575	41,652	(11.5)	203,227	9.05%	18,392
Calendar	115,210	25,353	(7)	140,563	30%	42,169
Hearing Officers	56,200	7,244	(2)	63,444	30%	19,033
Director Adj'n. & Staff	81,490	16,299	(4.5)	97,789	15%	14,668

Table 5B: Cost Computation (In Dollars per Year)

(1) Sum of "Amount Attributable", from Table 5A column 6.....	\$159,579
(2) Attributable portion (30%) of transcription contract (\$30,000).....	9,000
(3) Contract with special inspector.....	17,000
(4) Attributable portion of remaining DCA costs (estimate).....	<u>12,000</u>

Annual cost of DCA home improvement consumer redress process.  
 (Excluding licensing costs or revenues).....\$197,579

Cost to taxpayers of above process (Excluding licensing costs and revenues)  
 per complaint (1841).....\$ 107.32

Before considering the effects of licensing costs and revenues on the annual cost and cost per complaint figures in Table 5B, however, the meaning of these figures should be explored. Clearly, one complaint more or less would add or subtract merely the cost of a few postage stamps and perhaps a few phone calls. Adding the full small claims court home improvement caseload (736), if that could somehow be done, would increase the number of home improvement complaints DCA handles by 40%, but would probably increase DCA's costs by only about \$31,000 (on the assumption, based on my observations, that the Home Improvement Division and the hearing officers would be sufficiently hard-pressed by the additional workload to make proportionate increases in their staffs necessary, while the remaining functions could be handled by existing staff). Similarly, eliminating DCA licensing of home improvement contractors would eliminate the Home Improvement Division (\$58,284) and 30% of the hearing officers' duties (\$19,033, assuming that one hearing officer could be assigned other duties for part of his time), more doubtfully 30% of the Calendar Division budget (\$42,169) and 15% of that of the office of the Director of Adjudication (\$14,668). It would not, however, significantly affect docketing and field office expenses since the complaints would continue to come in, though perhaps at a slightly reduced volume, and would have to be processed in the same way that complaints filed against other non-licensees presently are. Indeed, one more person (about \$20,000, including associated expenses) would probably have to be added to the Complaint Division staff to perform the type of informal mediation

presently done by this Division where complaints are filed against non-licensed vendors. The net savings to the taxpayers would therefore be approximately \$115,000, or \$62 per complaint, making optimistic assumptions. Of course, the entire \$197,579 would be saved by shutting down DCA entirely. But either of these cost-cutting measures would have serious effects on the City's consumers, since there is no reason to believe that all or even most of them would know enough or be persistent enough to bring their complaints to small claims court. The wisdom of any such cost-cutting measure will be discussed in the next section, after the actual and possible contributions of licensing revenues to meeting these costs has been discussed.

Licensing costs can be calculated in the same manner as the costs of the other DCA functions which were considered. There are 60 employees in the Licensing Division, earning a total of about \$1,011,600, including fringe benefits and the costs of municipal personnel services. The portion of the OTPS and the departmental overhead attributable to the Division is \$217,314. To this and the personnel costs must be added half the computer costs, or \$34,000, for a total annual cost of \$1,262,914. The Department issued approximately 49,000 licenses in 1978, of which 2,942 went to home improvement contractors and 3,523 went to home improvement salesmen. The two categories together thus comprise about 13.19% of the Licensing Division's workload, on the assumption that the complexity of the processes for issuing them is about average for DCA (they may in fact be somewhat less complex than most). Multiplying the

annual cost of operating the Division by this fraction yields an annual cost for issuing licenses to home improvement contractors and salesmen of \$166,578. To this should be added the 25% of the efforts of the Home Improvement Division which are devoted to pressuring unlicensed contractors to obtain licenses (\$19,428), and perhaps \$8,000 for the combined efforts of people elsewhere in the Department, the Corporation Counsel's office, and the Criminal Court, also designed to produce the same result, which yields a gross cost to the taxpayers of \$194,007 for requiring licenses for these business categories.

Annual licensing revenues, at the present fees of \$50 for a home improvement contractor license and \$25 for a home improvement salesman license, yielded \$235,175 in 1978. This left a \$41,168 surplus to be applied to the cost of operating the complaint resolution/consumer redress process with respect to these categories. If it is so applied, the annual cost to the taxpayers of this process drops from \$197,579 to \$156,411, and the cost per complaint drops from \$107.32 to \$84.96. This amount is still large when compared to the \$26.55 cost of handling a small claims court complaint.

However, if the license fee for a contractor were raised to \$100/year, and no change were made in the license fee for salesmen, the total revenue from these two categories of licensees in 1978 would (on the assumption that demand for contractor's licenses was totally inelastic within this price range) have been \$382,275. Subtracting the \$194,007 licensing costs from this leaves \$188,268 to be applied against the \$197,579 cost of operating the complaint resolution/



consumer redress process. Given the fact that the average contract size for licensees in my complaints sample was \$2832, compared with an average contract size for non-licensees of \$1565, the additional \$50/year required on the assumption of an increase to \$100 of the license fee seems an insignificant increase in their cost of doing business, making the assumption of demand inelasticity plausible. Allowing a 10% decrease in the number of contractors renewing (which might well be ample), the revenue under the new fee schedule would be \$352,875. Assuming no corresponding decrease in licensing costs, this would leave \$158,868 to be applied against the \$197,579 dispute resolution cost, leaving only \$38,711 to be covered by the taxpayers. Dividing this by the 1841 complaints brought against home improvement contractors brought to DCA in 1978, yields an average cost per complaint to the taxpayer of \$21.03. This latter figure is in the same ballpark -- indeed 20% less -- than the \$26.55 per claim which taxpayers foot for small claims court.

It is perfectly appropriate for home improvement contractors to bear the additional \$50/year burden for helping to support this process, as the results of my complaints sample demonstrate. Thirty-one of the consumer complaints against licensees were vindicated in the sense that the consumer received complete or partial redress for his grievance, whereas in only six cases of complaints against licensees was the complaint either dismissed or apparently without merit. Though in some of the former cases the contractor may have afforded "redress" without having been legally obligated to, in most of these cases the contractor was at fault, at least to some extent. It is entirely just that a category of businesses

bear the major part of the cost of a mechanism designed to insure that they carry out their obligations. Furthermore, even in those cases where the contractor prevails he has generally received a benefit -- a public vindication, which decreases the likelihood that the consumer will pursue him in other forums or will disparage his reputation to other potential customers.

D. The Two Forums Compared: Summary and Recommendations

The average case brought by a consumer against a home improvement contractor in New York City's small claims court cost the consumer \$9.53, the contractor \$29.20, and the taxpayers \$26.55. These amounts are small compared with the average recovery of \$401 and the median recovery of \$270, even when these recoveries are discounted to take account of the fact that only about half of the apparently deserving consumers received them. It is difficult to imagine how a court could operate more efficiently and inexpensively, and quite impossible to believe that anyone concerned with justice would want to eliminate this most accessible of courts or to narrow its jurisdiction. Even if a non-judicial tribunal could provide the same remedies at lower cost for the identical population, to intentionally deny meaningful judicial access to a substantial segment of the public in our extremely court-centered society might be widely interpreted as a decision to exclude them from a basic privilege of citizenship, and would at the least be politically unwise.

Furthermore, it is doubtful that a non-judicial tribunal could provide the same remedies at lower cost. Since the marginal loss

to the court of revenue from filing fees were it deprived of jurisdiction in home improvement cases would be greater than the likely marginal savings in costs, the only proposal which would be certain to reduce the net cost to taxpayers of this service would be to shut individual courts or the entire small claims court system. While adequate non-judicial alternatives can be provided in specific categories of cases (including home improvement cases), such alternatives do not presently exist with respect to most categories, and any conceivable set of alternatives each of which has a specific subject matter jurisdiction will fail to exhaust the small claims court's non-subject-matter-specific jurisdiction. While a "non-judicial" tribunal which had no limitations on the subject matter under its jurisdiction and which offered at least the same remedies as small claims courts do presently could perhaps be established, it is difficult to understand how that tribunal would differ from the present small claims court (or from some possible improved version thereof).<sup>173</sup>

The average complaint brought by a consumer against a home improvement contractor at DCA cost the consumer \$5.80, the contractor \$9.93, and the taxpayers \$84.96. These amounts are, respectively, 61%, 34%, and 320% of the corresponding costs in small claims court. The 61% figure actually overstates the relative costs to the consumer at DCA, since the \$9.53 specified as the cost of suing in small claims court does not include two sets of non-monetizable costs. The first set are those surrounding the obligatory trip to file the claim, which costs are probably greater than the costs of writing a letter to DCA (else more consumers than presently would

walk their complaints in to a DCA field office rather than write them in). The second set are those involved in having to appear at a hearing -- an experience undergone only 27% as frequently by DCA complainants as by small claims court claimants.

On the other hand, these figures may well understate the absolute and relative cost to the contractor of the DCA process. If the \$41,168 surplus of licensing revenues from home improvement contractors and salesmen over the licensing and enforcement costs attributable to these categories is divided by the 1841 complaints brought against such contractors and salesmen, their license fees contribute \$22.36 to the cost of resolving each complaint. If this is added to the contractors' direct costs of handling each such complaint, their total expense relative to each complaint is \$31.31, or 124% of their cost of responding (or not responding) to a small claims court summons.

The cost to the taxpayer is highly dependent on the contribution made by contractors' and salesmen's license fees. If the contractor's fee goes up to \$100/year, the cost to the taxpayer drops to \$21.03/complaint, 79% of the corresponding cost in small claims courts and only \$38,711 in total. Of course, this simply shifts the incidence of the cost to the licensees, raising the contributions from their license fees to the complaint resolution/consumer redress process to \$86.29 per complaint (assuming a 10% drop in number of contractors renewing), and raising their total expense relative to each complaint to \$95.24.

Nonetheless, this is precisely where the cost of complaint

resolution should fall. As mentioned in the previous section, five times as many complaints are resolved in favor of consumers as are (or clearly ought to be) resolved in favor of the contractors. There is no reason why anyone but the contractors themselves should pay the costs of rectifying their inadequate performances. Furthermore, the additional \$50/year is a small increment in their cost of doing business, and is unlikely to affect their individual standards of living or their willingness to continue doing business in New York City. On the other hand, it is not large enough in and of itself to affect the prices they charge for their services, and is therefore unlikely to be passed on to the consumers.

There remains the question why this service should be preserved, or instituted in a city which does not have it, if small claims court can provide a similar service at a lower total cost per complaint. There are several answers to this question.

First, although the proportion of consumers using either process whose complaints were substantially satisfied was approximately the same, the quality of DCA's fact-finding, mediation and conciliation processes, as well as the appropriateness of its remedies to the problems presented, were generally better.<sup>174</sup>

Second, many more consumers who have had problems with home improvements, 1841 vs. 736 (250%), make use of DCA than make use of small claims court where both are available. The two processes are presented very differently to consumers -- one as "Call in (and then write us) about your consumer complaints and we will enforce the City's consumer protection laws on your behalf, just as we're

hired to do", the other as "If you want to sue someone this is the place to do it". There is no reason to believe that most of the consumers who are willing to let DCA "carry the ball" for them would if DCA could not help them be willing or able to take the initiatives necessary to prevail in small claims court: first suing the contractor (requiring at a minimum traveling to the court clerk's office and laying out 3.40), then assembling legally sufficient evidence and appearing at the hearing (unless the contractor settles first), and finally investigating the contractor's assets and presenting this information plus \$10 to the sheriff (unless the contractor pays the judgment voluntarily). Nor is there any reason to abandon the consumers who are not sufficiently aggressive to navigate small claims court successfully. The great majority of the consumers are, after all, victims of injustices. They should not be expected to make additional investments, learn new skills, and so forth, simply to obtain what is their due.

Third, DCA's consumer redress hearings are an inextricable part of its process of enforcing behavioral standards upon home improvement contractors. The Home Improvement Business Law (Appendix A), DCA's Regulations Relating to the Home Improvement Business (Appendix B), and General Regulation 7 (Appendix C), all impose requirements designed to prevent fraud, overreaching, and other unfair practices. Violations come to the attention of DCA only through consumer complaints. While DCA could enforce the more technical requirements, such as those requiring certain information to appear on the contracts, without further involvement

of the consumer and without providing her with any redress, the more substantive requirements, such as that requiring the contractor to refrain from "Abandonment or wilful failure to perform, without justification, any home improvement contract..."<sup>175</sup> can hardly be enforced without the consumer's active cooperation. It is difficult to imagine a more effective incentive to encouraging this cooperation than the consumer's belief that she will benefit from demonstrating the contractor's misfeasance. True, the practice of ordering consumer redress upon the proper showing in individual cases does not guarantee that contractors will adhere to the legal standards in future jobs, since they can instead do nothing in each instance until a complaint is brought, or even until a DCA sanction is about to be imposed. Nonetheless, it both serves as a forceful reminder of the applicable standards to those who would be disposed to obey them and as a mild deterrent (via the time, bother, and embarrassment of responding to DCA complaints) against violating them.

Fourth (and finally), consumer complaint handling is an ordinary and appropriate function of local, county, and state government. Consumers today expect that someone in government will at least write a letter or make a phone call on their behalf if they allege that a businessman has defrauded them or otherwise treated them badly. A government which attempts to abdicate this responsibility entirely may not save much money, since it cannot avoid devoting some manpower to dealing (one way or another) with consumers who insist they have a right. New York City deals with consumer com-

plaints by directing them to the DCA field offices or to the Complaint Division. Either way, DCA not only docket each complaint filed but also assigns an employee to attempt to resolve it. If home improvement complaints were no longer differentiated and handled by a distinct division, they would have to be handled by inspectors working for the Complaints Division. As mentioned in the previous section, this would probably require an additional employee and associated expenses, as well as continuing the existing docketing and field office expenses in this category, for an average cost of \$24.67 for handling a complaint. While this is far less than the \$107.32 which it presently costs if licensing revenues are not factored in, and significantly less than the \$84.96 cost per complaint when the excess of present licensing revenues over costs is considered, it is more than the \$21.03 per complaint which the taxpayers would have to bear if the current licensing system were retained but the fee for contractors was raised to \$100/year.



VII. Conclusion: Applicability of Consumer Redress Hearings by Licensing Authorities to Complaints Other Than Home Improvement Contractors

A. The Advantages

The process examined in this study -- a consumer complaint resolution process culminating in consumer redress hearings, decisions, and enforcement activity, all administered by the authority which licenses the businesses being complained against -- has several advantages not shared by other consumer dispute resolution processes.

First, the fact that the licensee's stake in his license is much larger than his stake in any particular dispute should produce a high level of compliance with the authority's orders, at least in those occupations and industries in which the retention of one's license is a practical as well as legal necessity.<sup>176</sup> With respect to other businesses, such as the home improvement business in New York City, a license is valuable but, as a practical matter, not absolutely necessary. However, the licensing authority has considerable leverage even with this group: my experience with the three DCA samples is that none of the home improvement contractors who had once bothered to obtain a license was indifferent to the prospect (or reality) of losing it.

Any existing licensing authority whose licensees deal with consumers could, if it were so authorized, use its leverage over licensees to obtain justice for consumers in appropriate cases by means of a process such as the one described in this study.

Licensing authority could also be granted over any presently unlicensed occupation or industry which deals with consumers expressly to establish this type of redress process. Furthermore, means of increasing the leverage of agencies such as DCA over existing categories of licensed businesses could be devised. They might include, for example, increasing the number of inspectors serving summonses on non-licensees, increasing the penalties actually imposed on persons convicted of operating without a license, or publicizing the fact that unlicensed contractors are not permitted to use the courts to recover from the consumer for unpaid work.<sup>177</sup>

Second, the ability of the agency to perform on-site inspections (where relevant), and to draw on the expertise of its staff in evaluating the available information with respect to the matter under dispute, should produce more accurate decisions.<sup>178</sup>

Third, it is a very inexpensive forum for consumers. DCA's procedure is 40% less expensive for consumers than that of small claims court,<sup>179</sup> but only a small fraction of the cost of hiring a lawyer and going to a court of general jurisdiction (as a consumer would have to do, absent DCA, if her claim exceeded the small claims court's \$1000 monetary limit). DCA has no upper monetary limit on its subject matter jurisdiction, and there is no reason why one should be imposed.<sup>180</sup> True, decisions requiring the licensee to spend substantially more than \$1000 are likely to be appealed to the courts, but the cost of defending its decision in the courts is paid by the agency rather than by the consumer.

Fourth, the agency is able to ensure that its regulations with respect to the particular occupation or industry (which may be both detailed and different from those applicable to other businesses), are applied in the resolution of disputes. A small claims court judge or arbitrator, or other tribunal without a subject-matter-specific jurisdiction, might not know about these regulations and might instead apply "general" -- and less appropriate -- principles.<sup>181</sup>

Fifth, the agency is in a position to take a consumer complaint which has both remedial and disciplinary implications and deal with both aspects in-house.<sup>182</sup>

Sixth, the agency is also in a position to monitor the complaints against individual businesses, enabling it to distinguish licensees who occasionally, inadvertently, and excusably violate the consumer protection provisions from those who repeatedly commit the same violations and perhaps make the same excuses (the latter being prime candidates for further investigations looking towards possible disciplinary actions).<sup>183</sup>

#### B. The Disadvantages

There are, of course, several possible disadvantages to establishing this type of consumer redress process.

First, it may entail additional costs to the taxpayers. These costs will be greatest where the occupation or industry is not presently licensed, there is no licensing authority handling similar types of activities whose jurisdiction could be expanded, and there

is no governmental organization systematically handling complaints about the occupation or industry in question that could be given licensing and redress authority as well. Where the activity is licensed, or some government agency is presently handling complaints about it, some of the costs of this process are already being borne. Even where the full cost of the process would have to be covered from fresh sources, the analysis in section VI.C.(2) of the cost to the public of DCA's process for dealing with complaints against home improvement contractors suggests that this cost could, and should, frequently be covered by a modest license fee.

Second, it may mean one more bureaucracy. Whether this will be a new or substantially expanded bureaucracy, rather than simply an added function for an on-going one, depends of course on what is already in place. Even where a new bureaucracy is entailed, it would be a combination of a court and a law enforcement agency -- two exceptions to the current popular distaste for expanded government. The tendency of the DCA process is to relieve court congestion, while providing inexpensive and effective justice for people who cannot afford lawyers, or do not wish to have one.

Third, it may permit unfair exertion of overwhelming governmental power against the small business. This is the obverse of the leverage advantage: the very reasons why the licensee has to take this process seriously can be pleaded as an argument against establishing it. The validity of this argument turns on the fairness of the process itself. DCA's process, with its detailed notice well prior to the hearing, its impartial hearing officers,

all testimony under oath, recorded, and if necessary transcribed, with opportunity to bring counsel and to confront, cross-examine, and rebut adverse witness, along with its right to a judicial review, is as fair a process as exists in our legal system. A process with less procedural safeguards might, however, allow an arbitrary government official to force a licensee to agree to a settlement not required by legal principles.

Fourth, the agency may be captured by the industry it is trying to regulate. There is certainly a subtle process by which familiarity with an industry's problems, and with some of its more likeable representatives, blunts one's initial consumerist zeal. An example is the lower performance expectations for aluminum replacement windows held by DCA's special inspector and its hearing officers than by the consumers who appeared complaining of condensation and drafts. Consumers tended to view the officials' acceptance of the inevitability of certain problems with this type of window (an acceptance which apparently followed from years of experience with the problems) with the greatest distrust. It was not my impression that the hearing officers tilted unfairly either way -- though after reading many files and attending many hearings I had become surprisingly sympathetic to the industry's problems and to its more likeable representatives as well. The consumers in some cases may have done better before a less knowledgeable tribunal, but that does not mean that they were entitled to one.<sup>184</sup> There may, on the other hand, be more serious problems of "capture" in industries in which powerful and prestigious companies, trade

associations, and law firms are involved.

Fifth, the agency may be distracted by the consumer redress cases from its more basic law enforcement mission. There may be a problem of resource allocation, though the last three mentioned "advantages" suggest various types of efficiencies which result from combining both missions in one agency. More fundamentally, a redress-oriented process encourages the agency to obtain satisfaction for the existing complainants, even at the expense of permitting a dishonestly inclined business to continue in operation.<sup>185</sup> Similarly, a marginal operator who makes a policy of satisfying those consumers (but only those consumers!) who complain to the agency will be more likely to earn the agency's respect and gratitude than to trigger its suspicions and a disciplinary investigation.

This problem is real enough, but abstaining from formal consumer redress endeavors is unlikely to solve it. Even a "pure" law enforcement agency will sometimes be presented with the choice between retrospective relief for those already injured and prospective relief for those who have not yet been affected.<sup>186</sup> Furthermore, limitations on prosecutorial resources will rationally lead to focussing on offenders who have produced the greatest apparent damage; if threats to go to the agency are the "magic words" which mobilize the errant businessman into action, the damage which he has done to all those who uttered the "magic words" will not be apparent to the authority.

Finally, the cagy and determined scofflaw is likely to avoid both the agency's consumer redress efforts and its disciplinary efforts.<sup>187</sup> For the relatively law-abiding businessman, on the other hand, the reminders of the law's requirements, and of its possible sanctions, in the course of consumer redress proceedings would usually be adequate to ensure greater adherence to these requirements in the future.

C. Criticisms that Cannot be Made of the DCA Process:  
The Relationship of this Study to the Continuing  
Critique of Licensing

Any proposal to extend licensing to yet another occupation confronts a hostile intellectual environment. Occupational licensing schemes have been frequently, vigorously and effectively criticized on the bases that they may unjustifiably restrict the constitutionally protected liberty to engage in the legitimate occupation of one's choice,<sup>188</sup> that the consumer protection functions which their supporters claim for them may have little reality other than as public relations,<sup>189</sup> and that their principal effects are typically to protect licensees from competition at the consumers' expense.<sup>190</sup> These criticisms are similar to the ones which have been made, to great intellectual and political effect, of the role of federal regulation in transportation, banking, and other industries.<sup>191</sup>

A careful examination of DCA's licensing of home improvement contractors and salesmen reveals that none of these criticisms apply to it.

First, the restrictions imposed by this license requirement upon would-be home improvement contractors or salesmen are minimal. Unlike many of the criticized licensing schemes, there is no requirement that the applicant be a citizen of the United States or a resident of the licensing jurisdiction -- much less that he have been such a citizen or resident for a specified period before applying;<sup>192</sup> none that he have had prior experience in the business;<sup>193</sup> none that he have had formal training;<sup>194</sup> and none that he pass an examination.<sup>195</sup> Nor has the contracting field been divided into specialties, thus requiring a multiplicity of licenses (or of licensees within one's employ) to carry on a non-specialized home improvement business.<sup>196</sup>

What is required is a modest license fee (\$50 for a two-year salesman's license, \$100 for a two-year contractor's license), three photographs of oneself, a trip to a police station to get fingerprinted (permitting DCA to check for a possible criminal record), a straight-forward application form, and a trip to DCA headquarters to file it. Applicants for contractors' licenses in addition file copies of trade name or partnership certificates or corporate papers (where applicable), of their workmen's compensation insurance certificates, and of their state sales tax identification numbers -- all documents which state laws other than the licensing law require them to have. Licenses can be denied only for failure to meet these requirements, for failure to pay small claims court judgment which had been outstanding for more than 30 days at the time of the application,<sup>197</sup> or if the applicant is not



"over 18 years of age and of good character."<sup>198</sup> The mere possession of a criminal record does not, however, disqualify an applicant in the absence of a "direct relationship between one or more of the previous criminal offenses and the specific license...sought" or of "an unreasonable risk to property...or the general public".<sup>199</sup> While these requirements are of course all restrictions of sorts upon the liberty to engage in the legitimate occupation of one's choice, none of them are unjustifiable.

Second, had there been any doubt before this study of the reality of the consumer protection functions served by DCA's licensing in the home improvement area, such doubt is no longer possible.

The licensing law states that

It is the purpose of the city council in enacting this article to safeguard and protect the homeowner against abuses and fraudulent practices by licensing persons engaged in the home improvement, remodeling and repair business.<sup>200</sup>

Everything I observed while gathering data for this study, including my conversations with DCA personnel, consumers, and contractors, as well as observations of DCA files, hearings, and decisions, is consistent with an understanding by all concerned that this is the sole purpose which should guide the agency in interpreting and enforcing the licensing law.

Third, because the application requirements are non-selective and easily complied with, the requirement of a DCA license in order to engage in the home improvement business in New York City has little if any anti-competitive effect. Furthermore, what discretionary authority there is in the law is exercised not by a

board composed of representatives of the "regulated" industry, as is typically the case with occupational licensing, but by the Commissioner of Consumer Affairs. Since the "restrictive practices of licensed groups are usually designed within the groups, rather than imposed on them from the outside",<sup>201</sup> there is little likelihood that the regulations adopted or procedures followed by DCA would take an anti-competitive turn. In fact, there is no detectible anti-competitive bias or effect in the DCA regulations<sup>202</sup> or procedures<sup>203</sup> applicable to those engaged in the home improvement business.

In a leading critique of "the abuse of occupational licensing", Professor Walter Gellhorn concludes:<sup>204</sup>

To say that licensing has been abused and overused is not to say that prophylactic administration should be abandoned. I do not advocate reviving the doctrine of caveat emptor, nor do I, as a realist, suppose for a minute that customers and clients who have been ill served can be made whole by lawsuits against their miscreant servitors. Litigation is too unwieldy to meet the needs of those who have suffered minor injuries. What are needed are measures that will provide protection against those demonstrably deficient in capability or integrity without in the process creating artificial limitations upon career choices, work opportunities, and stimuli to provide superior service at lesser cost. Among these protective measures are permissive certification and mandatory registration.

....A far more comprehensive regulatory device /than permissive certification/ is the simple registration of anyone who desires to receive a particular occupational license, with the automatic issuance of the license upon registration. Engaging in the occupation without a license, or obtaining it by misrepresentation, would be made a serious offense, in order to stimulate prompt and accurate registration. An appropriate state agency, not linked with an occupational group, would be created to receive complaints against licensees, investigate them, and, if objectionable conduct is found, initiate proceedings looking toward revocation, suspension, or other appropriate discipline by a court or a special tribunal.

A plan of this nature would, I believe, end the present abuse of licensure that serves selfish interests by constricting occupational freedom. It would recapture the public power now delegated to multiple licensing boards whose members are drawn from and owe allegiance to the occupations they supposedly regulate in the public interest. It would require that licensees be subject to stern discipline, but only after carefully formulated charges, fair hearings, and impartial determinations, untainted by suspicion that the determiners' self-interest has influenced their judgment. It would take away the eligibility of those whose occupational unworthiness could be demonstrated, but would not, as so many licensing laws now do, place artificial roadblocks in the path of work opportunities or squelch career aspirations by treating predictive opinions as final judgments.

DCA's licensing of home improvement contractors and salesmen is, I submit, an actual, operating, effective version of the hypothetical mandatory registration plan which Professor Gellhorn justly praises.

**CITY OF NEW YORK**  
**DEPARTMENT OF CONSUMER AFFAIRS**  
**ADMINISTRATIVE CODE**  
**CHAPTER 32**  
**ARTICLE 42**  
**HOME IMPROVEMENT BUSINESS**

§ 32-350.0 **Legislative declaration.**—It is the purpose of the city council in enacting this article to safeguard and protect the homeowner against abuses and fraudulent practices by licensing persons engaged in the home improvement, remodeling and repair business.

§ 32-351.0 **Definitions.**—1. "Persons" means an individual, firm, company, salesman, partnership or corporation, trade group

2. "Home improvement" means the construction, repair, replacement, remodeling, alteration, conversion, rehabilitation, renovation, modernization, improvement, or addition to any land or building, or that portion thereof which is used or designed to be used as a residence or dwelling place and shall include but not be limited to the construction, erection, replacement, or improvement of driveways, swimming pools, terraces, patios, landscaping, fences, porches, garages, fallout shelters, basements, and other improvements to structures or upon land which is adjacent to a dwelling house. "Home improvement" shall not include (i) the construction of a new home building or work done by a contractor in compliance with a guarantee of completion of a new building project, or (ii) the sale of goods or materials by a seller who neither arranges to perform nor performs directly or indirectly any work or labor in connection with the installation of or application of the goods or materials, or (iii) residences owned by or controlled by the state or any municipal subdivision thereof, (iv) painting or decorating of a building residence, home or apartment, when not incidental or related to home improvement work as herein defined. Without regard to the extent of affixation, "home improvement" shall also include the installation of central heating or air conditioning systems, central vacuum cleaning systems, storm windows, awnings or fire or burglar alarms or communication systems.

3. "Building" means any structure containing no more than four residence or dwelling units.

4. "Owner" means any homeowner, condominium unit owner, tenant, or any other person who orders, contracts for or purchases the home improvement services of a contractor or the person entitled to the performance of the work of a contractor pursuant to a home improvement contract.

5. "Contractor" means any person or salesman, other than a bona fide employee of the owner, who owns, operates, maintains, conducts, controls or transacts a home improvement business and

who undertakes or offers to undertake or agrees to perform any home improvement or solicits any contract therefor, whether or not such person is licensed or subject to the licensing requirements of this article, and whether or not such person is a prime contractor or sub-contractor with respect to the owner.

6. "Home improvement contract" means an agreement, whether oral or written, or contained in one or more documents, between a contractor, and an owner; or contractor and a tenant, regardless of the number of residence or dwelling units contained in the building in which the tenant resides, provided said work is to be performed in, to or upon the residence or dwelling unit of such tenant, for the performance of a home improvement and includes all labor, services and materials to be furnished and performed thereunder.

7. "Licensee" means a person permitted to engage in the home improvement business under the provisions of this article.

8. "Home improvement establishment" means any shop, establishment, place or premises where the home improvement business is transacted or carried on.

9. "Commissioner" means commissioner of consumer affairs\*.

10. "Salesman" means any individual who negotiates or offers to negotiate a home improvement contract with an owner, or solicits or otherwise endeavors to procure in person a home improvement contract from an owner on behalf of a contractor, or for himself should the salesman be also the contractor, whether or not such person is licensed or subject to the licensing requirements of this article.

§ B32-352.0. **License required.**—(1) No person shall solicit, canvass, sell, perform or obtain a home improvement contract as a contractor or salesman from an owner without a license therefor.

(b) A license issued pursuant to this article may not be construed to authorize the licensee\* to perform any particular type of work or engage in any kind of business which is reserved to qualified licensees under separate provisions of state or local law, nor shall any license or authority other than as is issued or permitted pursuant to this article authorize engaging in the home improvement business.

§ B32-353.0. **Fees; term.**—1. The fee for a license to conduct a home improvement business shall be fifty dollars and for each renewal thereof the fee shall be fifty dollars.

The fee for a salesman's license employed by a home improvement contractor shall be twenty-five dollars and for each renewal thereof the fee shall be twenty-five dollars.

2. The fee for issuing a duplicate license or for one lost, destroyed or mutilated shall be ten dollars.

§ B32-354.0. **License not assignable; posting required; removal.**  
—a. No license shall be assignable or transferable.

\* Should probably be licensee.

## HOME IMPROVEMENT BUSINESS

b. A license issued hereunder shall at all times be posted in a conspicuous place in the place of business of the licensee.

c. Every licensee shall within ten days after a change of control in ownership, or of management, or of change of address or trade name notify the Commissioner of each change.

d. A duplicate license may be issued for one lost or mutilated and shall bear the word "duplicate" stamped across its face.

e. Commission.—In addition to the powers and duties elsewhere prescribed in this article, the commissioner shall have power:

(1) to appoint an adequate number of assistants, inspectors and other employees as may be necessary to carry out the provisions of this article, to prescribe their duties, and to fix their compensation within the amount appropriated therefor;

(2) to examine into the qualifications and fitness of applicants for licenses under this article;

(3) to keep record of all licenses issued, suspended or revoked;

(4) at any time to require reasonable information of an applicant or licensee, and may require the production of books of accounts, financial statements, contracts or other records which relate to the home improvement activity, qualification or compliance with this article by the licensee provided, however, that said information and production of records is required of him pursuant to its regular business and functions under this article.

§ B32-355.0. **Application.**—1. An application for a license or renewal thereof shall be made to the commissioner on a form prescribed by him.

2. A separate license shall be required for each place of business.

3. The application shall be filed only by the actual owner of a business, shall be in writing, signed and under oath; it shall contain the office address of the business; the name and residence address of the owner or partner and if a corporation, trade group or association, the names and resident addresses of the directors and principal officers.

4. The commissioner may require the names and residence addresses of any employees of an applicant, in addition to any other information which he may deem advisable.

5. Each applicant shall be over 18 years of age and of good character.

6. The commissioner shall investigate each applicant as to good character before a license is issued.

§ B32-356.0. **Rules and regulations.**—The commissioner may make such rules and regulations not inconsistent with the provisions of this article, as may be necessary with respect to the form and content of applications for licenses, the reception thereof, the investigation and examination of applicants and their qualifications, and the other matters incidental or appropriate to his powers and duties as prescribed by this article and for the proper administration and enforcement of the provisions of this article, and to amend or repeal any such rules and regulations.

§ B32-357.0. **Fines; suspension; revocation of license.**—The commissioner shall have the power to impose a fine not to exceed two hundred fifty dollars upon a licensee or suspend or revoke a license or deny an application for the renewal of a license for any one or more of the following causes:

1. Fraud; misrepresentation, bribery in securing a license.
2. The making of any false statement as to a material matter in any application for a license.
3. The person or the management personnel of the contractor are untrustworthy or not of good character.
4. The business transactions of the contractor have been or are marked by a practice of failure to timely perform or complete its contracts, or the manipulation of assets or accounts, or by fraud or bad faith, or is marked by an unwholesome method or practice of solicitation of business from owners.
5. Failure to display the license as provided in this article.
6. Failure to comply with any demand or requirement lawfully made by the commissioner.
7. When an agent or employee of a licensee has been guilty of an act or omission, fraud, misrepresentation and the licensee has approved or had knowledge thereof.
8. Violation of any provision of this article or any rule or regulation adopted hereunder or for performing or attempting to perform any act prohibited by this article.

§ B32-358.0. **Prohibited acts.**—The following acts are prohibited:

1. Abandonment or wilful failure to perform, without justification, any home improvement contract or project engaged in or undertaken by a contractor; or willful deviation from or disregard of plans or specifications in any material respect without the consent of the owner;
2. Making any substantial misrepresentation in the solicitation or procurement of a home improvement contract, or making any false promise of character likely to influence, persuade or induce;
3. Any fraud in the execution of, or in the material alteration of any contract, mortgage, promissory note or other document incident to a home improvement transaction;
4. Preparing or accepting any mortgage, promissory note, or other evidence of indebtedness upon the obligations of a home improvement transaction with knowledge that it recites a greater monetary obligation than the agreed consideration for the home improvement work;
5. Directly or indirectly publishing any advertisement relating to home improvements which contains an assertion, representation or statement of fact which is false, deceptive, or misleading, provided that any advertisement which is subject to and complies with the then existing rules, regulations or guides of the federal trade commission shall not be deemed false, deceptive or misleading; or by any means advertising or purporting to offer the general public any home improvement work with the intent not to accept contracts for the particular work or at the price which is advertised or offered to the public;

## HOME IMPROVEMENT BUSINESS

6. Wilful or deliberate disregard and violation of the building, sanitary, fire and health laws of this city;

7. Failure to notify the commissioner of any change or control in ownership, management or business name or location;

8. Conducting a home improvement business in any name other than the one in which the contractor is licensed;

9. Wilful failure to comply with any order, demand, rule, regulation or requirement made by the commissioner pursuant to provisions of this article;

10. As part of or in connection with the inducement to make a home improvement contract, no person shall promise or offer to pay credit, or allow to a buyer any compensation or reward for the procurement of a home improvement contract with others;

11. a. No salesman may concurrently represent more than one contractor in the solicitation or negotiation of any one home improvement contract from an owner. The use of a contract form which fails to disclose a named contractor principal, whether for the purpose of offering the contract to various contractors other than the one the salesman purported to represent in negotiation or otherwise, is prohibited. No salesman may be authorized to select a prime contractor on behalf of the owner.

b. No salesman shall accept or pay any compensation of any kind, for or on account of a home improvement transaction, from or for any person other than the contractor whom he represents with respect to the transaction.

12. a. As a part of or in connection with the inducement to enter any home improvement contract, no person shall promise or offer to pay, credit, or allow to any owner, compensation or reward for the procurement or placing of home improvements business with others.

b. No contractor or salesman shall offer, deliver, pay, credit or allow to the owner any gift, bonus award or merchandise, trading stamps, or cash loan as an inducement to enter a home improvement contract.

c. A contractor or salesman may give tangible items to prospective customers for advertising or sales promotion purposes where the gifts is not conditioned upon obtaining a contract for home improvement work; provided no such item shall exceed a cost value of two dollars and fifty cents and no owner and/or other person shall receive more than one such item in connection with any one transaction.

§ B32-359.0. **Waiver.**—No acts, agreements or statements of a buyer under a home improvement contract shall constitute a waiver of any provisions of this article intended for the benefit or protection of the buyer. Any home improvement contract entered into between a contractor and the owner shall be unenforceable if the owner not later than forty-eight hours following the date thereof gives written notice of rescission to the contractor or his agent at his place of business given in the contract or by mailing the notice of cancellation to the contractor to his place of business given in the contract or by mailing the notice of cancellation to the contractor to his place of business given in the contract by depositing a properly addressed certified letter in a United States post office



or mail box, but if rescinded after forty-eight hours, all defenses in mitigation of damages and any right of action or defense that arises out of the transaction can be offered by the owner. However, where the owner cancels a contract as stated above, the contractor shall be entitled to the following payments from the owner: Where the contract entered into is for a sum less than five hundred dollars, the owner shall pay to the contractor the sum of twenty-five dollars; for contracts between the sum of five hundred dollars and one thousand dollars, the sum payable shall be fifty dollars, and for all other contracts the sum payable shall be seventy-five dollars.

§ B32-360.0. **False or fraudulent representation; damages.**—a. Any contractor, canvasser or seller of home improvements who shall knowingly make any false or fraudulent representations or statements or who makes or causes any such statements to be made in respect to the character of any sale, or the party authorizing the same, or as the quality, condition, or value of any property offered by him for sale, shall be deemed guilty of a misdemeanor, and, upon conviction thereof, shall be punished by imprisonment not exceeding one year or by a fine not exceeding one thousand dollars.

b. Any person who is induced to contract for home improvements in reliance on false or fraudulent representations or statements knowingly made, may sue and recover from such home improvement contractor or solicitor a penalty of five hundred dollars in addition to any damages sustained by him by reason of such statements or representations made by the contractor or by his agents or employees.

§ B32-361.0. **Exceptions.**—No contractor's license shall be required in the following instances:

1. An individual who performs labor or services for a contractor for wages or salary.

2. A plumber, electrician, architect, professional engineer, or any other such persons who is required by state or city law to attain standards of competency or experience as a prerequisite to engaging in such craft or profession, and who is acting exclusively within the scope of the craft or profession for which he is currently licensed pursuant to such other law.

3. Any retail clerk, clerical, administrative, or other employee of a licensed contractor, as to a transaction on the premises of the contractor.

4. This article shall not apply to or affect the validity of a home improvement contract otherwise within the purview of this article which is made prior to the effective date of the respective provisions of this article governing such contracts.

5. Any home improvement, where the aggregate contract price for all labor, materials and other items is less than two hundred dollars. This exemption does not apply where the work is only a part of a larger or major operation, whether undertaken by the same or a different contractor, or in which a division of the operation is made in contracts of amounts less than two hundred dollars for the purpose of evasion of this provision or otherwise.

## HOME IMPROVEMENT BUSINESS

§ B32-362.0. **Power to investigate.**—The commissioner upon reasonable cause should believe that any licensee or any other person has violated any of the provisions of this article or any other law, relating to home improvement business shall have the power to make such investigation as he shall deem necessary, and to the extent necessary for this purpose, he may examine such licensee or any other persons and shall have the power to compel the production of all relevant books, records, accounts, documents or other records.

§ B32-363.0. **Hearings on charges; decision.**—No license shall be suspended or revoked nor fine imposed until after a hearing had before an officer or employee of the department designated for such purpose by the commissioner upon notice to the licensee of at least ten days. The notice shall be served either personally or by registered mail and shall state the date and place of hearing and set forth the ground or grounds constituting the charges against the licensee. The licensee or registrant shall be heard in his defense either in person or by counsel and may produce witnesses and testify in his behalf. A stenographic record of the hearing shall be taken and preserved. The hearing may be adjourned from time to time. The person conducting the hearing shall make a written report of his findings and a recommendation to the commissioner for decision. The commissioner shall review such findings and the recommendation and, after due deliberation, shall issue an order accepting, modifying or rejecting such recommendation and dismissing the charges or suspending or revoking the license. For the purpose of this article, the commissioner or any officer or employee of the department designated by him may administer oaths, take testimony, subpoena witnesses and compel the production of books, papers, records and documents deemed pertinent to the subject of investigation.

§ B32-364.0. **Judicial review.**—The action of the commissioner in suspending, revoking or refusing to issue or renew a license may be reviewed by a proceeding brought under and pursuant to article seventy-eight of the civil practice law and rules.

§ B32-365.0. **Violations and penalties.**—1. Any person who shall own, conduct or operate a home improvement business without a license therefor or who shall violate any of the provisions of this article, with the exception of violations referred to in § B32-360.0, or having had his license suspended or revoked shall continue to engage in such business, shall be guilty of a misdemeanor, and upon conviction, shall be punishable by imprisonment for not more than six months, or by a fine of not more than one thousand dollars, or both such fine and imprisonment, and each such violation shall be deemed a separate offense.

2. The corporation counsel may bring an action in the name of the city to restrain or prevent any violation of this act or any continuance of any such violation.

§ B32-366.0. **Official acts used as evidence.**—The official acts of the commissioner and the department shall be prima facie evidence of the facts therein and shall be entitled to be received in evidence in all actions at law and other legal proceedings in any court or before any agency, board, body or officer.

§ B32-367.0. Separability clause.—If any part or provision of this article or the application thereof to any person or circumstances be adjudged invalid by any court of competent jurisdiction, such judgment shall be confined in its operation to the part, provision or application directly involved in the controversy in which such judgment shall have been rendered and shall not affect or impair the validity of the remainder of this article or the application thereof to other persons or circumstances, and the council hereby declares that it would have enacted this article or the remainder thereof had the invalidity of such provision or application thereof been apparent.

§ 2. This local law shall take effect October first, nineteen hundred sixty-eight.

Appendix B: Amended Regulations Relating to the Home Improvement Business

**DEPARTMENT OF CONSUMER AFFAIRS**

**Amendments to Regulations Relating to the Home Improvement Business**

NOTICE IS HEREBY GIVEN PURSUANT TO SECTION 1105 OF THE CITY Charter that, due and proper publication in THE CITY RECORD having been made, and an opportunity for comment having been duly afforded, amended regulations regarding the Home Improvement Business are adopted pursuant to Section 773-4.0 of Title A of Chapter 32 of the Administrative Code of The City of New York effective September 15, 1975, to read as follows:

**AMENDED REGULATIONS RELATING TO HOME IMPROVEMENT BUSINESS**

**1. Content and Cancellation of the Contract**

(a) Every agreement to perform a home improvement shall be evidenced by a written contract and each home improvement contractor or salesperson shall furnish to the buyer a fully completed legible copy of the entire home improvement contract at the time of its execution which shall contain the date of the transaction; the contractor's name, office address, telephone number and license number; and the salesperson's name and license number legibly printed thereon. The home improvement contract shall be in English and any other language, e.g., Spanish, that was principally used in the oral sales presentation.

(b) Any advertised representation, including, but not limited to, any charge, guaranty, or warranty, shall be clearly stated and made a part of the home improvement contract.

(c) Each home improvement contract shall contain a clause wherein the contractor agrees to furnish the buyer with a certificate of Workmen's Compensation Insurance prior to commencement of work pursuant to the contract.

(d) Each home improvement contract shall contain, on the face of the contract, a clause wherein the contractor agrees to procure all permits required by local law.

(e) Each home improvement contract shall contain, in immediate proximity to the space reserved in the contract for the signature of the buyer, in bold face type of a minimum size of 10 points, a statement in the following form:

**YOU, THE BUYER, MAY CANCEL THIS TRANSACTION AT ANY TIME PRIOR TO MID-NIGHT OF THE THIRD BUSINESS DAY AFTER THE DATE OF THIS TRANSACTION. SEE THE ATTACHED NOTICE OF CANCELLATION FORM FOR AN EXPLANATION OF THIS RIGHT.**

(f) The contractor or salesperson shall furnish to the buyer at the time s/he signs the home improvement contract a completed form in duplicate captioned "NOTICE OF CANCELLATION" which shall be attached to the contract and easily detachable, and which shall contain in ten point bold face type, in English and in any other language used in the contract; the name and address of the contractor, the date of the transaction, the date until which the buyer may give notice of cancellation, and the following statement:

**NOTICE OF CANCELLATION**

(enter date of transaction)

(Date)

**YOU MAY CANCEL THIS TRANSACTION, WITHOUT ANY PENALTY OR OBLIGATION, WITHIN THREE BUSINESS DAYS FROM THE ABOVE DATE. IF YOU CANCEL, ANY PROPERTY TRADED IN, ANY PAYMENTS MADE BY YOU UNDER THE CONTRACT OR SALE, AND ANY NEGOTIABLE INSTRUMENT EXECUTED BY YOU WILL BE RETURNED WITHIN 10 BUSINESS DAYS FOLLOWING RECEIPT BY THE SELLER OF YOUR CANCELLATION NOTICE, AND ANY SECURITY INTEREST ARISING OUT OF THE TRANSACTION WILL BE CANCELLED. IF YOU CANCEL, YOU MUST MAKE AVAILABLE TO THE SELLER AT YOUR RESIDENCE, IN SUBSTANTIALLY AS GOOD CONDITION AS WHEN RECEIVED, ANY GOODS DE-**

LIVERED TO YOU UNDER THIS CONTRACT OR SALE; OR YOU MAY IF YOU WISH, COMPLY WITH THE INSTRUCTIONS OF THE SELLER REGARDING THE RETURN SHIPMENT OF THE GOODS AT THE SELLER'S EXPENSE AND RISK.

IF YOU DO MAKE THE GOODS AVAILABLE TO THE SELLER AND THE SELLER DOES NOT PICK THEM UP WITHIN 20 DAYS OF THE DATE OF YOUR NOTICE OF CANCELLATION, YOU MAY RETAIN OR DISPOSE OF THE GOODS WITHOUT ANY FURTHER OBLIGATION, IF YOU FAIL TO MAKE THE GOODS AVAILABLE TO THE SELLER, OR IF YOU AGREE TO RETURN THE GOODS TO THE SELLER AND FAIL TO DO SO, THEN YOU REMAIN LIABLE FOR PERFORMANCE OF ALL OBLIGATIONS UNDER THE CONTRACT. TO CANCEL THIS TRANSACTION, MAIL OR DELIVER A SIGNED AND DATED COPY OF THIS CANCELLATION NOTICE OR ANY OTHER WRITTEN NOTICE, OR SEND A TELEGRAM TO [Name of seller], AT [address of seller's place of business] NOT LATER THAN MIDNIGHT

(Date)

I HEREBY CANCEL THIS TRANSACTION.

(Date)

(Buyer's signature)

(g) The contractor or salesperson shall inform the buyer orally at the time s/he signs the contract, of his or her right to cancel.

(h) The contractor or salesperson shall not misrepresent in any manner the buyer's right to cancel.

(i) Until the contractor or salesperson has complied with regulations (e) (f) the buyer or any other person obligated for any part of the contract price may cancel the home improvement contract by notifying the contractor or salesperson at any time, in any manner and by any means of his or her intention to cancel. The period prescribed by Regulation 1(e) shall begin to run from the time the contractor or salesperson complies with sections (e) (i).

(j) The buyer's notice of cancellation to the contractor or salesperson need not take the form prescribed and shall be sufficient if it indicates the intention of the buyer not to be bound.

(k) The contractor or salesperson shall not fail or refuse to honor any valid notice of cancellation by the buyer and within ten business days after the receipt of such notice, the contractor or salesperson shall (i) refund all payments made under the contract; (ii) cancel and return any negotiable instrument executed by the buyer in connection with the contract; (iii) take any action necessary or appropriate to terminate promptly any security interest created in the transaction; and, (iv) Within ten business days of receipt of the buyer's notice of cancellation the contractor or salesperson shall notify the buyer whether the contractor intends to repossess or to abandon any shipped or delivered materials.

(l) The contractor or salesperson shall not negotiate, sell, transfer or assign any note or other evidence of indebtedness to a finance company or other third party prior to midnight of the fifth business day following the day the contract was signed.

(m) A home improvement contract may not be cancelled if the buyer initiated the contract and requested commencement of work without delay because of an emergency, provided that the buyer furnishes the contractor with a separate dated and signed personal statement in the buyer's handwriting describing the situation requiring immediate remedy and expressly acknowledging and waiving the right to cancel the contract within three business days.

(n) For purposes of this regulation a business day is any calendar day except Sunday, or the following business holidays: New Year's Day, Washington's Birthday, Memorial Day, Independence Day, Labor Day, Columbus Day, Veteran's Day, Thanksgiving Day, and Christmas Day.

2. A licensed salesperson shall exhibit a current license to any buyer or prospective buyer upon request, whether the request is made at the salesperson's place of business or elsewhere in The City of New York.

3. A salesperson shall notify the Department of Consumer Affairs, by written confirmation from his or her employer, within 48 hours of employment. Where the salesperson has more than one employer, each employer shall file written consent with the Department of Consumer Affairs, such consent to include the name or names of other employees of the salesperson.

#### 4. Advertising and Selling Practices

##### (a) License number.

All advertising and sales literature must contain the license number of the contractor. For purposes of this regulation, an alphabetical listing in a telephone directory shall not be considered advertising.

##### (b) Prices and Illustrations.

Prices and descriptions of articles advertised shall be so placed in relation to any illustration that they will not be deceptive or misleading. An advertisement shall not be so designed as to give the impression that the price or terms of the featured merchandise apply to other merchandise in the advertisement when such is not the fact. An advertisement shall not be used which features merchandise at a price or terms displayed, together with illustrations of higher-priced merchandise, so arranged as to give the impression that the lower price or more favorable terms apply to the higher priced merchandise, when such is not the fact.

##### (c) Headlines.

Headings shall be free from exaggeration or deception. For example, a heading which refers to a different make, brand, grade, or quality than the item or items illustrated or listed immediately, therewith shall not be used. Headings and captions shall conform with the descriptions in the text.

##### (d) "Savings" not a Selling Price.

A savings claim shall not be expressed in any manner which implies that the amount specified is the selling price of the merchandise.

(e) Descriptions and illustrations of advertised items or offers shall accurately portray the products to be sold as to size, quality, quantity and design.

##### (f) Materials.

Any description in advertising or selling of materials to be furnished shall be accurate and there shall be no statement or implication that material will be of a particular type when such is not in fact the case.

##### (g) Advertised Price, Limitations.

When a price or specific credit terms are featured in an advertisement, the advertisement shall accurately describe what is being offered at that price or terms, (e.g. Where an item such as "10 feet by 16 feet Extension," "10 feet by 15 feet Basement," etc., is featured at a price or specific credit terms, this shall mean that a finished extension basement, etc., will be built at the advertised price or terms.) Any limitations or conditions on what will be supplied at the featured price or on credit terms shall be clearly and conspicuously stated in immediate conjunction with the featured statement, (e.g.: "14 feet by 21 feet Frame Garage-Unpainted," "10 feet by 15 feet Extension-Shell Only.")

##### (h) Installation Charge.

If installation is extra, the advertising shall clearly and conspicuously disclose the fact in immediate conjunction therewith. For example:

"Installation Extra"

"Plus Installation"

"Installation at Extra Cost"

##### (i) Accessories and Extra Charge.

If the price advertised does not include all of the accessories which either appear in the advertisement, or which are necessary to effect proper installation and the use of the item (such as hardware, panels, frames, etc.), the advertisement shall state that fact clearly and prominently in close conjunction with the advertised price. Extra charges shall not be used as a device to disguise the actual selling price of merchandise.

##### (j) Delivery Charges.

If an extra charge is required to make delivery of any advertised home improvement or part thereof, such requirement shall be clearly and conspicuously stated in the advertisement.

##### (k) "Factory to You," "No Dealers".

General statements such as "Factory to You," "Direct to You," "Buy from Manufacturer," "Save the Middleman's Profit" or phrases of similar meaning shall not be used unless the advertiser is actually the maker or producer of the merchandise advertised or offered for sale.

##### (l) Guaranty or Warranty.

If reference is made to a guaranty or warranty or the word "guaranteed" or "warranted" is used, the terms, conditions, and period of time covered thereby shall be clearly and conspicuously disclosed in the advertisement. The terms shall indicate whether "labor and material only," "repair," "replacement," or "full (partial) refund" is offered. Any limitations shall be disclosed in the advertisement.

## (m) Reasonable Fulfillment, "Lifetime."

Guaranty shall not extend for a period of time beyond the normal life of the item or service, or in the case of guarantees against defective materials and workmanship, beyond the time within which defective materials and workmanship are likely to show up "Lifetime" and other long-term guarantees shall not be made.

## (n) Credit and Credit Charges.

All statements and claims regarding installment buying plans, and finance, credit service, carrying or service charges, etc., including references to down-payments and amounts and frequency of payments, shall be accurate and clearly understandable, and made in good faith.

## (o) Credit Terms.

Where any repayment price is offered, it shall be stated in specific amounts per month.

## (p) Price Reductions.

Claims which state or imply a price reduction or savings from the advertiser's previous price, whether as a dollar amount or percentage, must be based on the advertiser's usual and customary selling price for the item in the normal and regular course of his business. Such claims shall not be based on isolated or infrequent sales, on fictitious list prices, or by "guesstimating."

(q) Phrases featuring a sale with a stated time limitation (e.g. "3-Day Sale") shall be used only when the advertised items are to be taken off sale and will revert to a higher price for a reasonable length of time, immediately following the sale.

## (r) Claimed Results.

Claims as to performance, protection, results which will be obtained by or realized from a particular home improvement product or service shall be based on known and provable facts. Extravagant claims such as "cuts fuel bill 30 per cent," "outlasts..." the accuracy of which is dependent on factors over which the advertiser or seller has no control, should not be used.

## (s) Model Home and Referral Offers.

No advertisement shall promise to any buyer or prospective buyer that his or her dwelling will serve as a so-called "model home" or "advertising job," or other similar representation, wherein the buyer or prospective buyer is led into believing that s/he will be paid a commission or other compensation for any sale made in the vicinity or within any specified distance from his or her home, or that the cost of the purchase of any home improvement product or service will thereby be reduced or fully paid.

## (t) Insured and Bonded.

Where claims of being insured and/or bonded appear in an advertisement, the nature of the insurance and/or bond shall be distinctly stated in the advertisement.

## (u) Pricing.

If a price ("per square foot," or other basis) is quoted in the advertising of residential aluminum siding which does not include all costs for labor, parts, and accessories for the proper functioning and appearance of such installed product (e.g. starter-strips, door and window trim, window head flashing, back-up pieces and corner pieces), it shall be clearly and conspicuously qualified in conjunction therewith by some explanatory statement, such as "Panels Only-Necessary Accessories at Extra Cost."

5. In the performance of any Home Improvement Contract it shall be the non-delegable duty and obligation of the prime contractor to secure or see to the securing of each and every permit, license, certificate or occupancy, special exception or the like necessary to the proper completion of such contract in accordance with applicable state or local building laws.

6. Each home improvement contractor shall maintain books of account, copies of all contracts with buyers, and other such records as shall properly and completely reflect all transactions involving the home improvement business. These records shall be maintained for six years or the length of time of the contract guarantee, whichever is longer.

7. A home improvement contractor must treat all funds received from a customer pursuant to a home improvement contract as trust funds to be applied solely to the payment of expenses directly related to the home improvement. Such funds may not be applied to the payment of expenses unrelated to the home improvement unless and until the home improvement is completed and all the expenses for direct labor, material and sub-contractors related thereto have been paid by the contractor.

## EXPLANATION

The Federal Trade Commission has promulgated a rule concerning a cooling-off period for door-to-door sales. These amendments incorporate the Federal Trade Regulation Rule into the Department of Consumer Affairs' regulation of Home Improvement Contractors. The amended regulations also require disclosure in the contract of the contractor's duty vis à vis Workmen's Compensation Insurance and to obtain various permits required by local law, as well as requiring certain record keeping procedures.

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ELINOR GUGGENHEIMER, Commissioner.

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Reprinted from The City Record of August 15,  
1975

Effective September 15, 1975

## DEPARTMENT OF CONSUMER AFFAIRS

### Amendments to the Home Improvement Business Regulations

NOTICE IS HEREBY GIVEN PURSUANT TO SECTION 1105 OF THE CITY Charter that, due and proper publication in THE CITY RECORD having been made, and an opportunity for comment having been duly afforded, amended regulations regarding the Home Improvement Business are adopted pursuant to Section 773-4.0 of Title A, Chapter 32 of the Administrative Code of The City of New York, effective November 30, 1975, to read as follows:

#### AMENDMENT RELATING TO HOME IMPROVEMENT BUSINESS REGULATIONS

8. Except as provided in paragraph f(m), the home improvement contractor shall not perform or cause or permit the performance of any of the following actions until after the three day cancellation period has expired and s/he is reasonably satisfied that the customer has not exercised his or her right of cancellation:

- (a) Disburse any money other than in escrow;
- (b) Make any physical changes in the property of the customer;
- (c) Perform any work or service for the buyer; or
- (d) Make any deliveries to the residence of the customer if the creditor has retained or will acquire a security interest other than one arising by operation of law.

#### EXPLANATION

The Federal Consumer Credit Protection Act (15 USC 1635), which covers home improvements financed by loans, prohibits the commencement of work within the three day cancellation period. This amendment adds those provisions to our home improvement contractor regulations.

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ELINOR GUGGENHEIMER, Commissioner.

-199.1-

Reprinted from The City Record of October 30,  
1975  
Effective November 30, 1975



Appendix C: General Regulations of the DCA**DEPARTMENT OF CONSUMER AFFAIRS****Amendment to General Rules and Regulations of the Department of Consumer Affairs**

BY VIRTUE OF THE AUTHORITY VESTED IN ME AS COMMISSIONER OF the Department of Consumer Affairs under the provisions of Section 1105 of the New York City Charter and Section 833 of said Charter, I hereby amend the General Rules and Regulations of the Department of Consumer Affairs by the addition of the following Regulation:

Regulation 2. Display of sign. A licensee of the Department of Consumer Affairs of The City of New York shall display and post conspicuously at his place of business, at all times so as to be readily legible by patrons, a sign or placard not less than 12 inches by 18 inches in dimension with letters thereon not less than 1-inch high stationed thereon.

"This business is licensed by the Department of Consumer Affairs of The City of New York, 80 Lafayette Street, New York, N. Y. 10013, Complaint Phone: 964-7777."

License No. (current license number)."

Regulation 3. Display of license. A licensee or permittee of the Department of Consumer Affairs of The City of New York shall be required to display and post his license or permit in a conspicuous place upon the premises or at such other place as the Commissioner of Consumer Affairs may designate.

Regulation 4. Identification cards; possession and display. A licensee or permittee who shall have been issued an identification card pursuant to the Rules and Regulations of the Department of Consumer Affairs of The City of New York shall carry such card on his person at all times, and shall display said identification card upon the request of representatives of the Department or other interested persons.

The foregoing amendment shall take effect 30 days after this publication.

018

BESS MYERSON GRANT, Commissioner.

Reprinted from the City Record of October 18, 1969.  
Effective November 17, 1969.

**DEPARTMENT OF CONSUMER AFFAIRS****General Regulations 5 and 6**

NOTICE IS HEREBY GIVEN THAT PURSUANT TO SECTION 1105, OF THE New York City Charter, preliminary publication for the purpose of comment in THE CITY RECORD and filing with the City Clerk having been completed, the following general regulations of the Department of Consumer Affairs are hereby promulgated, and shall become effective January 4, 1971.

Regulation 5. Licensee's duty to appear at departmental proceedings. A licensee of the Department of Consumer Affairs of The City of New York shall personally respond, by the appearance at the Department of an officer of a corporate licensee, a partner, or the individual owner, to notices of hearing involving departmental proceedings relating to its laws, rules and regulations. Service of notice of hearing by ordinary mail directed to the licensee's place of business, residence, or the residence of an officer or principal stockholder of a corporate licensee, shall be sufficient.

Regulation 6. Change of address of principals. A corporate licensee, partnership, or individual owner, shall notify the Department of Consumer Affairs of The City of New York in writing of any change of address of an officer, stockholder, partner or individual owner.

December 2, 1970.

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BESS MYERSON GRANT, Commissioner.

Reprinted from the City Record of December 4, 1970.  
Effective January 4, 1971.

## DEPARTMENT OF CONSUMER AFFAIRS

### GENERAL REGULATION 7

#### Notice of Adoption of General Regulation Relating to the Payment of Small Claims Court Judgments

NOTICE IS HEREBY GIVEN PURSUANT TO SECTIONS 1105 AND 2203 (c) of the New York City Charter that, due and proper publication in THE CITY RECORD having been made, and an opportunity for comment having been duly afforded, General Regulation 7 relating to the payment of Small Claims Court judgments is adopted pursuant to Section 773-40(1) of Title A of Chapter 32 of the Administrative Code of The City of New York effective July 31, 1977, to read as follows:

#### GENERAL REGULATION 7—SMALL CLAIMS COURT JUDGMENTS

(a) No person shall be issued or allowed to hold or renew any license granted by the Department of Consumer Affairs if it shall be determined that there is any judgment of the Civil Court of The City of New York, Small Claims Court Part (hereinafter called the "Small Claims Court") outstanding against such person which has gone unsatisfied for a period of thirty (30) days from the date of entry of such judgment, unless said judgment has been stayed, appealed or is to be paid in installments or on a deferred basis pursuant to an agreement with the judgment creditor or said creditor's lawful representative.

(b) Any licensee of, or applicant for a license issued by, the Department of Consumer Affairs shall at the time of application for such license and at the time of filing for any renewal thereof, certify to said Department in writing either, (i) that there are not any outstanding, unsatisfied Small Claims Court judgments against it, or (ii) such judgments do exist but are either the subject of a pending appeal, have been stayed or are being paid pursuant to an agreement between the licensee, or prospective licensee, and the judgment creditor. The licensee or applicant for a license shall, in the situation described in (ii) above, list each such judgment showing the name and address of the judgment creditor, the amount of the judgment, the date of the judgment and the county in which the Small Claims Court granting the judgment is located. Where any judgment is being appealed or has been stayed the licensee, or applicant, shall attach to the certificate referred to above a copy of each notice of appeal or stay. Where the licensee or applicant is paying any such judgment in installments or on a deferred basis pursuant to an agreement with a judgment creditor such licensee or applicant shall attach a copy of such agreement to said certificate for each judgment being so paid.

(c) Any failure to supply the certificate called for herein, or any failure to make a full and truthful disclosure of the information called for by this regulation, shall constitute grounds for the Department to deny a license, in the case of an initial application, or to deny a renewal of a license to any licensee seeking such renewal.

#### EXPLANATION

The Department of Consumer Affairs has found the Small Claims Court an effective forum for many consumers. Unfortunately some merchants seek to undermine the effectiveness of this court by ignoring its judgments and trying through a variety of ways to block the collection of judgments rendered by the court. The Department believes such merchants are not fit persons to hold a Department license. Therefore, this regulation would require merchants to furnish us with information about any outstanding Small Claims Court judgments whenever they apply for a new license, or seek to renew an existing license. Changes in Small Claims Court procedures make it feasible for the Department to find out if a particular merchant is trying to cover up a record of ignoring court judgments.

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ELINOR C. GUGGENHEIMER, Commissioner.

Reprinted from The City Record, Vol. CV,  
No. 31504, p. 2121 dated June 30, 1977.  
Effective July 31, 1977.

Appendix D: License Enforcement Law of 1973

## THE CITY OF NEW YORK

## DEPARTMENT OF CONSUMER AFFAIRS

## LOCAL LAWS OF THE CITY OF NEW YORK

FOR THE YEAR 1973

No. 20

Introduced by Mr. Friedland (by Request of Commissioner of Consumer Affairs)—  
**A LOCAL LAW** to amend the administrative code of the city of New York, in  
 relation to the licensing of various activities.

Be it enacted by the Council as follows:

Section 1. Title A of chapter thirty-two of the administrative code of the city of  
 New York is hereby repealed and re-enacted to read as follows:

## TITLE A

## License Enforcement Law of 1973

§ 773-1.0 The council finds that for the protection and relief of the public from  
 deceptive, unfair and unconscionable practices, for the maintenance of standards of  
 integrity, honesty and fair dealing among persons and organizations engaging in licensed  
 activities, for the protection of the health and safety of the people of New York City and  
 for other purposes requisite to promoting the general welfare, licensing by the department  
 of consumer affairs is a necessary and proper mode of regulation with respect to certain  
 trades, businesses and industries. The council finds further that, in order to secure the  
 above-mentioned purposes, and generally to carry out responsibilities for supervising and  
 regulating licensed activities, trades, businesses and industries, the commissioner of con-  
 sumer affairs requires powers, remedies and sanctions which are equitable, flexible and  
 efficient. Finally, the council finds that sanctions and penalties applied by the commissioner  
 and by the courts for the violation of laws and regulations by individuals and organiza-  
 tions engaging in various licensed activities, trades, businesses and industries, must be  
 sufficient to achieve these above-mentioned purposes of licensing.

§ 773-2.0 **Definitions.**—Wherever used in this chapter:

- a. "Commissioner" shall mean the commissioner of consumer affairs.
- b. "Department" shall mean the department of consumer affairs.
- c. "License" shall mean an authorization by the department of consumer  
 affairs to carry on various activities within its jurisdiction, which may take the  
 form of a license, permit, registration, certification or such other form as is desig-  
 nated under law, regulation or rule.
- d. "Organization" shall mean a business entity, including but not limited to  
 a corporation, trust, estate, partnership, cooperative, association, firm, club or society.
- e. "Person" shall mean a natural person or an organization.
- f. "Trade name" shall mean that name under which an organization or  
 person solicits, engages in, conducts or transacts a business or activity.

§ 773-3.0 **Construction of this title and other titles of this chapter.**—The provi-  
 sions of this title and other titles contained in this chapter shall be liberally construed in  
 accordance with the legislative declaration of the city council set forth in section 773-1.0.

§ 773-4.0 **Powers of the commissioner of consumer affairs with respect to  
 licensing.**—a. The commissioner shall have cognizance and control of the granting,  
 issuance, transferring, renewal, denial, revocation, suspension and cancellation of all li-  
 censes issued under this chapter and under all other laws conferring such powers upon  
 him. The commissioner or the commissioner's designee shall collect all fees for all such  
 licenses and permits and shall otherwise enforce the provisions of this chapter.

- b. The commissioner shall, as he determines necessary and appropriate, promulgate,  
 amend and rescind regulations and rules:
  1. to carry out the powers and duties of the department;
  2. to prevent and remedy fraud, misrepresentation, deceit and unconscionable  
 dealing, and to promote fair trade practices by those engaging in licensed activities;
  3. to require adequate disclosure by those engaging in licensed activities of both  
 the terms and conditions under which they perform licensed activities, adequate  
 disclosure of the true names or true corporate names of licensees, and adequate  
 disclosure of applicable local, state and federal law pertinent to consumers' interests  
 regarding the conduct of activities licensed under this chapter;
  4. to require that licensees keep such records as he may determine are necessary  
 or useful for carrying out the purposes of the chapter and, except as specifically set  
 forth in this chapter, retain them for three years;

5. to ensure that all persons and organizations licensed under this chapter have made appropriate financial disclosure, and that the premises complies with all legal requirements necessary to engage in the licensed activity;

6. with respect to licensed activities, to protect the health, safety, convenience and welfare of the general public; and

7. to ensure that those engaging in licensed activities do not discriminate against any person on the basis of age, sex, race, color, national origin, creed or religion in violation of city, state or federal laws.

c. The commissioner shall compile all regulations and rules promulgated by the department and maintain a copy thereof, available for public inspection at his principal office at such times as that office shall be open for business. A record of each license issued indicating its kind and class, the license number, the fee received therefor and such other records as the commissioner may require shall be kept by the department.

d. The commissioner or the commissioner's designee shall be authorized to conduct investigations, to issue subpoenas, to receive evidence, to hear complaints regarding activities for which a license is or may be required, to take depositions on due notice, to serve interrogatories, to hold public and private hearings upon due notice, to take testimony and to promulgate, amend and modify procedures and practices governing such proceedings.

e. The commissioner shall be authorized, upon due notice and hearing, to suspend, revoke or cancel any license issued by him in accordance with the provisions of this chapter and, except to the extent that dollar limits are otherwise specifically provided for in this chapter, the commissioner or the commissioner's designee may impose or institute fines of not more than three hundred and fifty dollars nor less than five dollars for each violation of this chapter and regulations and rules promulgated under it; the commissioner may arrange for the redress of injuries caused by such violations, and may otherwise provide for compliance with the provisions and purposes of this chapter and with regulations and rules promulgated under this chapter. The commissioner or the commissioner's designee shall be authorized to suspend the license of any person pending payment of such fine or pending compliance with any other lawful order of the department. The commissioner shall be authorized to impose a fine or to suspend a license or both for a failure to appear at a hearing at the department after due notice of such hearing. If a license has been suspended, it shall be returned to the department forthwith upon receipt of the order of suspension. Failure to surrender the license shall be grounds for a fine or revocation of the license.

f. The commissioner, upon due notice and hearing, may require that persons licensed under this chapter who have committed repeated, multiple or persistent violations of this chapter, conspicuously display at their place of business and in advertisements a notice (of a form, content and size to be specified by the commissioner), which shall describe the person's record of violations of this chapter; provided that, for each time such display is required, the commissioner may require that such notice be displayed for not less than ten nor more than one hundred days.

§ 773-5.0 Judicial enforcement.—a. Except as otherwise specifically provided in this chapter, or in subsection (b) of this section, any person, whether or not he holds a license issued under this chapter, who violates any provision of this chapter or any regulation or rule promulgated under it shall, upon conviction thereof, be punished for each violation by a fine of not less than twenty-five dollars nor more than five hundred dollars or by imprisonment not exceeding fifteen days, or both; and any such person shall be subject also to a civil penalty in the sum of one hundred dollars for each violation, to be recovered in a civil action.

b. Any person who engaged without a license therefor in an activity for which a license is required by any provision of this chapter, shall, upon conviction thereof, be subject to the following sanctions:

1. If he has never held a license for such activity, he shall be subject to a fine of not less than twenty-five dollars, nor more than five hundred dollars or by imprisonment not exceeding fifteen days, or both; and any such person shall be subject also to the payment of a civil penalty in the sum of the greater of twice the applicable license fee or one hundred dollars, to be recovered in a civil action.

2. If he has never held a license for such activity, and has been convicted once previously for engaging in such activity without a license, or if he has held such license and his license has lapsed prior to his perfecting an application for a renewal, he shall be subject to a fine of not less than one hundred dollars nor more than one thousand dollars or by imprisonment not exceeding thirty days, or both; and he shall be subject also to civil penalty in the sum of one thousand dollars to be recovered in a civil action.

Reprinted from The City Record of June 16, 1973.

Approved by the Mayor on June 5, 1973.

3. If he has held such a license, but his license has been suspended or revoked, or he has twice previously been convicted of engaging in such activity without a license, he shall be subject to a fine of not less than two hundred dollars nor more than two thousand dollars or by imprisonment not exceeding sixty days, or both; and he shall be subject also to a civil penalty in the sum of two thousand dollars to be recovered in a civil action.

c. Every manager or proprietor of a business required to be licensed under this chapter who consents to, causes or allows that business to operate without a license and every person aiding such unlicensed business and every owner or lessee of any building, part of building, grounds, room or place, who leases or lets the premises for the operation of any unlicensed business or assents that the premises be used for any such purpose is in violation of this chapter and shall be subject to a penalty of one hundred dollars per day for every day during which the unlicensed business operates. This penalty shall be prosecuted, sued for and recovered in the name of the city.

d. The corporation counsel is authorized to bring an injunction proceeding to restrain or enjoin any violation of this chapter.

§ 773-6.0. Applications; filing fee; license fee.—All applications for licenses shall be made to the commissioner or the commissioner's designee in such form and detail as shall be prescribed. Except as specifically provided in this chapter, every application shall include the license fee for the full license term. If the license is not issued, the lesser of fifty dollars or one half of the amount of the annual license fee shall be retained by the department as a non-returnable filing fee. In the event a license is issued for less than the full license term, the applicable fee shall be decreased proportionately to the nearest half year, except that in no case shall the fee be less than the fee for one half year. Where a two year license is surrendered for a reason other than suspension or revocation and less than one year of the license term has expired, the licensee may apply for a refund of an amount equal to one year's license fee. Except as otherwise specifically provided for in this chapter, reference to fees, license fees or any other word or similar import shall be deemed to be the license fee for one year. (Amended by LL No. 74 of 1977)

§ 773-7.0. License terms.—a. The commissioner shall establish by regulation the expiration date of licenses issued pursuant to this chapter.

b. Licenses issued pursuant to this chapter shall be for a two-year term unless otherwise specifically provided for in this chapter. (Amended by LL No. 74 of 1977)

§ 773-8.0. Transferability.—No license issued under this chapter shall be assignable or transferable unless otherwise specifically provided by law or regulation or rule issued by the commissioner.

§ 773-9.0. Change of corporate ownership.—If any person or organization becomes the beneficial owner of ten per cent or more of the stock of an organization to which a license has been granted pursuant to this chapter, if such person or organization previously did not hold at least a ten per cent interest, such license shall immediately become void unless prior written approval of the commissioner or the commissioner's designee is obtained.

§ 773-10.0. Change in a partnership.—Any license issued under this chapter shall immediately become void upon the addition or termination of any general partner or upon the dissolution of a partnership unless prior written approval of the commissioner or the commissioner's designee is obtained.

§ 773-11.0. Address of licensed activity.—Except as specifically provided in this chapter, a license shall be valid only for the location designated upon the application therefor, except in the case of licenses issued for activities which in their nature are carried out at large and not at a fixed place of business. No license shall be issued for more than one location. Licensees shall, at least ten days prior thereto, notify the commissioner or the commissioner's designee by registered or certified mail or personal service, of any change of address of the licensed premises or of the residence of the licensee.

**§ 73-120 Trade name.**—A license issued under this chapter shall be valid only for activities conducted under the name of the person or organization to whom such license was issued or under the trade name stated in the application therefor; if a licensed activity is to be conducted under a trade name, the application must state that trade name. No license shall be issued for more than one trade name, and no licensed activity may be carried out under more than one such name; provided, however, that if a person or organization was engaged in bona fide licensed activities under more than one such trade name or was issued a license to conduct licensed activities under more than one trade name prior to the effective date of this law, a single license shall be issued for such trade names. Licensees shall notify the commissioner or the commissioner's designee of any change of trade name at least ten days before such change becomes effective and no such change may take place without the prior written approval of the commissioner or the commissioner's designee.

**§ 73-130 Inspection; display of license.**—a. All licensed vehicles or places of business shall be regularly inspected, and reports thereof shall be made to the commissioner.

b. All licensees shall conspicuously post on their premises, licenses issued under this chapter and said licenses shall be accessible at all time for inspection by any interested person. Licensees having no fixed place of business shall exhibit their licenses upon the request of any interested person.

**§ 73-140 Bonds.**—Except as specifically provided in this chapter, a bond may be required for any licensed activity in a form and amount approved by the commissioner for the due observance of the provisions of this chapter and the laws, regulations and rules governing the conduct of licensed activities. The amount of the bond shall be established by the commissioner after a public hearing, five-day notice of which shall be published in The City Record.

**§ 73-150 Separability.**—If any provisions of this title or the application of such provisions to any person or circumstance shall be held unconstitutional or invalid, the constitutionality or validity of the remainder of this chapter and the applicability of such provision to other persons or circumstances shall not be affected thereby.

§ 2. The following sections of title B of chapter thirty-two of such code are hereby repealed:

- |                |                |
|----------------|----------------|
| § B32-60       | § B32-46.0(h)  |
| § B32-110      | § B32-47.0(d)  |
| § B32-119.0    | B32-52.0       |
| § B32-30.0(b)  | § B32-56.0(b)  |
| § B32-21.0     | § B32-57.0     |
| § B32-27.0     | § B32-65.0(h)  |
| § B32-32.0     | § B32-75.1     |
| § B32-39.0     | § B32-81.0     |
| § B32-137.0    | § B32-96.1     |
| § B32-141.0(b) | § B32-105.1    |
| § B32-142.0(b) | § B32-112.0(c) |
| § B32-143.0(d) | § B32-112.1    |
| § B32-145.0(d) | § B32-124.0    |
| § B32-148.0    | § B32-134.0    |
| § B32-149.0(b) | § B32-175.0    |
| § B32-151.0    | § B32-181.0    |
| § B32-170.0    | § B32-190.0    |
| § B32-44.0     | § B32-204.0    |
| § B32-45.5(b)  | § B32-217.0    |
| § B32-243.0    | § B32-368.0    |
| § B32-261.0    | § B32-326.0    |
| § B32-266.0    | § B32-331.0(h) |
| § B32-272.0    | § B32-457.0    |

§ 3. No existing right or remedy of any character shall be lost or impaired or affected by reason of the adoption of this local law.

§ 4. This local law shall take effect immediately.

Reprinted from The City Record of June 16, 1973. effective June 9, 1973.

Appendix E: Methodology: Approach, Acceptance, Bias

This study, Informal Resolution and Formal Adjudication of Consumer Complaints by a Licensing Authority: A Case Study, is based on field research which I did during my sabbatical from Northeastern University School of Law, from January through June, 1979.

My interest in studying New York City's Department of Consumer Affairs was aroused by Philip Schrag's provocative article based on his experiences there ten years earlier,<sup>205</sup> as well as by my continuing involvement in teaching a course in "Consumer Protection Planning" at Northeastern. I gained entree to DCA via my friendship with Marjorie M. Smith, who was a Deputy Commissioner of the Department at the time of my study. Marjorie encouraged me to do a study of some aspect of DCA operations, and helped me to obtain Commissioner Bruce Ratner's permission and support.

After interviewing several knowledgeable DCA officials to evaluate possible areas of study, I accepted the suggestion of Charles Greenman, the then Consumer Advocate, to study the consumer redress hearing process. The suggestion was particularly attractive to me since I had long been convinced of the critical importance for consumer protection of providing inexpensive and effective dispute resolution procedures, yet had been unaware of the DCA process or of any similar one. A check of the dispute resolution, consumer protection, and licensing literatures confirmed the absence of any extensive description, much less evaluation, of this or of any similar process.

Within the DCA hearing process, I soon decided to concentrate on home improvement cases, which constitute between 35 and 40% of the total. It was by far the largest single category,<sup>206</sup> the one in which

hearing officers were most comfortable awarding redress, and the only one for which DCA had a separate administrative unit (the Home Improvement Division) or its own expert to perform special inspections.

Access to the relevant DCA employees, all the necessary files and documents and the consumer redress hearings, was made easy by my connection with Marjorie Smith. Because of her, no one doubted my authority. For example, I was given a desk to use near the complaints file in the Complaints Department and a telephone with which to call consumers to check out the results of their cases. To enable me to sit in on home improvement hearings without my having to waste time waiting for them to begin, the employee who called the cases agreed to inform me at my desk whenever such a case was ready to be called. Many DCA employees who saw me every day just assumed I worked there, too.

In other words, my presence at DCA did not seem to alter the normal work environment. If this were an efficiency study I would have had to be very concerned about who knew what about me, and how this might have affected their behavior. As it was, I was much more concerned with the contents of the case files (most of which had been assembled before I had arrived), general procedures (which were obviously well settled, and were reflected in the case files), and decisions that were written with an eye to outside criticism in the first place. While hearing officers could have been on their best behavior for me,<sup>207</sup> they gave the definite impression of "doing their thing". For instance, one of them regularly arrived 20 minutes late for his hearings, as he apparently always did, despite his acute awareness of my "official" connection.<sup>208</sup>



Consumers at the hearings never showed any curiosity about me. Contractors sometimes realized I was an extra hand and raised an eyebrow, but I have no reason to suspect that those who received an explanation behaved any differently as a result. When I called consumers I was not looking for their reactions to DCA but simply for their statements as to whether the work was done or the refund made. It is well that nothing turned on my independent status since, despite my careful statement at the beginning of each conversation that I was a law professor doing a study of DCA procedures, most of them seemed to assume that I was working for DCA.

Access to small claims court was also not difficult. While I did not know anyone there in advance, introducing myself as a law professor studying small claims court quickly got me an interview with Phoenix Ingraham, Chief Clerk of the Civil Court. He offered to help out in any way that would be valuable, and began by introducing me to Tom Slattery, the clerk of the Manhattan small claims court. Unfortunately, Manhattan was not prime territory for home improvement contracts (at the end of a morning looking for home improvement contractor cases in their files, I had found only one such case in 150 file cards), I therefore moved my operation to the Brooklyn small claims court where the clerk, Stuart Feigel, after checking my bona fides with Ingraham, gave me a desk to sit at next to the file drawers and, fortuitously, just behind the counter clerk, where I was able to overhear the conversations between clerks and would-be claimants. I was there for a total of about 40 hours, spread over several weeks in March 1979. Again, my main interest was in the contents of the files (and in the responses of consumers to my calls inquiring about the end results of

their cases, which calls I made from my desk at DCA). The file cards had been filled out between July 24, 1978 and October 24, 1978, and whatever was going to happen in most of the cases already had before I arrived.

People who have behaved in a particular way in their jobs for years are not likely to significantly change their personae and their methods of operations when they realize they are being studied. Typically, they do not think there is anything wrong with what they have been doing, and they have little conscious control over their personae, anyway. Furthermore, they are not likely to change if they believe that nothing important to them turns on what the person doing the study observes and concludes. Neither the evening court personnel, nor those who worked in the clerk's office during the day, took me very seriously. Most of them seemed to assume that I was simply a graduate student writing at most a Master's thesis. I was clearly not an official or even a friend of an official in the system, and some of the clerks were short or even impolite to the claimants often enough to indicate that they either discounted my presence or else were unable to alter their long settled habits (such behavior might, of course, have been more frequent had I not been there).

Many of the consumers whom I telephoned from DCA also could not quite figure out who I was (a law professor, calling them??), and a couple were suspicious that maybe I was someone in cahoots with that thug-of-a-contractor, but they all gave me (most quite willingly) the little piece of information I needed, which was whether the work had been done, the settlement or judgment voluntarily paid, or the sheriff's execution successful.

I do not see that consumers in either my DCA samples or my small claims court sample had any reason to lie to me about whether a payment owed them was actually made. Once a dispute between two parties reaches the stage of a complaint to the licensing authority or a claim filed in court, it is most unlikely that the defendant will pay, whether in accordance with a settlement or in satisfaction of an official order, without obtaining a receipt or cancelled check, which the plaintiff would thereafter have great difficulty disputing. Biased statements as to whether the work was done are more likely, since (1) there may have been a disagreement or misunderstanding as to what work needed doing, so that the "it" in their statement "it was never done" might be different from the "it" that the hearing officer, arbitrator, or the contractor (in agreeing to a settlement) thought needed doing; and/or (2) "it" may have been done, but their distrust of the contractor is so great that they do not quite believe their eyes or are convinced it will fall apart tomorrow. They may not want to commit themselves until they have had some time to see whether it holds up.

I tried to control for this in cases where the contractor was supposed to do some repairs or some more work and those in which the consumer claimed the work was never done by asking whether the contractor came back and, if so, what he did. If the consumer admits that the contractor came back, she will usually admit he did something toward the required work, in which case I consider that the consumer received "partial redress". At least for quantitative purposes, I do not pretend to be able to make finer distinctions

than "substantial redress", "partial redress", and "no redress".

Access to arbitration hearings required a letter to Judge Francis X. Smith, the Administrative Judge of the Civil Court, who quickly sent his authorization to the clerk of the Brooklyn court for me to sit in on these otherwise private hearings. The clerks who work in the evening court are totally different from those who staff the office during the day. They were very accommodating to me the first evening I spent at the court, and largely ignored me thereafter. Their behavior toward litigants did not change, being throughout gruff, bossy, occasionally kind. I also spent one evening at the Queens small claims court, where most of the personnel did not know I was doing a study: they were, if anything, a mite less gruff and bossy than their Brooklyn counterparts who did know I was studying their operation.

The arbitrators, on the other hand, being lawyers, doubtless cared what a law professor thought about them. While they put on their "best" performances for me, I am sure these are the same performances they would have put on without me. The system of arbitrators works the same way that Tom Sawyer got his fence painted: the court graciously permits practicing or retired lawyers to play judge one evening each month without pay. While their abilities varied considerably, all the arbitrators I observed clearly treated this opportunity as a privilege and as a chance to show what wise and judicious judges they would have made had they but received the call.

My own attitudes toward both the DCA and the small claims court processes as well as toward the various people involved in them of course find expression throughout the non-quantitative sections of this paper, including the present one. This is not only inevitable

but largely helpful. I came to admire the intelligence, dedication, and genuine concern for consumers of many of the people involved, particularly at DCA. If some of that admiration comes through in my writing, it is principally a reflection of the qualities and accomplishments of the people who produced it. Similarly, the criticisms I sometimes express, particularly of some small claims court personnel, have bases in instances of insensitivity which I observed in their dealings with the public. That said, my judgements both of individual people and of the two systems as a whole may be somewhat prejudiced by factors which I will now attempt to trace.

I was and continue to be a friend of Deputy Commissioner Smith. The Licensing Division and the Home Improvement Division are within Deputy Commissioner Best's jurisdiction, and the Complaints, Calendar, and Adjudication Divisions were within Deputy Commissioner White's jurisdiction until he left in April, 1979. It is not clear to me whose jurisdiction they fell under thereafter. While Marjorie Smith clearly had some involvement in these areas (jurisdictional lines between Deputy Commissioners being less sharp in practice than they are on the organization chart), she had only been at DCA for about a year at the time of my study. She was clearly not responsible for the way these Divisions were operating, and was genuinely interested (and not entirely optimistic) about what I would find and its policy implications. She would have been disgusted if I came up with something she thought was a whitewash or a propaganda piece. Most of the other people I felt close to at DCA similarly did not see themselves as career DCA employees (many have already left),

were genuinely interested in being helpful to my study, and had no investment in reaching any particular conclusions.

On the other hand, it is easier for me to keep my critical distance from the career people both at DCA and at small claims court. They were typically both pleasant and helpful to me. I think I have done a good job here empathizing with them (understanding the cognitive and emotional frameworks with which they approach their job responsibilities), but their backgrounds and approaches are sufficiently different from mine that I have had little difficulty treating their job performances as objects of study to be evaluated by criteria I have developed elsewhere (rather than treating these performances as, at least in part, normative in themselves). Nonetheless, I am not a complete stranger to gratitude, and I may have unconsciously shaded my judgments in favor of the many people who were nice to me, and of the efficacy of the jobs that they do.

Another factor cutting in the same direction is my own desire to have uncovered a process that is effective, efficient, and broadly applicable. If I have, this study becomes important, and so to some extent do I. If not, while all is not lost, a promising opportunity has been missed. By way of disclaimer, I cannot be sure that I have not been more ready to accept evidence that DCA processes were working well than evidence that they were working poorly, and conversely, more ready to accept evidence that small claims court (which serves as a baseline) was working poorly than evidence that it was working well. However, predictable unconscious biases such as these can be counteracted. It was largely for the purpose of counteracting them that I relied so heavily on documentary evidence (e.g. notations on small claims court file cards that "execution satisfied", or letters in

DCA case files from the consumer confirming that the work had been done) and telephone calls to consumers narrowly focused on the question of whether the work (or whatever) had actually been done.

FOOTNOTES

1. In more technical terms, this is a court of general jurisdiction, as opposed to a court of limited or special jurisdiction, such as a small claims court.
2. For example, a high volume "legal clinic" in New York City presently calculates its rates on the basis of \$65 - \$75 per hour. At this rate, a fully litigated case would cost several thousand dollars. While a letter threatening suit could probably be had for \$100 and might well produce the desired settlement, a contractor who did not (for whatever reason) wish to settle at this point could be quite secure in calling the lawyer's bluff, knowing that the cost to the consumer of carrying out her lawyer's threat would be prohibitive.
3. Standard practice is, apparently, to demand at least \$1000 "up front" before litigation is actually undertaken. See note 97.
4. The principal exceptions are members of the occasional union-negotiated "judicare" program.

Under some circumstances a victorious plaintiff can recover her attorney's fees from the defendant. Examples are cases in Massachusetts in which the seller had employed "an unfair or deceptive act or practice," Mass. Gen. L. ch 93A, sec. 9, and cases anywhere in the United States in which the warrantor of a consumer product has failed to carry out his obligation under the warranty, 15 U.S.C. sec. 2310(d). However, unless an attorney can be found who is willing not only to finance his or her own expenses until recovery from the defendant can be had, but also to assume the risks that the defendant will prevail (on the merits, on a "technicality", or on appeal) or that a judgment against him will prove uncollectible, fee-shifting



statutes will not make the formal judicial process accessible to most consumers.

5. See Note, "The Persecution and Intimidation of the Low-Income Litigant as Performed by the Small Claims Court in California," 21 Stan. L. Rev. 1659 (1969).

6. See e.g. New York Public Interest Research Group, Inc. (NYPIRG), Winning Isn't Everything 6 (1976), discussed in sec. II.B., below, at note 33.

7. This is true both because the marginal propensity to consume declines as income rises, and because the poor tend to pay more than the middle class for comparable items. See D. Caplovitz, The Poor Pay More: Consumer Practices of Low Income Families (1963).

8. See H. Ross and N. Littlefield's study of a business which apparently did treat consumers fairly for just these reasons, "Complaint as a Problem-solving Mechanism," 12 Law & Soc. Rev. 199 (1978).

9. The average home improvement contract involved in a complaint to New York City's Department of Consumer Affairs (hereinafter, DCA) in 1978 cost the consumer \$2,091; the median such contract cost her \$1,536. See sec. VI.B.(1), below, at note 167.

10. See H. Ross and N. Littlefield, note 8, at 213.

11. See e.g. J. Ruhnka and S. Weller, Small Claims Courts: A National Examination (1978); A. Sarat, "Alternatives in Dispute Processing: Litigation in a Small Claims Court," 10 Law & Soc. Rev. 339 (1976); B. Yngvesson and P. Hennessey, "Small Claims, Complex Disputes: A Review of the Small Claims Literature," 9 Law & Soc. Rev. 219 (1975).

12. E. Steele, "Fraud, Dispute and the Consumer: Responding to

Consumer Complaints," 123 U. Pa. L. Rev. 1107 (1975); Center for the Analysis of Public Issues, The New Jersey Office of Consumer Protection: A Promise Unfulfilled (1970); compare W. Whitford and S. Kimball, "Why Process Complaints? A Case Study of the Office of the Commissioner of Insurance of Wisconsin," 1974 Wisc. L. Rev. 639.

13. R. Wexler, "Court-ordered Consumer Arbitration," 28 Arb. J. 175 (1973); J. McGonagle, "Arbitration of Consumer Disputes," 27 Arb. J. 65 (1972); M. Jones and B. Boyer, "Improving the Quality of Justice in the Marketplace: The Need for Better Consumer Remedies," 40 Geo. Wash. L. Rev. 357, 369-380 (1972).

14. Most recently, in L. Nader, "Disputing Without the Force of Law," 88 Yale L. J. 998 (1979).

15. For example, the Department of Consumer affairs of the State of California licenses home improvement contractors. Bus. & Prof. Code sec. 7150 - 7161. Its investigators handled more than 15,000 complaints from consumers of home improvements in the last half of 1978. In that period, it obtained about \$3.5 million in restitution or in additional work done for these consumers, and referred about 240 cases for formal hearings before the Office of Administrative Hearings. Contractors' State License Board, Report of Investigation Activity for the Six Months Ending December 31, 1978. While the hearing may be disciplinary in nature, it may also culminate in a stipulation that the contractor provide specific consumer redress, or in a suspension order which permits the contractor to complete specific work and to apply for reinstatement thereafter. See Bus. & Prof. Code sec. 7095, 7192. This system is structurally similar to DCA's. The extent to which it is similar in terms of procedures,

effectiveness, and efficiency remains to be investigated.

16. Contrast the systems investigated in the sources cited in note 12.

17. Formally, the Civil Court of the City of New York, County of \_\_\_\_\_ (The Bronx, Kings, New York, Queens, or Richmond), Small Claims Part.

18. See note 11 for the general literature. The Sarat study is based on the Manhattan (New York County) small claims court. The NYPIRG study, note 6, is based on the Queens court. See also Note, "How to Defeat the Jurisdiction (and Purpose) of Small Claims Court for Only Fifteen Dollars," 44 B'klyn L. Rev. 409 (1978) (data from Manhattan).

19. These data, and other statistics about the small claims courts not otherwise attributed, were given me in July, 1979 by Mr. Phoenix Ingraham, Chief Clerk of the Civil Court, or by his direction.

20. N.Y. City Civ. Ct. Act, sec. 1801.

21. The restrictions preventing the small claims court from ordering the defendant to perform, and from punishing him for failing to pay a judgment, derive from similar restrictions upon the law courts of England. Neither restriction, on the other hand, bound the court of equity operated by the Chancellor. In the United States, even today when most courts have both "legal" jurisdiction (derived from the law courts) and "equitable" jurisdiction (derived from Chancery), when a court is exercising its "legal" jurisdiction it is bound by these traditional limitations. New York's small claims courts, like most such courts, have only "legal" jurisdiction.

22. N. Y. City Civ. Ct. Act, sec. 301, 1801.

23. N. Y. City Civ. Ct. Act, sec. 1809.
24. N. Y. City Civ. Ct. Act, sec. 1802.
25. N. Y. City Civ. Ct. Act, sec. 1807. As to arbitrators' decisions, New York's Civil Practice Law and Rules (CPLR), sec. 7511(b)(1), provides that

"The award shall be vacated...if the court finds that the rights of (the protesting) party were prejudiced by:

- (i) corruption, fraud, or misconduct in procuring the award; or
- (ii) partiality of an arbitrator...; or
- (iii) an arbitrator...exceeded his power or so imperfectly executed it that a final and definite award upon the subject matter submitted was not made; or
- (iv) failure to follow the procedure of this article..."

26. My observations in this section were gathered during several days which I spent sitting at a desk just behind the counter in the Brooklyn small claims court clerk's office. Most of what I was doing there was going through file cards in completed cases in order to assemble a systematic sample of home improvement cases. I did, however, take advantage of my proximity to observe the waiting line and the interactions between clerks and claimants.

27. A 1979 statute, L. 1979, c. 78, sec. 1, which added sections 1813 and 1814 to the N. Y. City Civ. Ct. Act, provides in a roundabout way that businesses sued in the wrong name may nonetheless be liable for the resulting judgment.

28. The Rules of the Civil Court, sec. 2900.33(b)(1), provide that the hearing on a small claim shall be scheduled "not less than 15 nor more than 30 days from the date the action is recorded." The practice in the Brooklyn court during the period studied was to schedule hearings closer to 30 than to 15 days from the filing date. A shorter period would increase the difficulty of serving defendants

with timely notice.

29. Statistical information about the incidence of such settlements in home improvement cases, as well as about other possible dispositions of these cases, appears in sec. IV.A., below. Descriptions of typical settlements, as well as of other dispositions of home improvement cases, appear in sec. V.D., below.

30. The description of small claims hearing procedures in this section is based on ten evenings which I spent observing calendar calls and arbitrations at the Brooklyn court. It is in general outline consistent with my observations during one evening spent at the Queens court.

31. This rule derives from New York's Civil Practice Law and Rules (CPLR), sec. 4533-a, which permits the use of paid bills as prima facie proof of damages. The CPLR was designed with the needs of the State's formal court system in mind. The N. Y. City Civil Court Act, sec. 1804, entitled "Informal and simplified procedure on small claims," provides:

"The court shall conduct hearings upon small claims in such manner as to do substantial justice between the parties according to the rules of substantive law and shall not be bound by statutory provisions or rules of practice, procedure, pleading or evidence, except statutory provisions relating to privileged communications and personal transactions or communications with a decedent or mentally ill person...The Provisions of this act and the rules of this court, together with the statutes and rules governing supreme court practice, shall apply to claims brought under this article so far as the same can be made applicable and are not in conflict with the provisions of this article; in case of conflict, the provisions of this article shall control."

It is clear to me that applying CPLR sec. 4533-a to require a small claims plaintiff to produce a paid bill -- or a live "expert" witness, whose testimony is admissible on the issue under general

rules of evidence -- before she can recover for damage she has sustained is unfair to the claimant who cannot afford to have the repair done until she receives her compensation from the defendant. A principal purpose of the small claims court acts was to avoid the unfairness of applying procedural rules which prevent poor people from recovering their substantive due. A fair reading of N. Y. City Civ. Ct. Act, sec. 1804, would permit claimants who have not yet repaired the damage they suffered, and who cannot afford (or do not know) an expert witness, to recover so long as the judge or arbitrator is persuaded of the justice of their claims.

On May 9, 1980 I telephoned Mr. John White, Assistant Chief Clerk of the Civil Court, to inquire about the practice I observed in the Brooklyn court. His position is that "to use sec. 4533-a is the 'legal' thing to do, but not the practical thing to do," and that doing so was inconsistent with the spirit of the small claims provisions of the N. Y. City Civ. Ct. Act (sec. 1801 - 1814) and of the Rules of the Civil Court (sec. 2900.33). His impression was that in most of the boroughs a claimant would be permitted to recover without producing either a paid bill or an expert witness. When I pressed him about the contrary Brooklyn practice, he responded unhappily that "Brooklyn is an entity in itself."

For the practices of arbitrators in Brooklyn in applying this "rule", see text at note 104.

32. Directive No. 464, from Administrative Judge Francis Smith to all judges, clerks, and arbitrators (April 27, 1978) , provides:

"To all litigants who try their cases before an Arbitrator it is imperative that notice be brought home clearly to them that the award is final and no appeal can be taken therefrom.

This shall never be treated as pro forma. It is the duty of the Arbitrator to so inform the litigants prior to the hearing and ascertain that they understand it fully."

The reason given for the Directive is that "(n)umerous complaints by litigants in small claims matters contend that prior to signing the consent to arbitrate form, notice by the clerk or arbitrator concerning the purpose and effect of the arbitration hearing has not been understandingly given."

As indicated in the next paragraph, the consequences of giving a clear and undiluted warning that arbitrations are not appealable may be at least as bad as those which caused Judge Smith to issue this Directive. Furthermore, perhaps in an effort to avoid diluting the warnings, arbitrators rarely (in my experience) adverted to any of the adverse consequences of refusing to consent to arbitrations.

33. See NYPIRG, Winning Isn't Everything 6 (1976): 52% of the "successful" claimants in their 1976 sample were paid in full, 4.1% in part, and 43.8% not at all. This is consistent with the results of my small claims court sample. See sec. IV.A., below.

34. See id. at 4: 100% (31/31) of settlements in both their 1974-75 and their 1976 samples were carried out. My data is consistent with this.

35. Out of 38 cases in both NYPIRG samples which were decided by a judge, only 2 (5%) were appealed. Id. at 8.

36. These examples are, respectively, cases SC11 and SC20 drawn from my small claims court sample. They are discussed in more detail in note 129.

37. See note 33.

38. NYPIRG, note 33, at Appendix D.

39. NYPIRG found that only two out of 19 judgment creditors who sought assistance from a sheriff or marshall were able to collect, even with his help. Id. at 6. My own survey uncovered two successful executions in contrast to four unsuccessful attempts to collect with the sheriff's aid.

40. Out of the seven judgments not resulting from settlements as to which I was able to determine whether or not they were ever satisfied, three (all against licensees!) were satisfied and four (all against non-licensees!) were not.

The NYPIRG-Citibank Small Claims Court Action Center to assist judgment creditors is described in NYPIRG, Small Claims: Big Problems (1978).

41. N. Y. City Adm. Code, Ch. 32, Art. 42, set out in Appendix A.

42. Sec. B32-352.0(a).

43. Appendix C.

44. Sec. B32-355.0 (5).

45. This alerting procedure is rather catch-as-catch-can, since no check is made with the Complaint Division's vendor file or with the Home Improvement Division before a license is issued, and the license applicant is not even asked whether any DCA complaints are outstanding against him.

46. Sec. B32-358.0. This section was held unconstitutional in People v. Lavender, 48 N.Y.2d 334, 398 N.E.2d 530 (1979), in the context of a criminal conviction for violating the section's prohibition, in subdivision (1), of "abandonment or wilful failure to perform, without justification, any home improvement contract or project engaged in or undertaken by a contractor." The court held that the



section violated the 13th Amendment of the United States Constitution and two statutes (42 U.S.C. sec 1994, 15 U.S.C. sec. 1581(a) ) implementing it, in that it established a form of involuntary servitude, albeit one voluntarily contracted for.

While the opinion stresses the criminal nature of the punishment imposed, the court was apparently unaware that the section is enforced in any other way (e.g. by threat of license revocation). Since a court may, in an appropriate case, require a contractor to complete (or to hire someone else to complete) his contract on pain of penalties for contempt, see Matter of Grayson-Robinson Stores (Iris Construction Corp.), 8 N.Y.2d 133, 168 N.E.2d 377 (1960), and since even a professional's license can be revoked for failing to carry out his commitments, In Re Feld, 263 App. Div. 653, 34 N.Y.S.2d 213 (1942), the opinion in Lavender should be read as invalidating section B32-358.0 only in the context of criminal sanctions for failure to perform. When the question arises, DCA's procedure for enforcing this section should be likened to the arbitration board's award of specific performance in Matter of Grayson-Robinson Stores, and to the Appellate Division's revocation of the attorney's license for (inter alia) failure to execute his agreements in In Re Feld, and should be upheld.

There is, nonetheless, a risk that the Lavender opinion will be interpreted woodenly by a lower court as invalidating section B32-358.0 in all contexts, and hence removing the basis for DCA's consumer redress procedures with respect to home improvement contractors.

47. By sec. 773-4.0 of the License Enforcement Act of 1973. This Act is set out in Appendix D.

48. Compare Application of Hippodrome Garage, 69 Misc.2d 831, 331

N.Y.S.2d 206 (Sup. Ct. 1972), which had apparently been interpreted by some DCA hearing officers, even after the License Enforcement Act of 1973, as depriving them of jurisdiction to award restitution to consumers. See memorandum of 11/29/78 appended to DCA's Guide for Hearing Officers (1979/1980), which argues against this interpretation, citing a later Court of Appeals case dealing with (and approving) the power of a state licensing agency to award this remedy. Kostika v. Cuomo, 41 N.Y.2d 568, 394 N.Y.S.2d 862 (1977). Curiously, this memorandum, prepared by DCA's Advocacy Division, omits any reference to the License Enforcement Act of 1973, despite the fact that that Act provides the most persuasive distinction of the 1972 Hippodrome case.

49. Sec. 773-5.0(d); sec. B32-365.0(2).

50. See sec. IV.C., below, at note 90 for a justification of this estimate and the text following note 90 for a discussion of differences between licensees and non-licensees.

51. This procedure is set out in CPLR sec. 7803(4), 7804(b), and 7804(g).

52. My descriptions of informal DCA procedures are based on my discussions with the personnel involved in administering them, and on my personal observations of their behavior, during the period from January through June, 1979. I had a desk and telephone at my disposal in the Complaints Division, and was a familiar figure in the halls and offices of DCA, asking questions about aspects of procedures which I did not understand or about particular cases in my systematic samples or -- as in the case of consumer redress hearings -- just sitting in and observing. See Appendix E for a discussion of issues raised by this information-gathering methodology.

53. Complaints involving matters other than home improvement contracts generally receive more handling by the Complaints Division at each stage -- on the telephone, when received by mail, and when the consumer walks in. An effort is normally made either by a volunteer or by a salaried employee of the Division to settle the case with the "vendor". The difference is that for most complaint categories no specialized unit analogous to the Home Improvement Division has been created.

54. I refer to Mssrs. Goodman and Sendyka by name as well as by title, since both men had occupied their unique positions within DCA since these positions were established, leaving room for question whether either position and its attendant duties would be quite the same once its incumbent departed.

Mr. Sendyka did in fact leave DCA in early 1980, well after the information-gathering phase of this study was completed. As of May, 1980 DCA was in the process of hiring a replacement.

55. More of the flavor of the hearings can be gotten from reading sec. V.D., below, and the accompanying notes.

56. The hearing officer who checks this entry also fills out the "Directions to Inspector" blank of a "Special Inspection" report form, entering the precise issues about the job performance for which the special inspector's report is needed, and the telephone numbers of both parties who he should contact in order to arrange his special inspection.

57. See sec. V.D., below, for a more thorough description and explanation of typical DCA orders.

58. There were 34 cases in my three DCA samples (of complaints

filed, formal decisions promulgated, and hearings held) in which hearings were held, decisions requiring licensee action were issued, and I was able to ascertain the results. Proportions of cases in which licensees pursued each option are rounded to the nearest percent.

59. DCA, Guide for Hearing Officers (1979/1980), at 43.

60. These cases are D11, discussed in note 151, and D6/D20, discussed in note 161.

61. The bias of the DCA process towards consumer redress rather than licensee discipline is clear. As I point out in sec. VII.B., below, it is not always possible to achieve both objectives at once. The fact that disciplinary objectives regularly give way to remedial ones supports my characterization of the process as a species of "alternative" dispute resolution mechanisms. See sec. I.A., above.

62. I obtained some confirmation that this was true in practice as well as in theory by visiting both the Manhattan and the Queens small claims courts, interviewing their clerks, and inspecting their files. However, my conversation with Assistant Chief Clerk John White on May 9, 1980, see note 31, in which he responded to my questions about a particular practice I had observed in the Brooklyn court by asserting that "Brooklyn is an entity in itself," leaves me in some doubt as to whether further probing might have revealed other peculiarities in the Brooklyn court's practices. My best judgment, based on what I observed in the three courts and on the shared structural limitations of all of the City's small claims courts, is however that differences in results in the different courts are not likely to be significant.

63. See also Appendix E: "Methodology: Approach, Acceptance, Bias."

64. The files in question were numbered K9500/78 through K13999/78. "K" refers to King's County, the formal designation for Brooklyn; "78" refers to the year in which the case was filed.

65. Included, for example, were "roofing", "woodworking", "waterproofing", "modernization", "remodeling", "home improvement", "construction", and "contracting" companies, as well as those whose names included "storm windows", "aluminum", "doors", "cement", "awnings", and "security systems".

66. Appendix A. In one of the deleted cases the job had involved replacing the consumer's picture window; in the other it had involved carpentry done at the claimant's business. See N. Y. City Adm. Code, sec. B32-351.0(6); see also subd. (2), (3), and (4) of that section.

67. Furthermore, I assumed that many contractors would be suspicious of someone who was prying into cases that had been brought against them. Unlike the situation when I called consumers, I did not feel free to invoke my vague connection with DCA to reduce their defensiveness. With non-licensees my temporary possession of a DCA telephone line, and my willingness to supply them with the name and number of a DCA official with whom they could check my bona fides, would hardly have encouraged them to speak openly, as it had when I dealt with some initially suspicious consumers. With licensees, on the other hand, assertions of a quasi-official status might have created problems for DCA if, for example, a contractor were to complain to an elected official that having to deal with me was a legally unauthorized burden of licensing.

68. See sec. III.D., below.

69. In sec. II.B., above.

70. In sec. VI.B.(1), below.

71. For example, as to how the arbitrators regarded themselves, their role, and the parties before them, how they conducted the hearings, how the parties behaved at the hearings, and the relationships between the evidence they tried to present, the evidence they were permitted to introduce, and the evidence that apparently moved the arbitrators.

72. Of course, there may have been some cases involving home improvement contractors which were mishandled by the docketing clerks and never labelled "HIC", but I have several reasons for thinking such uncorrected mistakes were rare. First, the docketing clerk had to make a discrete decision whether to send the file to the Home Improvement Division. Once she decided to do so, marking the docket book was a mechanical process and part of her routine. Second, if she failed to catch the fact that a home improvement contract was involved, the file would go to an investigator whose responsibility was to call the vendor and try to obtain satisfaction for the consumer. The appropriate procedure for dealing with home improvement cases was well known among investigators, and the mistake would likely be corrected at this point. Finally, if any case in the 134000 series had been routed to the Home Improvement Division but not so marked in the docket book there is a good chance I would have discovered it, since I kept a close look-out for cases in this series when looking through Harold Goodman's files, hearing calendars, and DCA decisions. I never found a case which had not been properly marked in the docket ledger.

73. This occurred where the contractor was out-of-business and

therefore never even received the NL letter (12 cases), or where the last correspondence in the file was from the contractor, denying all liability (three cases).

74. There were 13 cases in this category.

75. There were four such cases.

76. These issues are discussed in Chapter V.

77. Some of these may, however, reflect the hearing officers' decisions on the merits, where these decisions took the form of pointed hints at the hearings and where the indicated losers accepted the hints gracefully rather than be confronted with formal orders adverse to them.

78. These issues are discussed in Chapter V.

79. See sec. V.D., below.

80. See sec. VI.A.(2) and VI.B.(2), below.

81. See sec. VI.D. and Chapter VII, below.

82. I would have preferred an entirely objective criterion, but since I had no independent means of verifying the existence, cause, or extent of the consumer's injury, or the quality of any repairs which may have been done, I could not with any certainty sort out the cases where the consumer deserved no more than she got (despite her protestations to the contrary) from those in which her continuing dissatisfaction is indeed justified. Where the cases does not meet one or both criteria yet the consumer received some redress, the case is classified as "OTHER".

The subjective nature of the second criterion also allows for the opposite possibility that a case may have been put in this category where the settlement or judgment was not in fact very substantial

in relation to the injury actually incurred. This subjectivism is practically unavoidable in a study of this type. Part of the reason for settling is the desire to put the details of the controversy, and the anxiety and unhappiness that frequently accompany it, behind one, and the consumer who had taken that step (or the similar step of accepting the legitimacy of a judgment issued by a judge or arbitrator) may well be reluctant to open her wounds for the benefit of an interviewer. Thus, though I always was given an answer to my question whether the requested (or agreed upon, or ordered) relief was actually received, I frequently picked up strong signals that the matter was an unpleasant one, and realized that it would be improper (as well as probably unproductive) for me to try to explore further.

Furthermore, a subjective element may be perfectly appropriate in the evaluation of dispute resolution procedures. Just as the extent of the "actual" loss (the money paid beyond value received, the cost of repairing damages attributable to the contractor's defaults, the value of time spend futilely awaiting his arrival, etc.) varies from case to case, so does the significance of that loss to the consumer's over-all well-being. A person who has been "ripped off" also suffers from an implied insult. The awareness that the contractor thought so little of her ability to defend herself that he was willing to treat her with contempt is painful. Yet the loss is entirely subjective, in the sense that it exists only to the extent that the consumer is aware of having been wronged. Once she concluded that "justice has been done", that the contractor has been made to honor his commitment to her, that he has not been permitted to "get away with it", the consumer's self-respect is restored and reinforced.



Yet this restoration is a subjective as the original loss, depending entirely on her perception that she has received an adequate measure of redress. Thus, if two consumers are mistreated in the identical way by a contractor and obtain the identical remedy from him, yet one feels she has received adequate relief while the other does not, they may both be right!

83. The purpose of these criteria is to isolate those cases where the consumer is presumably entitled to some relief, but she nonetheless failed to obtain it. These criteria are in principle over-inclusive, since in some of these cases the consumer may never have been entitled to anything. However, the appropriate discount factor for this over-inclusiveness is probably small. Out of the 12 cases in this sample which were heard by a judge or arbitrator (excluding one case which was "dismissed without prejudice" for reasons unknown), the consumer obtained a settlement in seven, won a judgment in four more, and lost outright in only one.

The DCA complaints sample supports this estimate: out of about 50 cases in which I was able to make a judgment as to the merits of the original complaint (on the basis of a settlement, a special inspection, or an adjudication), I was fairly clear that the consumer's claim was without merit in four only. On the other hand, out of the 37 cases in the decisions sample, 28 were either decided for the consumer or settled, while nine were dismissed on the merits. The ratio was even less favorable to the consumer in the hearings sample, where in 34 cases that had definitely come out one way or the other, 22 were for the consumer (including settlements) but 12 were for the contractor (including orders that the contractor do the

work five days after he received the consumer's check).

However, the ratios from the first two samples are more relevant than those from the latter two in estimating the "quality" of raw consumer complaints. The latter samples are drawn exclusively from those cases which licensees (who, as Table II demonstrates, have a strong tendency not to wait for a hearing to be held before resolving meritorious complaints against them) have refused to settle before a hearing. If 8% is about the correct proportion of groundless complaints in a raw sample, then my original presumption, that an injustice had occurred (or at least a procedural imperfection had been revealed) whenever a consumer who complained received nothing without having lost on the merits, seems close enough to being accurate to be usable for present purposes.

84. In addition to abandoning her small claim in favor of an ordinary Civil Court proceeding, the consumer also failed to pursue a DCA complaint which she had brought about the same matter. Her Civil Court suit was still pending eight months after her original claim was filed!

85. Like the consumer in SC15, this consumer had also filed a complaint with DCA at the same time as his small claims court complaint. He permitted both to lapse in favor of his formal Civil Court action. In this case DCA had issued a notice of hearing for a date exactly two months after his complaint was filed. Had he pressed forward with his DCA complaint rather than going to Civil Court, he would have obtained the same relief he eventually did, four months earlier, and without an attorney's fee. My impression is that DCA loses a lot of patronage to people who believe that you never get

something for nothing.

86. Of course, I do not have the contractor's story, or the arbitrator's: either or both may think the consumer has been dealt with generously. This is a classic instance of the subjective criterion in operation. The consumer received a sizable judgment (by small claims court standards). "Objectively" the system seemed to have worked well for her (at least better for her than for about half the claimants), yet she is convinced that she has been done in, albeit by the arbitrator's stupidity rather than by the contractor's cupidity.

87. The consumer got this much out of the contractor by dint of "incessant phone calls."

88. Thus, NYPIRG's study of the Queens small claims court, Winning Isn't Everything (1976) at 6, found that all of the settlements in their samples were in fact carried out.

89. Typical examples are a service receipt signed by the consumer, or on the other hand, a report by a DCA inspector that he visited the contractor's purported business address and found it vacant.

90. Twenty-two licensees in the small claims court sample, plus 47 L's and seven L-NL's in the complaints sample, equals 69 contractors who were presumably licensed at the time of the contract. Thirty-one non-licensees in the small claims court sample, plus 34 NL's plus four NL-L's in the complaints sample, equals 69 contractors who were presumably not licensed at the time of the contract. I say "presumably" because my data with respect to the small claims court sample is adequate to tell me only whether the contractor was licensed at the time I checked the records, six months or more

after the complaint was filed, and of course significantly more than that after the typical contract was signed. The ratio of licensee/non-licensee complaints may of course not be a perfect indicator of the ratio of licensee/non-licensee contracts. Licensees may for example be so much more reliable than non-licensees that they are complained against significantly less frequently in proportion to the work they do. But this tendency might be counter-balanced by the fact that licensees are much more amenable to dispute-resolution processes, which fact, if known to consumers, would likely increase their relative incidence of complaints in proportion to their contracts. Thus, the 50:50 licensee/non-licensee complaint ratio is probably a fair estimate of the licensee/non-licensee contract ratio as well.

91. See note 49 and its accompanying text, sec. II.C., above.

92. I have cited only one licensee and one non-licensee for each match, though in most instances several cases could have been cited. Furthermore, there are doubtless matches in this sample for a number of other types of contracts, but since I did not always make a note of the details of the underlying contract, my data with respect to other possible matches do not permit definite assertions.

93. The foregoing analysis of the attitudes and dispositions of non-licensees was based on inferences from their behavior. In-depth interviews with them would of course be helpful in confirming or refining this analysis. Unfortunately, many of the non-licensees whose conduct gave rise to complaints in my samples are out-of-business and/or without listed telephones. Those numbers I did obtain turned out to be answering services who instructed me to leave my number

and my call would be returned. I judged this an inauspicious way to begin what would in any case be difficult interviews, and declined to leave my number. Strategies exist for obtaining frank interviews with acknowledged law-breakers, see e.g. E. Sutherland, The Professional Thief (1937); F. Thrasher, The Gang (1963); C. Shaw, The Jack-Roller (1966); P. Letkemann, Crime as Work (1973); C. Klockars, The Professional Fence (1974). They are, however, complicated and time-consuming, and I did not pursue them.

94. See A. Schwartz, "The Case for Specific Performance," 89 Yale L. J. 271, 296 (1979), arguing that specific performance should generally be available at the plaintiff's option, and that the strongest case for allowing this option is one in which a consumer has contracted for major construction services.

95. An example of a statute permitting victorious consumer-plaintiffs but not victorious seller-defendants to recover their attorneys' fees is sec. 110(d) of the Magnuson-Moss Consumer Warranty Act of 1974, 15 U.S.C. sec. 2310(d), which applies to actions brought under that statute in state or federal court for breach of warranty on consumer goods. Home improvement contracts come within this statute only to the extent that they involve the installation of specific goods (storm windows, aluminum siding, appliances, etc.) for which a separate warranty is given or properly implied. The statute is, however, unfamiliar to most attorneys, and few cases have been brought under it. See also note 4.

96. See sec. VI.A., below, for evaluations based on my samples of the actual navigability of these two processes.

97. An example of this is D27 (from my DCA decisions sample). As a

result of a special inspection and two hearings by DCA the contractor finally completed the work specified in the contract. DCA did not, however, have jurisdiction to award the consumer the \$4500 which he claimed was owed him by the contractor under a \$50/day liquidated damages clause for delay in completing the contract. Since the amount in question was above the \$1000 jurisdictional limit for small claims court, his only alternative was to bring a formal action in Civil Court. But for that he needed a lawyer, and though he contacted several attorneys with neighborhood offices in Queens, he had not been able to locate one who would take the case for less than \$1000 payable up front, which the attorney would keep regardless of the outcome. Since that was more than he was willing to risk for this venture (the delays and vagaries of litigation being what they are), he intended to drop this claim if he could not find a lawyer who would take it on a contingent fee basis.

98. N. Y. City Civ. Ct. Act, sec. 1801.

99. She could straddle the fence by suing for \$1000 in small claims court, and hope that someday she would find a way to sue for the remainder in civil court. This is technically possible because the doctrine of res judicata does not bar recipients of small claims court judgments, as it does recipients of judgments in courts of general jurisdiction, from later suing for amounts in excess of those awarded. N. Y. City Civ. Ct. Act, sec. 1808.

100. N. Y. City Civ. Ct. Act, sec. 1804.

101. Id.

102. E.g. Woodart v. Frankart Kings, Inc., 415 N.Y.S.2d 587 (1979); Swarth v. Barney's Clothes, Inc., 140 Misc. 2d 423, 242 N.Y.S.2d 922

(1963).

103. See CPLR sec. 7511(b)(1), quoted in note 25.

104. See note 31 for a discussion of the source of this "rule" and a criticism of the Brooklyn court's practice of applying it.

105. See sec. II.B., above, at notes 38-40.

106. This was true in three of the six cases in my small claims court sample which were settled at the hearing. See note 129 for details.

107. N. Y. City Adm. Code, sec. 773-4.0(e).

108. N. Y. City Adm. Code, sec. B32-358.0(1).

109. See, for example, the logical evasions and legal fictions which courts have needed to invoke in order to approve the administrative determination of workmen's compensation claims. The classic case is Crowell v. Benson, 285 U.S. 22 (1932), which validated this practice on the theory that the administrative fact-finders were agents of the court (despite the fact that they were firmly imbedded in the executive branch). A few state courts have refused to engage in double-talk and have struck down statutes delegating such powers to administrators as violative of their state constitutions. See e.g. State v. Mechem, 63 N.Y. 250, 316 P.2d 1069 (1957). The New York Court of Appeals, however, early on accepted the propriety of such administrative adjudication. See e.g. Carroll v. Knickerbocker Ice Co., 218 N.Y. 435, 173 N.E. 507 (1916).

110. In most of these cases there would be an adequate remedy at law, as is evidenced by the fact that the very same types of cases are presented to small claims courts and adjudicated by them despite their limitation to legal remedies. See the comparisons of specific

cases brought in each tribunal in sec. V.D., below.

111. Thus, in SC23 the consumer had paid \$600 towards the installation of storm windows, but had heard nothing from the contractor and got no response to her many calls to his answering service. Her complaint, filed in small claims court on September 6, apparently brought (or at least was followed by) quick action. She explained to me that the contractor "had gone away on vacation. His man was supposed to call me. They did the work in September." The case may well be one of premature panic by the consumer (apparently, her present interpretation), or it may be one of the many cases in which an official paper of some sort is enough to prod the slow-moving contractor into immediate action. If the latter, it is an example of a cheap and effective form of consumer relief.

112. In L69, the mistake involved the contractor's failure to put a strap around an electrical pipe, with the result that Consolidated Edison refused to connect up the electricity to a basement apartment in the consumer's house. An L letter from DCA got the problem solved immediately.

113. In L-NL8 and NL letter on August 2 produced a letter from the contractor enclosing a note to him from the consumer admitting that it was just a misunderstanding and agreeing that she would pay the contractor \$15 to do the window in question. He also immediately renewed his lapsed license.

114. In D16 the complaint had to go to hearing before the problem could be worked out. The contractor had made many attempts to complete the job but, since the consumer had not given him a key and was never in when his men arrived, the work never got done. This knot



was untied by an order that the contractor call the consumer on the day before his men go to the job site! It is hard to know if they would eventually have communicated successfully with each other without such an intermediary, but at least in some cases of this type the availability of an intermediary speeds and eases communication at a time when developing resentments make this difficult, and even prevents minor mistakes and misunderstandings from developing into hardened positions and implacable distrusts.

115. In D37 a contract was made on May 27, 1878 and \$100 deposit paid toward a total of \$5570. For some reason work had not begun as of August 9, when the consumer made her complaint to the DCA's Jamaica field office. At the hearing on October 31, the hearing officer found that as a result of the contractor's not starting the work the consumer had had to have it done by someone else at a higher price, and therefore ordered the contractor "to refund all monies paid by (the consumer) to the licensee and further relieve the complainant of any and all burdens or obligations under the contract." The money was returned.

116. Her claim would take the form of an "affirmative defense" of "failure of consideration" to the contractor's or finance company's claim. While this defense would not have to be proven anew had the consumer obtained her restitution in a court of general jurisdiction, the doctrine of res judicata does not apply to judgments obtained in small claims court.

117. In L79 the contractor, upon receiving an L letter, immediately refunded the consumer's \$50 deposit with a note saying "We can't do it for the price quoted and are cancelling. Sorry for the delay."

The consumer had indicated to DCA on the postcard in which he made his complaint that he wanted the option of going forward with the contract or cancelling. However, he apparently accepted the contractor's decision to treat the contract as cancelled.

NL76 involved two separate contracts between the consumer and the contractor (an individual, apparently working alone). The first contract, in October 1977, involved the installation of shutters for \$330. The second contract, in February 1978, was for the installation of a storm door, \$50 deposit paid, the \$168 remainder due on completion. Sometime between February and August the shutters fell off in a wind; they were never fixed, and the storm door never installed. Following an NL letter on August 15 the contractor immediately returned the deposit, but had never (as of June 13, 1979) replaced the shutters. Nonetheless the DCA file was closed on August 31, 1978 with the notation "returned deposit".

118. The many hearings I sat through and files I read in cases where disputes arose after the job had begun suggest the probability that a party who has come to regret having entered into a relationship (even for a home improvement contract!) will find ways to make the other party share his regrets. Since here too an annulment is likely to be less traumatic than an enforced relationship or a subsequent divorce, a restitutionary remedy which does approximate justice, or which even falls a bit short, at this stage may be much better than specific performance.

119. The requirement that contractors pay for someone else to do the job, while having received nothing from the consumer in return, may strain the resources of the less liquid among them, and will

generally seem a lot less fair, despite the rule of contract law which allows the consumer her "expectation" recovery. The uncertain ethical basis for this insistence that someone be compensated for what she would have received under the contract (here, a given job at a given price), rather than simply for her "reliance" interest (the amount, if any, it cost her to have relied on the contract, for example an equally favorable price from another contractor which is no longer available) and her "restitutionary" interest (the return of her deposit) was first pointed out in L. Fuller & W. Perdue, "The Reliance Interest in Contract Damages", 42 Yale L. J. 52, 57 - 66 (1936).

120. See notes 115 and 117.

121. See Amended Regulations Relating to Home Improvement Business (1975) sec. 1(e) - 1(1), set out in Appendix B.

122. In L65/D36 (the same case picked up in two samples), the consumer alleged she had cancelled within three days, while the contractor denied that the cancellation was sent within that time and wanted as liquidated damages 25% of the \$7485 contract price. The contract was signed in June, 1978, the complaint filed in August, the hearing finally held in November (after an adjournment at the consumer's request, for illness, of an October hearing date). At the hearing, "after an off-the-record discussion, the licensee agreed to refund the \$85 deposit". Perhaps he believed the consumer would persuade the hearing officer that her cancellation was timely, or perhaps he felt that if she was unwilling to compromise at the hearing (as by agreeing to have part of the work done) the matter was not worth a fight.

Just such a compromise was reached in L47. The contract, signed in July 1978, was for remodeling two bathrooms for a total of \$5700. The consumer indicated in her complaint letter that while she had attempted to cancel, the contractor wanted \$750 for permitting her to do so. The DCA's L letter of August 14 elicited no response from either party, nor did the 7-day letter sent on September 16. My phone call on April 13, 1979 uncovered a happy consumer: "They compromised with us and did just one bathroom. It was fine except that they chipped the tub. They're supposed to come back and fix it." Her voice indicated no doubts that they would do what they were "supposed to".

The three day cancellation provision worked less smoothly in H13. The consumers had paid \$100 deposit toward a \$4600 bathroom renovation contract. After a month of second thoughts by the consumers and episodic negotiation with the contractor over just which fixtures were to be installed, the consumers (apparently on the advice of counsel, whom they paid \$150) sent the contractor a letter protesting that they thought the document they had signed was just an estimate, that they never received the "notice of cancellation", and in any case that they had cancelled. The company's salesman testified, without serious contradiction from the consumers, that he had spent five hours at the consumers' home the evening of the sale, that the consumers had signed that evening not only the contract but the \$100 deposit check and a bank agreement for the remainder, that they were handed the cancellation notice, and that his company had ordered some of the fixtures after their supervisor had twice visited the consumers' home, with the consumers never mentioning that they had

cancelled. The contractor's position was that they were entitled to 30% of the contract price (\$1380) if the consumers cancelled; the consumers insisted that \$100 was enough (tacitly abandoning their right-to-cancel claim). Throughout the hearing the salesman made frequent offers to carry out the contract as written, or with modifications (such as an iron tub!) upon a small adjustment in price. The consumer-wife would not hear of it, stating that anyone who would try to foist a junky steel tub on her could not be trusted working on her house.

The DCA dismissed the complaint on May 7, 1979, five weeks after the hearing, the opinion declaring -- quite properly -- that the consumers had failed to demonstrate a timely cancellation.

In L70, the consumers, a Hispanic couple, claimed they had been told to sign the \$6700 contract on July 25, 1978 simply to determine their credit availability, and that in any case they had cancelled within three days. The contractor responded to the L letter of August 15 by insisting that "we would have been happy to let her out, but she told us to start." The hearing was held on September 27, at which the husband testified that when he received notice on July 28 that the bank loan had been approved the previous day, he had gone to a notary and together they tried unsuccessfully to notify the contractor by telephone that he was cancelling. Apparently at the hearing officer's suggestion, the consumer had the notary mail the hearing officer a "certificate" on September 30 verifying the incident. DCA's decision deftly avoided the issues of whether the consumer's efforts on July 28 constituted a sufficient cancellation, and whether the contractor had misrepresented his intention to treat the contract

as binding when he induced the consumer to sign it on July 25, by pointing out that the "notice of cancellation" which the contractor supplied did not conform to the requirements of section 1(f), and therefore treating the notice of rescission which the consumer gave at the hearing as sufficient. It therefore ordered the contract rescinded, and directed the contractor in the future to furnish proper cancellation notices with his home improvement contracts.

Finally, in H20 the consumer, an upper-middle-class insurance salesman, had paid \$890 deposit on a \$2890 bathroom remodeling contract. At the time the complaint was filed the parties had agreed in principle to call the deal off, but a dispute remained over whether the consumer would be required to accept a vanity which the contractor insisted was almost complete, with the value of the vanity deducted from the amount of the consumer's refund. The consumer had wanted to look at the vanity, but the contractor had refused to let him see it. At the hearing on April 11, 1979 the contractor justified this by saying that no one would be very impressed by looking at a half completed vanity; the consumer, while not really doubting the vanity's existence, was inclined to think that it was being made by a subcontractor, and that the contractor, who had claimed to the consumer that he did all his work in his own factory, was ashamed to admit he had lied. The case changed complexion at some point between the complaint and the hearing when the consumer discovered his three-day cancellation right. Since the contractor had given none of the three forms of notice required by the regulations, the consumer could cancel at any time, and indicated his desire to do so and receive his full deposit back. The contractor explained that he never gave that notice

when the consumer had come into his office (confusing the DCA three-day "cooling-off" period with a similar Federal Trade Commission requirement, 16 C.F.R. sec. 429, applicable only to door-to-door sales).

DCA's decision recognized that the consumer's cancellation at the hearing was effective, and the contractor was ordered to return the \$722.50 deposit within 5 days. Furthermore, since the contract form had not merely omitted the required cancellation clause, but had stated that "this contract is not cancellable by the consumer for any reason", the contractor was given the substantial fine of \$250. Finally, he was ordered to prepare new contract forms which conform to the regulations. The decision was formally issued on July 18, the fine was paid on July 19, and the contractor called the Calendar Division on July 30 to say that he would send the consumer his check as soon as possible, and in any case by August 15. DCA had no practical alternative to acquiescing in the contractor's unilateral decision that he must postpone for a few weeks the carrying out of his obligations under an order.

123. Warranties given on home improvement jobs can be of four principal types. First, the contractor typically warrants that he did his job in a workmanlike manner. This warranty need not be stated, since it is normally assumed to be part of the contractor's contractual obligation. An implicit part of this warranty is that the contractor has shown care and competence in his choice of materials and his judgment as to how to accomplish the job. This part of the warranty can be negated by evidence that the consumer or her architect dictated just how the job was to be done! On the other hand it may, if

the consumer had hired the contractor simply to solve a problem, while leaving him almost complete discretion as to how he would do it, expand into a second type of warranty: that the problem would be solved, regardless of the contractor's reasonableness in choosing the particular "solution". In this latter case it would resemble the Uniform Commercial Code's sec.2-315 "Warranty of Fitness for a Particular Purpose".

Third, the contractor typically warrants against defects in the materials he used. This warranty must be explicit, since it will not be implied. This applies to any material which is not "up to snuff" in any relevant respect, including failure to demonstrate reasonably-expectable durability, regardless of whether the contractor could have known of this defect at the time he made use of the material. This warranty runs for the same period as the warranty of workmanship, so that it may conceivably run out before the product's lack of reasonable durability becomes evident. The manufacturer usually makes a similar warranty, either explicitly in advertising and/or in literature accompanying the product, or implicitly via the Uniform Commercial Code's sec. 2-314 warranty of "merchantability". The consumer has a right against the manufacturer if the warranty was explicit and directed to consumers; otherwise, the contractor as the "beneficiary" of the warranty will typically relay the consumer's complaint to the manufacturer, achieving essentially the same result. The statute of limitations for the manufacturer's warranty under the U.C.C. is four years, unless otherwise modified.

Finally, a fourth type of warranty is a warranty of perfor-



mance, an assurance that the job will continue to perform certain functions (e.g. keeping the rain out) for a specified period. This warranty does not require a showing of any defect at the time of installation, though it cannot be invoked if the breakdown is the consumer's fault (e.g. failure to perform regular maintenance of which she was notified at the time of installation). A "free service period", typically of one year, is the functional equivalent of such a warranty often given by contractors. Long-term warranties, typically of ten to thirty years duration, are often given by siding and waterproofing manufacturers; they bind only the manufacturer, not the contractor, and cover only the cost of replacement materials, not of labor.

The importance of determining who gave the warranty is illustrated by two cases involving different contractors but the same siding manufacturer. In H12 the job was done in 1968. Beginning in 1976 the paint started washing and chipping off. The contractor had given a warranty (apparently without time limit) against defective material or poor workmanship, but the problem may not have involved defective material so much as ordinary deterioration. As to the latter, the manufacturer had given a "lifetime" warranty, the hidden catch being that it was as dependent on the manufacturer's continued existence as on the consumer's. The manufacturer, who had been in St. Louis, was now out of business. The consumer had corresponded with a successor company to the manufacturer and with the Missouri Attorney General, and both had requested that he send them more information about the problem. The DCA hearing officer instructed him to do so, and ordered that if he did not get

satisfaction a special inspection should take place to determine the cause of the problem. There is, of course, faint hope that the consumer will recover anything from a successor to a defunct guarantor located in a distant state. The likelihood that material that lasted eight years would be held to be defective is probably not much greater, and in any case a claim based on the contractor's warranty against defective materials would be barred by the statute of limitations. While a fair argument could be made that the contractor who sold the siding to the consumer, doubtless emphasizing the manufacturer's lifetime guarantee, ought in justice to be held as a guarantor of the manufacturer's lifetime obligation to the consumer, such is not the law, as DCA explicitly held in H15, the next case.

H15 involved siding of the same manufacturer, also installed in 1968, but this time by a different contractor, a major New York discount chain. The consumer had spend \$290 fixing the siding after the contractor refused. At the hearing on April 5, 1979 the contractor's attorney argued that the contract was executed prior to the effective date of the Home Improvement law (October 1, 1968), that they had been out of the home improvement business since 1974 pursuant to an FTC consent decree (!), that they expressly disclaimed the manufacturer's guarantee in their contract, and that they are certainly not liable for implied warranties from 1968. The DCA hearing officer got angry at the attorney for attempting to disclaim the manufacturer's warranty when the consumer was certainly relying more on the reputation of the contractor than on the unknown manufacturer. The attorney pointed out that nonetheless their disclaimer

was legally effective. The consumer then suggested that the problem was not the aluminum but the workmanship and added, picking up the cue, that of course she was relying on the contractor's famous name. The attorney pointed out that they had not defaulted on their workmanship warranty, but had spend \$600 on repairs of this \$775 contract. The hearing officer instructed the attorney to try to get the manufacturer to pick up the tab. The attorney agreed, and wrote the hearing officer on April 25 that he had definitely ascertained that the manufacturer was out of business. The hearing officer then drafted a decision that the contractor should reimburse the consumer for the \$290 she spent getting the job repaired, thus "sticking to his guns" on the theme that a contractor just should not be permitted to get away with this. But he left DCA before his recommended decision was acted upon, and on July 18 the Director of Adjudication issued an exactly contrary decision, that "based on the evidence and the current law governing the agency in this jurisdiction", the contractor was not responsible for the manufacturer's guarantee and the complaint must therefore be dismissed.

124. Five cases from the samples exemplify this process. In NL4 the consumer had paid \$50 toward a \$550 awning installation in April 1978, the contractor made a beginning on the job, and then abandoned it. The consumer complained in August that the seller would neither refund the deposit nor finish the job. The NL letter from DCA got the job done quickly -- most probably, the consumer's preferred remedy.

In L72 the contractor apparently had more to do on a roofing job contracted for in January 1978. An L letter on August 14 again

brought a quick response, as evidenced by a note from the consumer dated September 7 acknowledging that her complaint had been fully satisfied.

In L27 the contractor installed the consumer's storm windows within a month of receiving the L letter, but about a year after he had promised to.

In SC17, when the contractor received the summons seeking \$500 and alleging "never completed ceiling", he went to the consumer's house and fixed the ceiling. The only clue to the cause of the problem is that the consumer indicated that he had paid for the job in full before it was completed. That prod surrendered, another strong reminder was needed; but the small claims court summons did the trick.

125. In NL87 an NL letter elicited immediate action from the contractor, though what he did was, in the words of the consumer, "a half-assed job." A similar result was achieved in SC53, where a complaint seeking \$900 for "breach of contract - defective and incomplete repairs to house" brought the contractor back. Though he did only part of the job, the consumer did not appear at the hearing and the complaint was dismissed (the contractor, taking no chances, appeared). However, whatever the contractor did had fallen off again by the time I spoke with the consumer's husband, who explained to me that the contractor had used lousy materials, and he did not know what his wife wanted to do now. The contract was already 14 months old when the consumer filed her complaint, and she might reasonably feel now that further attempts to get him to finish the job right would be beating a dead horse.

L62 involved a \$722 roof installed in 1972 with a 10 year warranty. The L letter went out August 15, 1978; the contractor had put some tar and plugged the leak by August 21. But the consumer told me in April 1979 that it had begun to leak again in January, that she had called the company and they had hung up. She asked me to send the contractor another letter; I directed her back to Harold Goodman.

L57 involved a patio awning installed in June 1977 with a five year warranty. By May 1979 some parts were rusting and the finish was peeling. An L letter on August 16 got the work done on September 6. My call to the consumer the following April elicited: "They finally came. After I called for three months and nothing, I got disgusted and wrote to DCA, and then they came. The screws are rusting again so I'll have call them back."

126. In SC50 the contractor had installed a storm door, but the screen that was supposed to go with it did not fit. A year later the consumer sued for \$250 (the amount paid), the summons alleging "wrong storm and screen door installed." The consumer told me: "We didn't want our money back -- just wanted a screen on it. The moment he got the summons he came back, took out the storm door, and gave us our money back. I was amazed. We have since gotten someone else to install one." The contractor can be forgiven for promptly giving the consumer what she appeared to want from the summons he had received. In fact, on the "Request for Information" she had filled out at the Small Claims Court clerk's office she had stated "wrong storm and screen door installed. When told by installer, owner said he would send missing parts and make necessary

repairs. Nothing was ever done." Had the contractor received this full statement he might have understood what she really wanted, and that she was suing for money solely in order to prod him to carry out his promise. But the clerk who has to write out the "cause of action" on the file card (from which the summons is prepared) has the responsibility of redrafting the complainant's statement of claim on the "Request for Information" in a way which clarifies the legal basis for the defendant's alleged monetary liability. The clerk understandably could have concluded that where the complainant was suing for the price paid allegations about promises to fix would only complicate the legally sufficient allegation that the wrong item was installed.

127. In L51 the consumer complained that the contractor, a garage door company, had damaged his garage door while repairing it. The L letter did not do the trick, but when the consumer called Harold Goodman 15 days later, per instructions in the L letter, to tell him that the complaint had not been resolved, Goodman called the contractor and left a message that he should call the consumer and get the job done. That did do the trick, and the door was fixed within another two weeks.

In L52 the contractor had done some inadequate work on the consumer's walk. Goodman got no response to his L letter, and called the contractor, who sent him a copy of a letter it had sent the consumer a week after receiving the L letter saying "Please call us -- we've been trying to reach you." Goodman then called the consumer to suggest that she do that, and apparently decided that the best way to insure that communication resumed was to arrange a

special inspection at which both parties would be present. That worked: the parties agreed at the inspection that the contractor would return within two weeks to make the repairs, and two weeks later the parties signed a statement that the work had been done.

In NL33 the NL letter went out on August 15, 1978. A DCA inspector visited the contractor's business address on September 18 in order to serve a summons and to try to resolve the complaint. The contractor was out, but his wife showed the inspector a 1975 license in someone else's name (the contract had the license number of still a third person). The inspector left a notice for the contractor to call Goodman. No call came, and the inspector returned on October 18, found the contractor in, and served him with a ticket. The file was closed the next day (standard DCA practice in NL cases at this point). My call to the consumer on April 12, 1979 produced the surprising news that the fence had been fixed sometime in the fall.

In NL53, the NL letter was mailed August 14 and a criminal court summons served August 17. The contractor told the inspector at that point that he was resolving the complaint and would apply for a license. This turned out to be half true. The contractor called on September 7 to inform Goodman that the window had been repaired, and the consumer not only confirmed this upon being called but promptly wrote a letter thanking DCA for its prompt and effective attention. But the contractor has not yet applied for the license.

NL44 involved a waterproofing job done in August, 1977, allegedly with "a 10 year warranty." It is unclear from the record

whether the warranty in question emanated from the contractor or the manufacturer. An NL letter in August, 1978 elicited a call from the contractor to say that he was no longer working as a home improvement contractor, but that he would work on the problem complained of. He did so on September 8, but the consumer sent DCA a note the same day requesting a hearing. Of course a hearing was not possible, but the inspector visited the contractor's address (where he was doing business as a "waterproofing" company) on October 26 and, as typically happens upon not finding him in, left him a notice to contact Goodman. The contractor's written response was the most forthcoming of any from a non-licensee in my complaints sample. He began by insisting that he was just a painter, not a home improvement contractor. He was doubtless in good faith on this point, and arguably was correct, since his business involved applying thick paint-like waterproof substance to the walls, and while "home improvement" is defined by Administrative Code sec. B32-351.2 to include the "rehabilitation... modernization, (or) improvement" of a dwelling, "painting or decorating of a ...home...when not incidental or related to home improvement work as herein defined" is an explicit exception. He then stated that he had done all necessary patching on September 8, and included both pictures of the work and a sample wall chip he had replaced to document this assertion. Finally, he stated that the building was old and badly made, the brick was rotting, and that therefore the waterproofing applied to the brick would constantly need repair. DCA closed the case at this point, rather than attempting to pursue the jurisdictional issue by issuing a criminal court complaint. My call to the consumer in April 1979 confirmed that he had indeed done the



job, but unfortunately also confirmed his prediction that it would continue to deteriorate; the consumer intended to call him back to make further repairs. Since the waterproofer was aware of the condition of the brick at the time of the contract, if he indeed issued a 10-year warranty it would have to be interpreted as the equivalent of a service contract, obliging him to return every time waterproofing material chips off. A similar result would follow, under a warranty of fitness for a specific purpose, if she had sought his advice on eliminating leaks and he assured her that this waterproofing material would do the trick; the duration of this warranty would depend on the amount of protection she reasonably believed she was getting. If, on the other hand, the warranty was made by the manufacturer, the contractor's evidence is that the consumer's problem is not related to any defect in the materials. The issue of what kind of warranty (if any) was made will of course arise only if the contractor refuses in the future to make periodic repairs.

128. SC12 was clearly such a case. The consumer had known the contractor, who was 82 and no longer active in the business, for 30 years from church. There was a fire in her house and in the house next door, which her niece owned, and as to which her niece gave her "a power of attorney." She had fire insurance on her own house, which was apparently repaired satisfactorily by a licensed contractor. She made a deal with defendant to repair her niece's house for \$6000, and had paid him \$3500 when the problem arose. Her version, in a complaint she filed with DCA on March 13, 1978, is that he was working away until she told him he was not doing it

right -- he then got very upset and ground to a halt. His version, which he told Harold Goodman on a personal visit on April 20, made in response to receiving the NL letter, is that the people he recommended want to do the work, but she is never home. Goodman called her on the spot, got no answer, and closed the case. The consumer filed her complaint in small claims court on August 14, alleging his refusal to finish work on the chimney and roof that he had been paid for, and further alleging that his failure to fix the roof allowed water to get in, causing the ceiling to collapse (and, as she told me later on the telephone, ruining the work inside the house that he had done earlier). She sought \$1000 and, when he did not appear at the hearing on November 1 received a judgment for that plus \$13.40 in costs at the inquest. When he did not pay she went to the sheriff who somehow determined that the contractor had no money but did own his house outright. He told her that she could file a lien on his house, but that the proceeding would cost \$400-500 and that she would require a lawyer. Her thinking in April 1979 was that she might go to a lawyer in the summer when she gets her bills paid, and that she guesses "the moral of the story is if you get a real contractor he does the job right, even if it costs more."

It is at least possible that, if some tribunal had had jurisdiction to determine an appropriate remedy in the case, without being limited to awarding the monetary equivalent of the injury suffered, and without having the contractor brought into the case by a notice which tells him that as a result of something he did or did not do he now allegedly owes the consumer money ( a notice calculated to produce incomprehension, indignation, and/or defiance on the part

of a contractor who has been proceeding, however ineptly, in good faith), the matter might have been worked out by e.g. a schedule indicating when the work was to be done (and perhaps how), to the satisfaction and benefit of both parties.

See sec. E of this chapter for a proposal to equip small claims courts with the necessary jurisdiction.

129. In SC11, the complainant brought a \$900 action alleging "breach of contract -- unfinished work" against an aluminum siding installer. The case was settled by stipulation before an arbitrator on November 15, 1978. The stipulation provided that "defendant pays \$900 by 12/10/78 unless defendant completes aluminum installation of the rear wall at (complainant's address)". Like clockwork, defendant did the job on December 10. The drafting of the stipulation was ingenious. Though the defendant had been dragging his feet about doing the work, he obviously preferred that to paying \$900 (complainant's probably generous estimate of the value of the work still undone). If he refused to stipulate, he ran the risk that the arbitrator would find him liable for the full \$900. By settling and doing the work, he reduced his exposure and gave the consumer what he probably wanted in the first place.

In SC20 claimant sued a garage door company for \$200 (amended at trial to \$1000) alleging "Default in installing garage door. Want back original door." Defendant counter-claimed for the \$508 owing him under the contract. The following stipulation was entered into at the arbitration: "\$508 to be paid to defendant upon completion of installation of overhead door by defendant (height of door to remain at 6'1" and door shall not roll down)." That was apparently the

magic formula, since my call to the consumer confirmed that the work had been done and the money paid.

SC46 involved a \$650 waterproofing job that failed to keep the rain out of the consumer's basement. The consumer sued for the return of the \$650, but also complained of consequential damage to her basement. Defendant, who was represented by an attorney, agreed at the arbitration to "redo the work per contract", and the settlement was noted. My conversation with the consumer five months later reveals that "they came at 3:40, opened and closed two cracks and stopped at 4:00. He called two weeks later, said he'd come back, but he didn't." After several months she called again and told them she would go back to small claims court if they didn't fix it. They came back and did some more patching but the rain is still coming in. She intends to go back to small claims court for her money, since "everyone tells us that patching won't do the job." She appears not to have pressed her claim for consequential damages, possibly because they were minor, or hard to monetize, or mentioned just as an example of the annoyance she experiences from the job not having been done right.

Rescission and restitution now seem called for, the waterproofer having proven himself incapable of fixing the job.

In contrast to these is SC55, in which a monetary settlement was arrived at. Work began on a miscellaneous contract -- painting, cement work, fixing a sewer, etc. -- two years before the complaint, but petered out, with each job allegedly completed only partially and poorly. The consumer also complained that the contractor had borrowed some of her tools and never returned them. She asked for \$1000,

the jurisdictional limit. When both sides appeared in court as scheduled on August 22, 1978, and neither requested a "court" trial, they were sent to an arbitrator, who began the hearing, as always, with an explanation that he cannot hear the case unless both parties waive their right to appeal. The contractor, as frequently happens to litigants confronted with this lecture, decided that he did not want to waive any of his rights, thus terminating the arbitration. In this case, however, the assignment clerk on seeing the parties return convinced the contractor that coming back again (with all his rights intact) just was not worth it, and hammered out a settlement; the contractor would pay the consumer \$400, to be paid at the rate of \$40/month, starting the following month. The contractor carried out the settlement for five months, then paid off the full remainder in the sixth month.

It is not clear why this case was settled with money, rather than the more usual agreement to finish the job. Either would apparently have made the consumer happy. The key may be the contractor's likely reluctance to go back to a job after a long time away from it, his belief (inferred from his willingness to appear and contest, and his fantasy about appealing) that he had a defense, perhaps based on the difficulty of doing this job for this particular consumer, and the clerk's appealing suggestion (in contrast to either going back to the job site or going through more legal hassles) of 10 easy payments. On the other hand, the key may instead be that small claims court personnel are more accustomed to thinking in terms of monetary relief, and are therefore more likely to suggest it to the parties when the occasion arises. The opposite tendency clearly exists among DCA hearing

officers.

130. In many of the DCA hearings I witnessed the consumer come in convinced that she had given the contractor every reasonable chance to cure, and therefore suspicious of the efforts by hearing officers to arrange for still another such opportunity. But while in 21 of the 37 cases in my decisions sample DCA ordered the contractor (usually after a special inspection and/or a settlement) to do further work on the job, out of the 17 of these in which I could confirm whether the ordered work was done, it had indeed been done in 16 cases, and the only reason it had not been done in the remaining case (D38) was that the consumer had refused to pay the quid pro quo. The hearing officers therefore appear fully justified in their general belief that regardless of the consumer's tale of unanswered phone messages and unkept promises, an official DCA order to cure is likely to produce the requisite action.

131. In D32, the complaint was filed June 6, 1978 and an NL letter was sent. The contractor responded by insisting that he had completed the job and by applying for a license, which was issued during the summer. Since the parties disagreed over whether the work had been done, a hearing was scheduled. At the hearing on November 20, the contractor agreed to complete four remaining items on a kitchen job. The order was issued on December 26, and specified that the work was to be done within ten days of the order. The consumer wrote a letter on the same date to DCA complaining that nothing had yet been done (she may well have understood at the hearing that the work would be done sooner). Nothing further having been heard from either party by January 5, 1979, Deputy Commissioner White sent a letter to the con-

tractor warning him that his license would be suspended if the work was not done within 15 days. This second letter is a regular department practice, giving the contractor yet another bite of the apple, but also keeping the Department from grinding its gears unnecessarily with quickly aborted suspensions. Nothing still having been heard, a formal notice of suspension was issued on January 23, to take effect February 9 unless the order is carried out earlier -- yet another bite! This finally elicited a letter from the contractor to DCA, received February 21, insisting that he had tried eight times to contact the consumer, and requesting the Department to set up a time with her.

DCA responded by scheduling a hearing on rescinding the suspension for April 26 (they may also have tried to set up an appointment with the consumer as the contractor requested, but if so it does not appear on the record); the consumer requested an adjournment due to illness, and the case was reset for June 11. On that date the hearing examiner assigned to the case and the head of the Calendar Division both noted that all work had been completed to the satisfaction of the consumer, doubtless based on telephone conversations with her. The suspension was therefore rescinded on June 19. Despite the delay of nearly a year in doing the work from the time the complaint was filed, and the invocation of actual DCA discipline (such as it is), the contractor may have been telling the truth about his difficulties in contacting the consumer. His attitude toward the DCA was admittedly not one of great respect; he began by operating without a license, did not bother to respond to the Department's escalating warnings of its impending suspension until it had gone into effect, and doubtless continued to do business for the more than four months that his license

was suspended. But it is possibly a good example of the domestication of a marginal home improvement contractor -- he got his license, he showed up at a hearing, he responded if belatedly to the DCA's disciplinary measures, and he eventually did the work.

132. In H22, the complaint was that each of the 19 windows installed was either too short, creating drafts, or too large, bending the window frames. As frequently happens, when the contractor got the complaint he referred it to the manufacturer, who sent a representative to the consumer's house. This technique can serve to reduce the amount of the consumer's anger directed at the contractor, give his assurances that the job was done perfectly added credibility, and sign the manufacturer up to correct any defects which were clearly its fault. If these were the purposes here it did not work, since when the representative tested for drafts by lighting a cigarette outside a closed window he and the consumer watched the smoke waft into the room! The consumer also brought to the hearing, in addition to his son and a neighbor/witness, a snake-like object which he placed on the table: when Cunningham (the hearing officer) could not resist and asked what it was, he explained it was insulation that came out from a window frame.

Whether the contractor would have admitted his mistakes in the face of a less impressive showing cannot now be determined, but when his chance to speak came he pointed out that he had sent men to fix the two worst windows, that the fix appears to have worked, and offered to do the same, or whatever was needed, with the remaining 17 windows if the consumer would pay the \$500 due on his \$3500 contract. When the consumer refused to pay until the repair survived another



winter, the contractor offered to extend the warranty until the end of 1979. The consumer still refused, and both sides then asked Cunningham to send an inspector. It was Cunningham's turn to refuse, on the basis that DCA had only one special inspector and would not send him out until all work was done and all money paid. This is a more rigid version of DCA policy than the other hearing officers' adhere to, but in this case (and others I witnessed) it did no harm and perhaps speeded things along. After he announced he would take the case under advisement and closed the hearing, negotiations began again, with the consumer and the contractor quickly agreeing on the basis of the contractor's last offer. The consumer later sent DCA a letter confirming that the work had been done.

In D38 the contractor had installed some doors improperly; furthermore, one had begun to rust soon after installation. The complaint was in August, the contractor promised to service the doors in September, but did not, and a hearing was held in November. At the hearing the contractor agreed to make the repairs immediately, and to send the door back to the manufacturer to be refinished in the spring (when it could be spared). The settlement was carried out on schedule.

133. So much so that in three cases the repairs were made as a result of DCA intervention despite the fact that DCA jurisdiction was questionable at best. In L88 the consumer complained that a siding job was not properly done. An L letter was sent on August 14, 1978, the consumer called Goodman on August 30 to say that he had heard nothing in response and that the contractor keeps making appointments but does not keep them; a notice of hearing went out on September 25

for a November 1 hearing, but the work was actually done on October 3. All of this is quite standard, except that the consumer lived in New Jersey and the contractor was based in Westchester County. The contractor did have a New York City home improvement contractor's license (permitting him to do business in the City) and the consumer did work in the City as well, but despite the silence of the Administrative Code on the DCA's geographical jurisdiction, ordinary principles governing the reach of a local government's regulatory authority would deny jurisdiction in a case like this.

In L58 the complainant had had no dealings with the contractor. The contractor had replaced a common awning at a neighbor's request, leaving the complainant with a messier awning than she had begun with. The neighbor was not complaining. An L letter was sent on August 15, 1978; the contractor responded that "We have replaced the awning free of charge"; the consumer replied on September 18 "I still have the bad awning they replaced it with. The company tells me 'See you at the DCA hearing!'". A DCA hearing was held on November 8, resulting in a settlement: "Licensee to install new awning prior to Christmas 1978 at no cost to consumer.(sic)" The contractor carried out the agreement. DCA's jurisdiction is once again doubtful. The notice of hearing alleged the violation of sec. B32-358.0(1)'s prohibition of "willful deviation from or disregard of plans or specifications in any material respect without the consent of the owner." The provision contemplates that it is the owner who agreed to the plans or specifications in question whose consent is necessary before the contractor deviates. While as a matter of property law both owners' consent (express or implied) is probably necessary before any

change is made in common property (including the original replacement), sec. B32-358.0(1) seems to contemplate the protection not of property rights but of contract rights. Only the neighbor appears to have had contract rights here, and her rights may not have been violated (i.e. the contractor may have done everything he promised her he would do ). The contractor's willingness to replace the awning at the complainant's insistence probably reflects his awareness of her property rights and his lack of awareness of this limitation on DCA jurisdiction, but the relevant analysis was not done by anyone at DCA either (witness the reference to complainant as "consumer" on the hearing disposition form). This case illustrates the fact that honest and responsible contractors will typically not push the DCA on the legality of its actions, even though by doing so it could deprive the consumer of her choice of forum and thereby increase the probability that it would never be forced to perform, e.g. to make expensive repairs.

H23/H23A is a dramatic example of this, underlining the fact that the contractor's forbearance in this situation need not be the result of his ignorance of his legal rights. The first hearing, H23, took place on April 16, 1979. \$4500 had been paid, and \$400 was due, on a contract to redo two bathrooms; the complainant alleges that the work had been botched. The contractor began his testimony by admitting that his man had done a lousy job (he has fired him) and that much had to be redone. He offered to redo the work by the end of the following week, but the hearing officer insisted that he wait until a special inspection could be done. The contractor did not understand why he should have to wait when he knew what the problem was, but the

hearing officer insisted.

By the next hearing, H23A, on June 13, the special inspection had been done as had most of the work indicated on it. Another hearing officer was now presiding, and he began the hearing by confirming his suspicion, gleaned from the record, that the complainant's property included a storefront. He then pointed out that that fact ousts him of jurisdiction. This is because while N.Y. City Adm. Code sec. B32-351.0(2) defines "home improvement" ordinarily enough as work done to "any land or building, or that portion thereof which is used or designed to be used as a residence or dwelling place...", sec. B32-351.0(3) defines "building" in an extraordinarily limited manner: "'Building' means any structure containing no more than four residence or dwelling units." The intent was apparently to limit the protection of the home improvement law to people who were, roughly speaking, "consumers" rather than "professional landlords", by limiting the coverage to buildings which were thought to be typically owner-occupied.

Since his lack of jurisdiction was established, the hearing officer proposed dismissing the case. The contractor immediately objected, "But it is all taken care of!" The hearing officer then asked him if he wanted to waive his objection to DCA jurisdiction, and the contractor, appearing amazed and confounded at this turn in the case, insisted "yes!". There was then a long, friendly discussion off the record of the special inspector's report, and the contractor agreed on the record to do the various odds and ends which remained by June 25.

The contractor's eagerness to have DCA decide the case may be

tied to the \$400 that he may still have been owed -- having done most of the required work, he would not want anything to prevent his receiving his ultimate reward. But this may be unduly cynical. Nothing was mentioned at either hearing about when he was to be paid and his right to be paid would seem to depend on his doing the remaining work set out in the special inspection report rather than on his continuing to permit a DCA hearing officer to issue him orders. Rather, he seemed from the beginning eager to do the right thing, and now that he had done most of it and was fully committed to quickly completing the rest he seemed to want some official recognition that he had done it, much as a child whose poor conduct has once been noted by his parents may crave their recognition that he has 'made up for it'.

134. In D9 the consumer paid a downpayment of \$50 on a \$2250 contract for assorted work. Much of the work was done, but 14 items remained when the contractor stopped work. At the hearing on June 19, 1978, the contractor agreed to do 13 items (one item on the consumer's list was dropped by mutual consent, as was a \$500 item not on the list because dropped previously); the agreement was conditional on the consumer's securing a bank loan and establishing an escrow. The fact that the contractor demanded an escrow at this point and that the consumer and the hearing officer went along with the demand strongly suggests that the reason the work stopped was the contractor's justified fear that he would never get paid. What followed reinforces this conclusion. The hearing officer, at the contractor's request, wrote to the consumer on July 31 that unless she implemented the settlement her case would be closed. Her attorney responded that the consumer was working on obtaining the financing. On September 18 the hearing

officer wrote another letter to the consumer, inquiring about her progress. Finally, on September 24 the consumer's attorney responded that her client had been told that the work was worth no more than \$1000. A DCA order followed dismissing the complaint on the ground that the consumer had unilaterally changed the terms of the settlement. But the consumer had, of course, done more than that -- she had gotten the benefit of whatever work the contractor had done, apparently a substantial amount, for \$50. The DCA can do nothing for the contractor, other than relieve him of this complaint in this forum. Furthermore, the amount involved may well be too small in relation to the anticipated hassle to give him a viable remedy in small claims court.

135. In L90 the consumer had paid all but \$250 on a \$4750 job, and was complaining about four details (such as a panel behind a shower head) that were not finished completely. The settlement reached at the hearing was that the contractor would complete the items "within five days after the receipt of \$250 from the consumer." Since the general custom is that the consumer is free to hold off the last payment until the work is complete, this seemed an implicit acknowledgement that the matters complained of were not substantial. The hearing was held November 20 and the order issued November 22. The only other entries in the file are a note to Deputy Commissioner White from the contractor on January 31: "We have waited patiently for the check. In response to a call from Mr. Cunningham we sent the consumer an additional stipulation (to cap four basement windows if the money is paid). If we do not receive \$250 in five days we will consider the matter closed.", and a note from White to someone

in the Calendar Division, dated January 18 (!): "Please write to consumer that the case will be closed if he does not carry out his responsibilities." To find out what happened thereafter I first tried to contact the consumer, and when I could not locate him I called the contractor. He told me he never received the check, but was not surprised. "He didn't want to make the last payment so he made up an excuse." This, he said, happens quite often.

In H21 a consumer, who had paid only \$20 on a \$660 roofing contract, complained that the job had been done wrong and leaks, damaging a room in his house. The contractor was worried that he would not get paid, but claimed to be even more worried by a threat from the consumer that he had a gun and would blow the contractor's head off if he ever came back. The consumer protested that this was slander. DCA's decision fined the contractor \$50 for neglecting to put the three-day cancellation clause in his contract (which he paid promptly), and ordered him to seal the leaks within five days of receiving a \$640 certified check from the consumer. The unusual requirement of a certified check suggests that the hearing officer thought the consumer extremely untrustworthy, and was unwilling to be a party to "holding up" the contractor for any additional work in exchange for an eventual total of only \$20.

136. D2 is an example, though hardly a shining one, of this process in action. The consumer concluded after she had paid \$1500 on a \$2600 siding job that it was not being done properly, and refused to continue progress payments. The contractor, in turn, stopped work, and in June 1977 the consumer complained to the DCA. A hearing scheduled for September was postponed at the consumer's request be-

cause she had a dialysis treatment, and for some reason nothing more happened until a special inspection was ordered and held in August 1978. Sendyka, the special inspector, not surprisingly found many items not done, but on the original issue of whether the work was being done properly he sided with the contractor. A dilemma arose about rescheduling the hearing: Sendyka's contract with DCA calls for him to be available for hearings every Wednesday and in the field two other days, but the consumer had dialysis every Wednesday. The Department's attempted solution was to hold a hearing on Wednesday, September 27 without the consumer, but to use Sendyka's list of 15 unfinished items as a bill of particulars, on the (mistaken) notion that the consumer would be happy to be "represented" by this list of unfinished items, whereas the contractor might want to cross-examine Sendyka on some of them. The hearing eventuated in an order on October 12 proposing that the remaining work be done in three one-day stages, with one-third of the balance being paid at the end of each day; if the consumer refused the settlement, the complaint was to be closed. The consumer did refuse, wanting to withhold payment until three months after the work was completed. The complaint was closed on December 5, but it was reopened on December 18 when the consumer called to request a hearing on the proposed settlement. A hearing was scheduled, then rescheduled at the consumer's request, then the contractor did not appear because his wife was having a baby, then someone decided to order a new special inspection, which reaffirmed the original report, and a hearing was held on it on June 6, 1979, again a Wednesday, at which the consumer of course did not appear. The tentative settlement was that the consumer place \$1100 in escrow,



to be released when Sendyka certifies that the work has been done; if the consumer refuses, the complaint would be irrevocably dismissed. This time someone must have brought the consumer into the negotiations by telephone before the order went out, because between June 18 when the order was drafted and June 27 when it was sent it was changed to eliminate the escrow requirement, apparently reflecting the contractor's agreement to accept the consumer's promise to pay when Sendyka gave the job his approval.

137. In D28 the consumer complained that some things had not been done properly, a special inspection was ordered after the first hearing, Sendyka found five minor items that required repairs ( on a \$7880 job), and at the second hearing the contractor agreed to do them if the consumer paid him the \$276 which he owed him for kitchen work. The consumer responded that he owed him nothing for kitchen work because he had never done any. The next day the contractor delivered documentation to DCA, including copies of invoices from kitchen equipment suppliers which he had paid that indicated delivery at the consumer's home. The hearing officer thereupon decided that "While I would normally order the contractor to do the repairs indicated on the special inspection report, because of the consumer's lack of candor and misuse of DCA processes I am dismissing the case." The case is an appropriate application of the equitable doctrine of "unclean hands": while the consumer would be entitled to a legal judgment for the value of the necessary repairs (against which the court would allow a set-off or counter-claim for \$276), on the theory that even a conniver is entitled to some forum in which to vindicate his rights, there is no reason why DCA should offer him an additional, more con-

venient, or even more effective forum in the very case in which he has attempted to use its processes to take unfair advantage of the contractor.

138. See the discussion of H21 in note 135, and the discussion of SC32 and of L80 in note 158.

139. The results of the small claims court sample illustrate the advantage for the consumer if the contractor acts voluntarily. Out of 15 cases in which the claimant received a judgment (11 by inquest and four after a hearing), I was able to confirm that she actually received redress in only three, while she definitely received no redress in four. In contrast, out of seven cases settled in court, four definitely received substantial redress, while none definitely went empty-handed; the corresponding results where the case was "dismissed -- no appearance either side", which normally indicated a pre-hearing settlement, were that out of 10 such cases five definitely resulted in redress while none definitely went without. See Table 1, page .

It is a commonplace in the sociology of law that orders which are perceived simply as attempts by a more powerful individual (or institution) to impose his (or its) arbitrary will will more likely be subverted, evaded, or at best carried out grudgingly, to the letter but not to the spirit, than will orders which are perceived as legitimate and appropriate. Orders resulting from settlements which been freely agreed to are, of course, likely to be perceived as legitimate and appropriate.

The reduction of antagonism is also an end in itself, since it is depressing to feel put upon, harassed, or cheated, to have

"learned a bitter lesson". There is no similar depression associated with involvements in mistakes, misunderstandings, or reasonable differences of opinion, so long as these have been satisfactorily resolved, or even with being the victim of a minor degree of neglect, so long as it has been apologized for and appropriate amends have been made.

140. This was Michael Cunningham, who heard about half of the home improvement cases I attended.

141. Employees like DCA's special inspector are common to law enforcement agencies (which DCA in part is) but unusual in courts. Analogies do exist in probation officers who make pre-sentence reports in criminal cases, in social workers and psychiatrists who may be associated with courts for the purpose of making home visits, mental examinations, and similar investigations with respect to custody and competency determinations, and in special masters and monitors who may be appointed in difficult or ongoing cases with instructions to find facts and to report back to the court. In no court of which I am aware, however, and certainly not in New York's small claims courts, is there one or more experts regularly retained by the tribunal to perform functions in "ordinary" civil cases (including home improvement cases) similar to those performed by DCA's special inspector.

142. In D14 the contract was to point the bricks and paint the windows. The consumer had at the time of his complaint paid only \$90 towards the \$1040 contract, but he complained of endless aggravation and poor and incomplete work. The complaint was docketed on July 5, 1978 and a special inspection done the next day. Frank

Sendyka, the special inspector, reported that the pointing was incomplete and not done in a workmanlike fashion, and that the painting was not done at all. The contractor called in response to the L letter and the report of the special inspection requesting an early hearing so that he could get paid. An order emanated from the hearing of September 13, doubtless after negotiation between the parties, that the work be done between October 10 and October 20, which it was.

The case thus contains elements of incompetent performance by the contractor, great irritation on the part of the consumer, and a desire by the contractor that the resulting deadlock be broken in a way that assures him that he will be permitted to complete the work and will be paid for it when he does. It is interesting that the combination of a special inspection which confirms that the contractor did a sloppy job, a "hearing", and a DCA order that the contractor complete the job at a specific time somehow solved the problem for the parties, leaving the contractor paid and the consumer content with the work and delighted with DCA (spontaneously: "I am very happy about this office of Consumer Affairs and I hope it stays in business a long time"). Sendyka's criticism of the job did not seem to figure into the final settlement, and setting a schedule for the job to be done seemed to be what both parties always wanted. But the consumer insists that the work was done only because of DCA's intervention, demonstrating that the interposition of neutral officials who merely state the obvious and provide a forum for the parties to reach a new understanding and "make it official" may be a critical step in settling disputes.

L91 involved a \$6500 contract signed in November 1977 cover-

ing assorted home improvements and painting. The consumer complained to DCA's Brooklyn field office on July 17, 1978 that the improvements were not completed and the paint job was shabby. Following unsuccessful efforts by the Brooklyn field office to resolve the complaint, an L letter was sent out August 14. The contractor replied on August 21 that his men had been to the job often between April and June and that all work had been satisfactorily completed. Harold Goodman called the consumer August 25 to request an itemized list of problems, and the consumer replied on September 2 with a catalog of 13 items broken and not repaired, improperly installed, or not done at all, plus 8 paint job defects. A hearing was accordingly held on October 30, at which a special inspection was of course ordered. At the inspection on December 5, the contractor agreed to make 9 repairs within sixty days, weather permitting, and the parties agreed to settle on 3 more items. While the hearing was reset as a matter of course for January 17, 1979, the consumer called the Calendar Division on January 3 to inform them that the contractor had started work and to request that the matter therefore be adjourned indefinitely. The settlement was therefore achieved, if not by Sendyka, at least in his presence, with his status as an expert, objective official serving at least as a catalyst, and without any further DCA input. Unfortunately, it did not close the case: by July 11, the second time I spoke with the consumer, the contractor had just completed the non-paint items, but was refusing to repaint, and the consumer told me he was writing to reopen the case, his house being "a total disaster".

The consumer in D5 complained in December 1977 that the contractor had not done an adequate job insulating their walls. A special inspection was ordered at a hearing in April 1978, but was not done until August 29. At the inspection Sendyka opened up walls and indicated where insulation needed to be added. Most of the required work, with the exception of one wall, was done in the following week. At another hearing on September 29 the contractor agreed to complete the work by October 11; the consumer complained on November 11 that it had not been done; the contractor insisted on November 19 that he would be glad to do it and was awaiting the consumer's call; a copy of the contractor's letter was sent the consumer on November 28, and nothing further appeared in the file. My call to the consumer on April 16, 1979 revealed that the work had still not been done and that the consumers were upset because they could not install siding until it was done, but that they had no specific plans to do anything about it. For some reason, a rather gentle tap produced most of the necessary repairs, while a formal order embodying an agreement reached at a hearing, and some follow-up correspondence, has not gotten the job finished. Perhaps the parties had such difficulty communicating with each other that only the presence of a third party on the scene saying "do this and that" could produce a breakthrough, but once a misunderstanding developed with respect to carrying out his instructions one or both parties could not overcome his reluctance to deal directly with the other even to the extent of arranging for an order issued from DCA headquarters to be carried out. That this may be the explanation is suggested by a demand I heard frequently from

consumers during settlement negotiations at DCA hearings: "I could go along so long as I don't have to deal with him again." Cunningham's response is usually, "You don't have to -- call me if there is any problem, and I will deal with him." This leaves both parties satisfied, at least for the moment. But it does reflect the extreme difficulty many consumers have in dealing directly with contractors who they feel have wronged them, and suggests to me that some of them would prefer to leave a job unfinished, even at considerable inconvenience to themselves, if the alternative involves, as it did in this case (which had been decided by another hearing officer) their taking the initiative to resume contact with the contractor.

H19 involved a consumer who perhaps expected too much. She hired a young contractor just starting out to build her her dream kitchen for \$6500. With this much at stake she watched the job closely as it progressed, exasperating herself and the contractor in the process. By the time of the hearing she had compiled a list of minor defects (most of which were confirmed by Sendyka when he later did a special inspection), all of which the contractor would probably have fixed without a hearing but for his realistic fear that the carping would continue indefinitely, the reality having somehow fallen short of her dream. Cunningham told the parties at the end of the hearing, "Don't do anything until you get my decision", and ordered the inspection the next day. The inspection was done two weeks later, with the contractor agreeing to do the work within 30 days. The adjourned hearing kept being reset at the parties' request until two months after the inspection, at which

point DCA was notified that another agreement was reached that the work would be completed within two weeks. The essential remedy in this case is the special inspection report, since it gives the contractor, who was willing to finish the job but afraid that it would never end, a finite task that would be recognized by the relevant government officials and therefore probably (if reluctantly) by the consumer as "finishing the job".

In H3 the contractor had installed a storm door and replacement windows. The door hinge came off the jamb in a wind, and wind was also coming through the windows. The consumer arrived at the hearing with photographs of the door, insisting on a new jamb, but agreed to the contractor's offer to put wood putty in the existing one. He also offered to recaulk the windows, but since she thought more than that was necessary a special inspection was ordered to determine what needed to be done. At the inspection Sendyka agreed with the contractor, the work was done on the spot, and the consumer signed a note agreeing that all necessary repairs had been made.

H8 involved a window and siding contract. The consumer complained to DCA early in 1978 that rain was coming through the windows. At a special inspection in July the contractor recapped the windows and drilled weep holes. This helped, but heavy, windy rains still left the floor soaked. At the hearing I attended in March, 1979 the consumer complained that the manufacturer and the contractor keep passing the buck between them, and mentioned that since her grandson was dying and her son going insane, she did not need this. Cunningham had no difficulty arranging with the contractor that he should set up a date with the consumer, the manufacturer,



and Sendyka for all of them to be at the house, to try a hose on the outside of the windows, and then "to scratch your heads to determine the source of the leaks and fix them." Both parties left the hearing very satisfied with this arrangement. While I have not been able to locate the file since to check that it worked out, the contractor has shown good faith and a willingness to spend money to correct complaints in other cases, and doubtless did the same here.

In H32 the contractor had installed two wooden doors for \$950; the lamination was now separating on both. The contractor, on his supplier's advice, offered to varnish the doors, but the consumer insisted she had already done that, twice, and really needed two new, good doors. The contractor, a young Italian immigrant, was troubled at the prospect of being ordered to install new doors, since he seemed sure he would not have any recourse against his supplier. The hearing officer ordered a special inspection, which was held within three weeks, on May 22, 1979. Sendyka's report: "After a rather long discussion it was decided that the contractor would return within two weeks to make effective repairs by the following procedure: by applying glue, sanding, staining, sanding, and finishing with a coat of varnish - both sides of each panel. Contractor will guarantee for three months." The returns were not in at my last visit to DCA, but the prospects were good that the job had been done. The settlement is clearly better than any the parties could have worked out alone, since mere varnishing would not have done the trick, the contractor did not know what more he should do, and he was not

willing to supply new doors, particularly when his supplier was insisting that the present ones could be fixed. Similarly, it is better than any specific order which any tribunal that did not have the benefit of an expert who had seen the doors would come up with, and probably better than an order to pay money, which the contractor might not have been in a position to obey. What we have is the at least potentially happy combination of an order to cure with expert advice on how to accomplish the cure.

Finally, in H18 cracks had developed in the consumer's driveway which the contractor had cemented. At the hearing on April 10, 1979 the parties disagreed over how many and how serious were the cracks, but they agreed that the contractor had ignored many phone calls from the consumer, and also agreed on the need for a special inspection. One was ordered, and was held on April 26. Sendyka found six hairline cracks, thus agreeing with the consumer as to how many and with the contractor as to how serious they were. A settlement was worked out on the spot, with the contractor agreeing, in exchange for not having to make repairs at present, to extend the guarantee for five years against cracks larger than a pencil-width, or the lifting or lowering of the concrete. This is an unusual settlement but one which seems to precisely fit the problem. It is probably not in the consumer's interest to require the contractor to dig up and redo her driveway at present; her real concern is what the hairline cracks portend. The very precise guarantee answers that concern, at least when put in the context (as I assume it was) of Sendyka's assurances that the cracks do not necessarily mean that the driveway is undergoing serious deteriora-

tion.

143. In D27, which involved a \$15,000 contract, it took over a year of hassling for the consumer and DCA to get the contractor to finish. The complaint was filed October 21, 1977; a notice was sent to the parties on December 7 for a hearing on December 15; a special inspection was held instead on December 12 (probably by agreement between the parties, with the concurrence of someone in Calendar Division) at which 17 deficiencies were identified. As often happens, the contractor promised at the inspection to correct the problems, apparently obviating the need for a hearing. As also frequently happens, the contractor did not do all of the agreed-upon work, and a hearing was held on August 2, 1978, at which it was agreed that 10 items had been done, one should be withdrawn, and the contractor would do the remaining 5. The contractor had done only one of these by the second hearing on November 15. At the hearing one more item was withdrawn and the parties agreed that the four remaining items, all minor, would be completed in Mr. Sendyka's presence. By that point that consumer had (he told me) been threatened by the contractor and had gone to the D.A. to tell him whom to look for if anything happened to the consumer. He continued, "Thank God for the Department of Consumer Affairs, without them I would have lost. Otherwise, we would have shot each other." What the DCA had offered was an expert fact-finder (Sendyka), a credible threat of sanctions (through the quasi-disciplinary hearings), and an on-the-spot umpire for the final stages of performance (Sendyka again, in an unorthodox but not unfitting role).

D30 involved a new bay window. The consumer complained on

March 29, 1978 to the New York Attorney General's Consumer Protection Division that the window was never properly installed; the AG's office immediately forwarded the case, as it always does at least in home improvement cases, to DCA with a form letter saying "this is within your jurisdiction". The contractor responded to the L letter by explaining that he was sure it was a manufacturing problem and was awaiting the manufacturer's inspection and report. The manufacturer's representative did not help the contractor's case, his report being that the installation was definitely incorrect and would have to be redone. The contractor stuck to his position, so Goodman sent Sendyka to inspect on August 22. Sendyka agreed with the consumer and the manufacturer, and a hearing was scheduled for September 28. The hearing was adjourned at the consumer's request to October 17, when the contractor did not appear. Calendar Division on November 3 accepted his explanation that he never received notice of the hearing, and it was rescheduled for November 29. The hearing resulted in an order on December 26 that the contractor install a new window within 30 days (the usual time period allowed in such DCA orders). The consumer wrote to DCA on January 30, 1979 that the contractor had neither installed the window nor spoken with him about it. Deputy Commissioner White called the contractor on February 20 and was assured work would start shortly; he relayed that information to the consumer in a letter on February 21, adding, "Tell us if he does not and we will suspend his license." The consumer duly notified him on March 12 that nothing had been done, and White wrote a letter to the contractor that his license was suspended effective March 25, 1979, and until the window was installed.

The contractor called Commissioner White on March 25 and spoke with the Director of Adjudication telling her that the window was then being installed. When the consumer confirmed this, the suspension was cancelled. The process had taken a full year, but it was effective.

144. In H6, the consumer was told by two other contractors that the windows that were installed under a November 1977 contract were too small. A hearing on September 11, 1978 resulted in a special inspection on October 23, at which Sendyka concluded that the windows simply needed caulking. The caulking was done soon thereafter. The consumer was not mollified, but continued to believe the windows to be defective. At a hearing on January 23, 1979 the contractor offered to install 13 storm windows at "cost" (\$30/window); the consumer reluctantly agreed to consider the offer. On reflection, her conclusions were that the offer was outrageous and that DCA was incompetent and prejudiced in favor of contractors. She communicated these conclusions to her Congressman who wrote Commissioner Ratner that a consumer protection agency should not treat a wronged consumer so badly. The settlement having been refused, the hearing was reconvened on March 20. The consumer was highly intelligent, articulate, and deeply convinced that she had been wronged, and would not agree to any settlement other than replacing the windows (which of course was not offered). The hearing officer spent much of the hearing expressing his anger at her for going over his and the Department's head, rather than giving her 30 days to produce her witnesses (as Cunningham does in similar situations). His decision was to order a second special inspection, which took place April 9 and resulted

in Sendyka's reaffirming his earlier determination that the installation was correctly done. The case was dismissed on May 23, 1979. In H11/11A the consumer complained that a siding job done in August 1974 was leaking and that part of the siding had fallen off. The consumer alleged that he had received a verbal 20 year guarantee; the contractor responded that he only gives one year (written) guarantees. The consumer, a city employee, was a member of his union's pre-paid legal services plan and was represented by an attorney (the only other consumer represented by an attorney at a DCA hearing I attended was a well-to-do lady who owned a co-op apartment in Manhattan). After the first hearing, on March 26, 1979, a special inspection was ordered. Sendyka did the inspection in May. His report concluded that there were four minor problems with the present condition of the siding, but that none of them could have caused the leak of which the consumer was complaining. As to that, he opined that the leak may be due to a problem he found on a part of the wall above the siding. At the adjourned hearing on June 20 the consumer's attorney now insisted that the contractor was responsible for all existing problems because his work was never completed and the warranty period therefore never started running. Her theory was predicated on the fact that, though the contractor had returned 10 to 12 times to correct various problems and to try to find and plug the leak, since the leak was never effectively stopped the job was never complete. Contractor: "We've been coming back to try to stop a leak we have no responsibility for -- it comes from above our siding, as Sendyka's report indicates." Consumer: "I don't agree the leak is coming from above."

Cunningham: "You can always get your own expert." Consumer: "No, I'll go along with the report." His attorney then tried to cushion that concession by emphasizing that Sendyka had merely concluded that the leak may be due to the problem he found above the siding, leaving room for the consumer's theory that the siding was at fault; however, it was clear that his theory plus her arguments were no substitutes for the evidence she was missing, and her cross-examination of Sendyka did not extract anything helpful either. The consumer lost.

146. In D19 a \$7935 contract for a new roof and for aluminum siding was signed on November 22, 1977. On December 9 the consumer complained to DCA, seeking to cancel the contract prospectively; the file does not indicate what happened with this complaint, except that the work proceeded. On June 27, 1978 the consumer wrote DCA that the work had been done, the roof leaked, the contractor patched it in 35 places, but it still leaks. At a hearing on August 15 the hearing officer ordered a special inspection. At the inspection on September 5 Sendyka, the special inspector, found that more patches were needed, and the contractor promised to do them within two weeks. Sendyka re-scheduled the hearing for October 18. The contractor's request that the hearing be adjourned pending a reinspection was granted, and another special inspection was done on October 23. Sendyka found no further problems with the roofing, but five problems with the siding, which the contractor was in the process of correcting. The adjourned hearing was held on November 8. The consumer presented photographs of the roof showing a roof thoroughly criss-crossed by large patches. DCA's decision on November 21 was that the patching detracted from

its being a "new roof" within the meaning of the contract, even though it had ceased to leak, that the relevance of the patched-up appearance is that if the consumer wanted to sell the house she would not be able to realize the full value of having a new roof, and ordered the contractor "to install a new roof on the premises in a workmanlike manner with careful attention to be paid to the finished appearance." On November 24 the contractor wrote to Deputy Commissioner White that he was taken aback by the DCA decision since even Sendyka had testified at the hearing that a new roof was not needed, and requested White to listen to the tape. On December 11 White wrote to the contractor that he reviewed the record and that it was his determination to let the decision stand as it is. "It is the opinion of this Department that the roof which you initially installed required too much follow-up servicing and patching. When consumers purchase a new roof, they are entitled to a job where quality of workmanship does not require as much patch-work repair as this particular job demanded. I am sorry you are dissatisfied with our decision." Somewhat surprisingly, without further prodding or Article 78 proceedings the contractor agreed on January 4, 1979 to install the new roof, requested an extension until the spring to do the work (which was granted) and actually did it on April 24, 1979.

The remedy in this case is extraordinary, not because it requires the contractor to redo part of a job which he botched, but because it does so in a situation in which the contractor had (at least by the time of the final hearing) already repaired the job in a way which a disinterested expert (like Sendyka!) might think think adequate. The roof could not be seen from the ground and was now



water-tight; the repairs were not elegant, but they were not conspicuous and they worked. If one assumes that the purpose of a good roofing job is to keep the water out while not embarrassing the homeowner with her neighbors, this one makes it. The analysis implicit in this decision is subtler. The purpose just stated might be appropriate in the case of a "roof repair" contract, or even an inexpensive or moderately-priced contract for a "new roof". But the case here is analogous to that of the consumers who purchased Cadillacs in 1977 and received "Cadillacs" with Oldsmobile engines. The engines were of course inconspicuous, and they may even have worked as well as genuine Cadillac engines. But they left the consumers, who had been convinced by Cadillac advertising that Cadillac engines were better, feeling gypped and insecure, and by the same token reduced the cars' trade-in value. In D19 the consumer had apparently paid enough for a "Cadillac" roof, and certainly more than one should pay for a "jalopy-roof", and was therefore entitled to a generous interpretation of the phrase "new roof" to include all of the values a new roof provides, including security from worries about the need for constant repairs, and resale value. DCA's ultimate decision was therefore appropriate, representing a fair interpretation of the contract and one that a sophisticated court would probably adopt if the case were properly presented to it. It is, however, a courageous decision, in that it departs from conventional analyses and therefore from safe bureaucratic routines.

147. Four cases, two against the same contractor, illustrate how these sanctions operate. D33 is an example of the consumer receiving satisfaction after DCA bared its teeth, but without any decision

having been reached on the merits. The \$960 contract in October 1977 for the installation of aluminum gutters and soffits was incomplete when the consumer complained in June 1978. A hearing was scheduled for September 15 on the consumer's complaint, but the contractor neither appeared nor contacted the Calendar Division with an excuse. His license was therefore suspended on October 16, and a hearing scheduled for November 21 on the issue of why he did not appear. The contractor did appear at that hearing and pleaded "more important business" as his excuse for not showing up at the earlier hearing. DCA fined him \$100 on December 5 and ordered the suspension continued until he paid the fine, at which point the hearing on the original complaint was to be reset. This was apparently sufficient to bring the contractor to heel, since he paid the fine on December 26 and told DCA that he had resolved the complaint. The Calendar Division called the consumer on January 30, 1979, confirmed the resolution, cancelled the reset hearing which had been scheduled for January 31, and closed the case.

D7/D31 involved a complaint filed April 24, 1978 that floor tiles had been improperly installed. The contractor responded to the L letter with a note admitting that this had occurred, and a (presumably unnecessary) special inspection on May 8 confirmed that. Despite the unanimity on the facts nothing was done for the consumer, and the contractor failed to appear at a hearing on July 20. His license was suspended for failure to appear, and when he appeared at a disciplinary hearing on September 11 the suspension was rescinded conditioned on his paying a \$100 fine, which he did. Both consumer and contractor then appeared at a November 8 hearing which resulted

in an order on December 26 that he redo the tile floor at no cost to the consumer within 30 days. When the contractor had not complied by February 16, 1979, Deputy Commissioner White wrote him that his license would be revoked if the work were not done within two weeks. When the consumer wrote White on March 15 that nothing had been done and that the contractor was still in business, White revoked his license as of April 12. The contractor brought his license into DCA on April 16 (as he was instructed to do in the revocation notice), informing DCA that he no longer works as a contractor, but only builds cabinets.

On May 9 Shelley Sherman (who had by this point taken over White's responsibilities in this area) wrote to the consumer that the contractor had told her that he had been robbed and was now out of business, but that he would, "as good public relations", do the labor if the consumer would provide the tiles. By May 24 the contractor must have reconsidered his decision to go out of the home improvement business, since Sherman wrote to him (copy to consumer) that DCA was authorizing him to complete the repairs, and that if they were done to the consumer's satisfaction within two weeks his revocation may be rescinded. On July 13 she wrote to the consumer: "Please advise within 10 days of the results of your complaint. If we do not hear from you we will assume the complaint has been resolved." While nothing more appeared in the file as of mid-August, when I called the consumer on September 15 he told me that the work had been done to his satisfaction two or three months previously, and that his son had written DCA telling them of this.

The two cases against a single contractor are L92 and H28.

At the beginning the matter in L92 looked simple enough. Everything had been done promptly on a \$681 contract except for "capping" around the entrance door, an item which later turned out, was worth about \$55. The contractor responded promptly to the L letter, stating that the contract was completed, that the complaint was not in the contract, and that DCA should send an inspector to compare the contract and the work done. The consumer was rather surprised at getting a copy of this reply and called Harold Goodman, at whose suggestion she wrote the contractor (copy to DCA) that the contract stated clearly, "will cap around entrance door", and that she would request a hearing if the job was not done within 48 hours. Two days later, on August 25, she arrived at Goodman's office with the information that the capping had not been done. A special inspection was arranged for October 3. The contractor did not appear at the inspection, as was his right. Sendyka duly reported that the capping was clearly in the contract and had not been done; a copy of his report was sent to both parties. The contractor still did not do the capping, and also did not appear as ordered for the subsequent hearing on November 22.

At this point the facts in H28 must be set out. As in L92, nothing much was at stake. The consumer had complained that some of the screens he had installed did not fit and that the trim around her front doorway was coming loose. The contractor also failed to attend a hearing on this case in November, 1978. His failure to appear in the two cases resulted in a suspension hearing on December 19 at which he did appear and claimed that he had called for an adjournment before the November 22 hearing in L92; but since

he had no excuse for missing the hearing in H28, he was fined \$50.

The contractor finally attended hearings on the merits of the two cases on February 15, 1979. The hearing officer ordered a special inspection in H28 and reserved decision in L92. Several days later the consumer in L92 wrote to Commissioner Ratner that the contractor had been bragging on February 16 or 17 that "I beat that guy". Ken Bromberg, the then Director of Adjudication, wrote back for the Commissioner that the hearing officer had not yet decided that case and that the contractor must have a lively imagination. The decision, issued March 23, of course ordered the contractor to cap the door immediately, and also to pay the \$50 fine previously assessed within three days or his license would be suspended. The contractor actually paid the fine on April 3, but did not cap the door.

Meanwhile, on March 6 at the special inspection which had been ordered in H28 Sendyka confirmed the existence of the problems the consumer had complained about, and the contractor promised to correct them within ten days. He did not do the work, but instead called the consumer on April 24 to tell her he could not get to the adjourned hearing scheduled for the following day, to beg her not to go, and to promise her that he would do the work the following week. She did go, he (for once true to his word) did not. When the hearing officer assured the consumer that he would suspend the contractor's license for his non-appearance, she insisted that she did not want anyone losing his license, but just wanted the job done.

It did not, however, appear that DCA would be able to oblige. It suspended the contractor's license on May 22 for failure to comply with the March 23 order in L92 and to appear at the April 25 hearing

in H28. The suspension order warned him that the failure to return his license within ten days would result in its revocation. On June 7 the license was revoked for failure to appear and for failure to surrender his license.

The revocation finally sobered the contractor. He asked Shelley Sherman what he would have to do to get his license back. She told him he would have to do the work that had been ordered. Another hearing was held in both cases in mid-October, 1979. The consumer in H28 called in to say that the work had been done; the consumer in L92 appeared, and the contractor handed her \$55 in cash. As of November 9, 1979, Ms. Sherman was preparing an order reinstating the contractor's license.

148. In H3, the consumers, an elderly woman (who appeared at the hearing with her nephew) and her 84 year old husband, paid a \$400 deposit in August, 1978 toward a \$1000 miscellaneous repair job. As of the March 20, 1979 hearing nothing had been done, other than letters sent from the contractor in November and in January apologizing for the delay and allowing them \$100 off the contract price. At the hearing the contractor insisted that he had not abandoned the contract, as evidenced by these letters, and would therefore not return the deposit. The consumer stated that she would rather have the money back, since her husband almost had a stroke from the excitement caused by this situation and does not want the contractor back in his house. She would, however, agree to let him do the external work -- gutters and leaders -- if he would set a definite date. The contractor's response was that he could not set such a date! The hearing ended with the nephew stating that it would be best (impliedly for his

uncle's health) if the contractor simply returned the money.

The DCA's decision, issued May 22, was that the contractor must return the deposit, within five days. On June 20, the head of the Calendar Division called the consumers to see if they had gotten their money; they had not. Since the orders in at least five other cases were being similarly ignored by the same contractor, the six cases were cited together as the reasons in an order of July 19 revoking his license. Another call to the Calendar Division on August 3 confirmed that they had not yet received their deposit. It is not likely that they will, unless the contractor makes a deal with the Department to comply with all outstanding orders in exchange for getting his license back.

Two more of these six cases, D34/H9 and H34, found their way into my samples. In D34/H9, the contractor had received \$1600 on a \$1787 contract, had done some of the work, but had not installed an awning or a door. The complaint was filed in July 1978 and a hearing was first scheduled for September 6. At the contractor's urgent request it was adjourned to September 27, and again to October 18. At the hearing the contractor offered to figure out the value of the work not done and to reimburse the consumer accordingly. The hearing was therefore adjourned, looking forward to a prompt settlement. It was reconvened on November 28, the contractor having offered \$341 (less the \$187 still owed him), and the consumer had refused because he was paying another contractor \$900 to do the work. The consumer's daughter, who appeared at all hearings in this case in lieu of her father who works and cannot take a day off, also brought in a \$775 estimate from a third contractor, who apparently could not do the

work himself. On December 26 DCA decided that the contractor's reimbursement offer was implausible and internally contradictory, that the work was worth the average of the other two estimates (\$900 and \$775), and that he should reimburse this amount to the consumer, less the \$187 owing (this decision was D34).

By March 20, 1979, the contractor had still not paid this, and a hearing was held on that day to determine why (this hearing was H4). The contractor's principal answer was that he had dealt at the time of the contract only with the father, that in the absence of this essential party this and the prior hearings were improper, that he had so protested at the first hearing and had written a long letter to Deputy Commissioner White on March 1 making this and a number of other objections to the decision (as indeed he had), that he was not refusing to pay, mind you, but he just thought he had some legal rights too. On May 8 he was ordered to pay the \$650 within 30 days and to submit proof to DCA that he had done so, or his license would be revoked. Instead of paying he sent another letter to DCA to Commissioner White on June 18, reiterating his objections to the original decision and requesting reconsideration. Shelley Sherman responded on June 26 that she had reviewed the decision and was affirming it. She followed this with an order to him on July 5 to pay within 10 days or lose his license. On July 12, he responded, as usual, with a letter rather than payment, insisting he was entitled to a point-by-point rebuttal of his criticisms. As was mentioned before, on July 19 his license was revoked.

Finally, H34 involved a leaky roof. The contractor guaranteed the roof for one year, and of course ignored the consumers' com-



plaints when the leak occurred within this period. After the continuing leak had damaged the interior of the house, the consumers paid another contractor \$20 to fix the roof and \$155 to repair the extrinsic damages. They then complained to DCA seeking reimbursement of the \$175, the contractor offered them \$75 to settle, and they -- understandably but unwisely -- refused. A hearing was scheduled for February 15, 1979 but the contractor did not appear. The same thing happened on March 26. As a result of these defaults he was ordered to pay a \$200 fine on May 8, as part of consolidated order dealing with several of his cases. For some reason the case was rescheduled for June 7 even though he had not paid the fine: surprisingly, he did appear at this hearing, but only to contend that the case should be dismissed for lack of evidence, the contractor who did the repairs not having appeared to testify. He did not testify himself that the repairs were not necessary, or that they were not done, but merely asserted, in his usual imitation-of-a-nitpicking-lawyer fashion, that there was a technical failure in the consumers' prima facie case. On June 26 Shelley Sherman, in her letter affirming the decision in H4/D34, reminded the contractor that he still had to pay the \$100 fine. On June 29 the hearing officer's decision in H34 was handed down, ordering him to pay the \$175 within 10 days because the job had been "guaranteed for one year and the contractor failed to abide by the guarantee, causing the consumer extra expense." The hearing officer did not deal with the contractor's technical failure-of-proof argument, doubtless because there is no evidentiary rule precluding consumers from testifying about the qualitative damage

done to their property, and the cost to them of that damage is sufficiently established by their testimony that they paid that much to repair it, buttressed by a paid bill. But the contractor as usual acted as if he could render the hearing officer's decision void simply by asserting it was incorrect, and wrote back to the hearing officer on July 12 that he should please dismiss the case because it was not proven. To reiterate, DCA's response to this, and to the contractor's shenanigans in the five other cases, was to revoke his license as of July 19, 1979.

I have not checked on the progress of these cases since October, 1979. It is conceivable that this contractor may, like those in Note 147, at some point conclude that it is in his interest to settle the outstanding cases in order to regain his license.

149. As I discussed in section II.C., II.D., and IV.C., above, DCA has very little leverage over non-licensees. The cases noted in this paragraph, however, all involve licensees and ex-licensees.

The following case illustrates the problems DCA runs into even when it makes an all-out effort against a large-scale offender. In L-NL82 the consumer complained that the contractor had improperly installed aluminum siding in April, 1976, so that water leaking around it was causing delamination. Since the contractor's license had been suspended in December, 1977 for failure to carry out two earlier settlements, Goodman sent out an NL letter on August 14. The file was then sent to the Advocate's Office, which was in the process of negotiating with the contractor who was seeking clearance for license renewal. This case, it turned out, was one of twelve unresolved complaints against the contractor; he had also failed to

carry out five (not two) settlements, had never complied in any respect with the three day cancellation provisions, had never stated on his contracts that he would provide the consumer with a Certificate of Workmen's Compensation Insurance or that he would purchase all necessary construction permits, as required by the Home Improvement Business Law, nor did he carry out his duty to secure the necessary permits. The attorney in the Advocate's Office who was handling the negotiations spoke with the consumer in December, 1978, telling her that DCA would do its best to try to get her some relief but that there was little hope since the contractor was out of business. However, on April 3, 1979 DCA obtained from the contractor a formal "Assurance of Discontinuance" which the attorney had drafted. In this Assurance he admitted on behalf of his corporation to having violated "section B32-358.0.1 of the Administrative Code by abandoning and wilfully failing to perform, without justification, home improvement contracts undertaken by it", to having violated section B32-357.0.3 "in that the business transactions of Applicant have been and are marked by a practice of failure to timely perform or complete its home improvement contracts", and to the various defaults and violations mentioned above. He then agreed to comply within three months with the terms of the settlement orders previously issued in four cases, and to "resolve to the consumer's satisfaction" the complaints of six more consumers, including L-NL82. Should he fail to satisfy these consumers, he agreed to binding arbitration before a DCA hearing officer, or if the consumer prefers an ordinary DCA hearing (thus preserving her option to go to court if she is unhappy with

the decision), he agreed to abide by the decision of the hearing officer. In either case he agreed to pay DCA a \$250 fine if the hearing officer determines that he was at fault in the matter. Finally, he agreed to comply in the future with all applicable laws and regulations, and to pay DCA a \$1000 fine. DCA, for its part, did not explicitly promise to renew his license, but the concluding statement in the Assurance:

CONDITIONS OF LICENSE RENEWAL

23. Before the Department of Consumer Affairs renews Applicant's license, Applicant will
- (a) Resolve all outstanding complaints against it;
  - (b) Pay \$150.00 of the \$1000.00 fine owed to the Department; and
  - (c) Satisfy all Small Claims Court judgments against it.
24. Each and every separate Paragraph in the Assurance is a material factor in the Department's decision on whether to renew Assurer's license.

when combined with the DCA attorney's acceptance "for Bruce C. Ratner as Commissioner of the Department of Consumer Affairs of the City of New York" may be interpreted as an implicit promise to do so if all conditions are met.

In any event, they were not met. When on July 9, a little more than three months after the agreement was signed, I called the consumer to find out whether the work was done (as was my wont), she expressed complete ignorance about the Assurance, telling me she had not heard from DCA since December, and had not heard from the contractor since long before that. I told her about the Assurance, and suggested that she contact the DCA attorney who was handling the case. Five weeks later, on August 16, I discovered that the consumer's ignorance was not a result of DCA oversight. The DCA attorney in question told me that DCA had received an irate letter from the

consumer as a result of my phone call, that the consumer had purposely not been told about the Assurance to avoid getting her hopes up, that they had never believed that the contractor was willing or perhaps even able to satisfy all of the complaints within three months (or perhaps at all), and that their understanding was that he had by this time done some work on some of the jobs, though not on this consumer's. The decision not to inform the consumers was also based on the belief that so long as the contractor wants his license he will keep chipping away at his obligations, and might eventually complete them, whereas if he were confronted with several consumers bringing arbitration proceedings he might just run for cover, leaving all his consumers at best with unenforceable awards against a bankrupt corporation. The latter scenario is quite plausible, since the contractor's only personal obligation (as opposed to his corporation's obligations, which are enforceable only against the property -- if any -- of the corporation) under the Assurance was to immediately deliver (on pain of \$100/day penalty) his suspended license to the Department if it was revoked pursuant to a provision in the Assurance providing for automatic forfeiture if he fails to comply within 15 days with any adverse arbitration or ordinary DCA hearing decision which might be issued under the terms of the Assurance.

DCA's strategy here may have been the best available one, but it raises two problems. First, why bother drafting strict remedial provisions if the beneficiaries are not to be informed of them? Second, might not a public agency have an obligation to inform consumers that they have become third party beneficiaries of

a contract giving them a new set of legally enforceable (at least in principle) rights? But all strategies generally available to public consumer advocacy agencies for obtaining redress from contractors of doubtful honesty are bedevilled with similar problems. They typically do business under a corporate name which they can abandon to bankruptcy if significant judgments are obtained against it. While techniques are in principle available for "piercing the corporate veil", they are ponderous to invoke and hence rarely used. Where licensing is required, as in New York City, an attempt may be made to keep them from getting a license in another corporate name. Even that is difficult, however, since the principals in a corporation may be able to find people to "front" for them in obtaining the license, or they may be able to carry on business without a license without an unacceptable level of official harassment. Furthermore, at least some contractors may be willing to move their business from one jurisdiction to another, or else take their unscrupulous techniques from one type of business to another, perhaps unlicensed, one. The leverage available to public enforcement agencies in exacting redress is therefore not large, and as in the present case is often more a matter of carrot than of stick. Since it is galling to enforcement officials to have to bribe offenders to do their duty, their formal positions tend to be stern, mandatory, and uncompromising. Once they have obtained ritual acquiescence in these positions from the offenders, however, they must frequently work out pragmatic and non-doctrinaire modus vivendi with the offenders if they are to obtain any actual relief for consumers.

150. H16 involved a storm door which did not fit right and the screen of which did not fit at all and hence had not been installed. The contractor had responded to the consumer's complaints about this by putting him off, but his most recent such assurance was ten months old. Yet when the consumer insisted at the hearing that he wanted his money back rather than more assurances, the contractor pleaded that they were a reputable company and should be allowed to complete the contract. Cunningham: "But you have a bad track record here." Contractor: "If we haven't installed a new door by May 15 (40 days after the hearing), they will get their money back." Cunningham: "Sounds fair." Consumer: "I don't want to have to talk to him again." Cunningham: "Talk to me if there are any problems." Consumer: "O.K." Upshot: On June 26(!) the contractor refunded \$215 of the \$275 he had received, deducting \$60 for "the cost of materials." The contractor apparently calculated correctly that the consumer would not make a fuss over the \$60, even though the settlement at the hearing had contained no reference to any such allowance.

In L85, a siding job was done for \$3000 in November, 1977; by the following summer it was falling apart. The consumer first went to the Better Business Bureau, which informed the consumer, based on the contractor's representations, that his problem had been adjusted. The consumer then presented his complaint in person at the DCA office, which sent the contractor an L letter on August 14, 1978. The contractor replied on August 18: "We repaired it on August 8. The consumer is still complaining about things we fixed." A copy of this reply went to the consumer, who

came back to the DCA office on October 5 to say that the repair was falling apart. Goodman called the contractor, who promised to send a repairman the next day. It does not appear whether the repairman came, but if so this repair did not last much longer than the earlier one, since on December 22 Goodman noted on the file, "set for hearing". The hearing notice went out January 23, 1979; at the hearing on February 15 a special inspection was ordered which was held March 27. Sendyka noted 11 specific problems with the job in his report on April 3, and the hearing was reset for May 16. At the adjourned hearing, a settlement was reached that the contractor would repair all deficiencies by June 15, and that Sendyka would reinspect thereafter. When I spoke with the consumer July 11, he told me that the contractor had patched some of the problems but not others, and that while Sendyka had been there the previous day for the scheduled reinspection, the contractor had not appeared. Presumably, this case will continue limping along at the same one-step-a-month pace until the consumer gets tired or the contractor finally fixes it right.

151. Thus, in D11 the contractor had received \$1550 for waterproofing the consumer's house pursuant to a contract of May 9, 1973; he gave the consumer a 15-year warranty. The consumer complained in October 1974 that the waterproofed brick was chipping; the contractor responded on October 21 to the L letter of October 8, insisting that the bricks underneath his work were deteriorating, and that he was therefore not responsible for the problem. A hearing was held on November 26, 1974. The record contains no decision by the hearing officer who heard the case or by anyone



based on this hearing. The contractor claims in an affidavit that the hearing officer dismissed the complaint; DCA, in verified pleading by Deputy Commissioner Smith, asserts that no decision was reached in that hearing because the hearing officer left the Department. By the summer of 1976 the consumer had had the work totally redone by another contractor, and was pressing DCA to get her \$1550 back. A hearing was held on October 20, 1976 before another hearing officer, who concluded that holes had developed in the waterproofing which had caused the cracking and falling away of the brick. This hearing resulted in an order of January 11, 1977, approved by the then Deputy Commissioner, that the contractor refund the \$1550. The contractor refused, his license was suspended, he brought article 78 proceedings, which were settled by an agreement removing the suspension and providing a new hearing. This hearing was held on July 7, 1978. The contractor (who is a general contractor, not specifically a waterproofer) argued that the consumer had chosen the waterproofing material, "Kenitex", based on advertising she had read, that he had no special knowledge about it but went along, and that his 15-year warranty applied to his workmanship but not to the Kenitex. The decision of October 31 reaffirmed the restitution order on the ground that he had had the duty to ascertain the appropriateness of Kenitex before applying it, and therefore was responsible when it did not do the job. Although the DCA opinion does not analyze the problem this way, this duty is presumably part of the contractor's warranty of workmanship which he acknowledges he made. The formal DCA order to repay issued on November 6, 1978, the contractor brought another article 78 proceed-

ing on November 29, the DCA (represented by the Corporation Counsel's office) and the contractor (represented presumably by the attorney he had hired in January 1977 to contest the earlier restitution order) began exchanging papers in December, the case was referred by the Supreme Court to the Appellate Division in April, 1979, and no decision had yet been reached by August, 1979. Thus, it is now five years since the consumer first complained, and at least three years since she had the work redone; she has been to at least three DCA hearings, is out \$1550, and has as yet not gotten any relief at all from this process. The contractor has not done so well either, since he must have paid at least \$1000 in attorney's fees and related litigation costs by now, has had to spend time with his attorney as well as at the DCA hearings, and may yet be forced to pay the \$1550 or lose his license. City officials and attorneys have also spent substantial amounts of time on the case. It is hard to believe that everyone involved (other than perhaps the contractor's attorney) would not be happier now if DCA had not misplaced the file (or whatever it did) after the November 1974 hearing, but had rather done its usual thing, sending the contractor back to patch or reapply the Kenitex or, if appropriate and necessary, to find some other way to solve the consumer's problem.

152. Three of these cases illustrate the problem.

In NL55/SC30, the consumer had paid \$2000 toward a \$4750 kitchen renovation job and gotten \$1463 worth of work before the contractor stopped. She presented her complaint at DCA's Brooklyn field office on June 19, 1978; when they could not get satisfaction

for her they sent it on to the main office, which sent out an NL letter on August 15. The contractor did not respond, and an inspector therefore paid them a visit on August 30. They assured him that they no longer did kitchens or any home improvement work and that they had resolved two of the three outstanding complaints, and were in the process of resolving the third (NL66). The process in question involved their sending the consumer a letter that day offering her \$500 if she returns the kitchen unit they delivered. DCA closed the case on August 31, having exhausted its processes. The consumer then filed in Brooklyn small claims court, seeking \$1000 ( the \$537 excess of payment over work done, plus \$500 from a penalty clause set out in the contract). At an inquest on December 11, she was awarded \$1000 plus \$17.60 in costs but she never collected a penny. Her response to my telephone call inquiry: "No, it's uncollectible. I went to the sheriff but he said he had tried to collect on behalf of others, and that they were out of business. Of course they're doing business under another corporate name at the same spot -- they have been through three different corporations. (They make cabinets and install them.) It's really frustrating to get a judgment and then not be able to collect." There is apparently no force presently operating in New York that can keep them from continuing this scam, although of course any consumer careful enough not to pay them except for work already completed will not be burnt. But most consumers are not this defensive in dealing with apparently respectable businesses, nor is it clear that consumers should in every case resist the entreaty, "why don't you give us something up front (or you'll have to give

us \$X up front) to pay our workmen (or suppliers)."

SC36 involved a consumer who had paid a fiber spraying company \$650 in April 1978 to repair four of her ceilings. As soon as the job was done one ceiling fell and was replaced. By the time of her complaint on September 18, the other three ceilings had fallen, but the contractor had stopped answering her calls. The contractor did not pick up the certified mail summons from the post office so the consumer had someone serve it personally on October 27. Not surprisingly, the contractor did not appear at the hearing on December 18, nor did he pay the resulting judgment of \$600 (+ \$13.40 costs). The consumer then went to the sheriff, who gave her the assignment of locating some seizable assets. The consumer's conclusion: "I have to do a lot of research -- the sheriff needs to know statistics and I don't have them. I guess it's a waste of time going to small claims court."

Finally, SC 26 really involves two separate complaints, each for \$1000 filed the same day by two neighbors against the same contractor. Each one began with identical allegations: the contractor had "installed blue stone steps and cleaned them with acid. The very next day the steps turned brownish-green. Totally discolored. ...We want him to change the stone or pay us." The two cases were tried before a judge on November 9, 1978, none of the parties was represented by a lawyer, and the judge awarded each complainant \$500 plus interest and costs. And that was it. When I contacted one of the consumers on June 13, 1979, she told me: "No, he never paid. We went to the sheriff, who did nothing. It was up to us to find the defendant's bank account -- how could we do that?"

See the sources cited in Note 6 for proposals to improve the effectiveness of small claims court collection procedures.

153. Appendix C.

154. H1 involved the same contractor whose shenanigans were described in Note 148. The consumer complained to DCA in late 1978 about the contractor's failure to complete a job. At the same time he filed a small claims court complaint. On January 10, 1979 the latter resulted in a \$500 judgment against the contractor, who did not pay it. The consumer, following the sheriff's advice, then tried to locate some assets of the contractor's corporation. This at first did not seem like a difficult assignment, since the contractor's forms listed two addresses. One address, however, turned out to be a chemical company, and the other one a private home (definitely not the owner's): people at both addresses reluctantly admitted that they picked up mail for the contractor, but they both insisted, possibly correctly, that they had no other connection with the contractor and knew nothing about him or his operation. At this point, a DCA hearing, which had been scheduled before the consumer won his judgment, was held. At the hearing, on January 15, 1979, the consumer was informed that, since his judgment debtor was a DCA licensee, he had a right to enlist DCA's assistance in collecting the judgment under its General Regulation 7 (Appendix C). However, since the Regulation required that the judgment have remained unpaid for 30 days, the consumer was told to wait the 30 days and come back if he did not receive payment. Between that hearing and the present one on March 20 the contractor had sent him a money order for \$10 with a note explaining that he would send additional checks from

time to time, or if the consumer preferred he would come back and complete the job which was the subject matter of the consumer's small claims court action. The consumer refused the offer. At the March 20 hearing the contractor made several defenses of his refusal to go beyond his offer. First, he stated that his "company is going through reorganization and refinancing." When the hearing officer indicated interest, telling the contractor to send him the relevant papers, the contractor realized that this tack could cost him his license (on the theory that the reorganized company was different from the one which had received the license) and went on to his second point, that his lawyer told him that a payment every once in a while is o.k. His third point was that if the sheriff had attempted to collect, the sheriff would have agreed to a schedule of periodic payments. The hearing officer's response to all three points was to tell the contractor that if he did not pay within 10 days his license would be revoked.

The contractor's response to this warning was to send DCA a check dated March 28, made payable jointly to DCA and to the consumer. DCA endorsed it and sent it on to the consumer. Unfortunately, the contractor had taken the precaution on March 14 of removing all money from the account on which the check was drawn; when the consumer tried to deposit it, it bounced. At the hearing officer's suggestion the consumer then went to see a friend of the hearing officer's at the Queens District Attorney office. This Assistant D.A. called the contractor and instructed him to pay the \$500 immediately or face prosecution. Finally someone was talking the contractor's language, and he sent the consumer a good money order

on April 10, 1979.

155. Thus, in L7 the consumer signed a \$1250 contract on May 17, 1978 to have his kitchen cabinets refaced and a missing counter-top installed. By the time of his complaint on July 15 to the Nassau County Department of Consumer Affairs, he had paid \$1000 and had received everything but the counter-top. Nassau relayed the complaint to the New York City DCA since, although the contractor's office was in Nassau, the sole basis for their own jurisdiction under their law is the consumer's residence, which in this case was New York City. The contractor, however, had a New York City license (as well as his Nassau one) as he is required to under New York's law if he does business in the City. He was therefore sent an L letter on August 4, and replied the next day that they were waiting to get the counter-top from their supplier, that they had told the consumer that, and that the consumer is withholding payment pending receipt. As it ordinarily does, DCA sent the consumer a copy of this reply. The consumer called Harold Goodman on August 22, and followed up the next day with a letter, stating that he did not know that the counter-top would be delayed until he had made his first \$500 payment. So far, nothing unusual; indeed, the case seemed ripe for settlement, and it was indeed settled in late October or early November by the contractor allowing him \$300 off the contract price in exchange for not having to deliver the counter-top.

But now the odd facts. The consumer explained in his communications with Harold Goodman that he had pressed the panic button on July 15, and now wanted a hearing in a hurry, because he was picking up rumors that the owner of the company was leaving town. A

hearing was scheduled for September 28, adjourned (supposedly so that the contractor's attorney could be present) until October 25, and then again (perhaps with the consumer's consent, since this is about when the settlement occurred) to November 22, by which time DCA had learned of the settlement and cancelled the hearing. By the time of the first adjournment the company's owner had indeed left town permanently, leaving behind at least 22 unsatisfied DCA complaints in addition to L7. His former general manager, who had not been a principal in the company, had purchased the assets of the company (including its "goodwill" which was apparently valuable!) and was negotiating with an attorney in the Advocate's Division of DCA seeking some kind of accommodation which would permit him to continue to operate the company under its original name (so much for any notion that word-of-mouth is more important than advertising in building a contractor's reputation). Under the settlement finally reached in June 1979, the new owner was permitted to operate under the original name in exchange for paying the 22 unsatisfied claimants between 10% and 30% of the amount owed them by the original licensee. The consumer in L7 was therefore fortunate in having come out about even. He apparently achieved it by never paying the contractor until he had done an equivalent amount of work.

156. In H29, as part of a larger contract, the contractor's plumber installed a new radiator on the consumer's porch. The pipes were exposed under the porch and froze the first winter, cracking the radiator, freezing the porch, and killing the consumer's plants. The hearing officer pressed the unhappy contractor to get his plumber to repair the job, insisting that the installation was unworkmanlike



and suggesting that the contractor tell his plumber that the hearing officer would complain to the Board of Master Plumbers about him if he does not make good. The contractor finally agreed, and ended up paying the plumber \$375 to install a new radiator rather than fight with him over whether he had done it right in the first place. But when, following the contractor's agreement to have the radiator repaired or replaced, the consumer asked, "What about my plants?", the hearing officer responded immediately, "That is not our problem, but I commiserate." The theory is clear: DCA will insist that the contractor deliver the performance he explicitly or implicitly promised, including in this a level of design, workmanship, and materials appropriate to the purposes the consumer obviously had in mind in contracting for the job, but the consumer will have to look elsewhere for the losses she had suffered as a result of the contractor's not having done the job right in the first place.

157. In SC19 the consumer complained of "leaky roof, concrete block base leaking, missing handle on window, etc. Ruined lawn not being able to water it." The contractor refused to accept the certified mail summons addressed to it, probably on the mistaken assumption that this would defeat the court's personal jurisdiction over him. The consumer obtained a default judgment for \$100 plus \$13.40 costs (there is no way to tell what proportion of this reflected the damaged lawn as opposed to defects in the job itself). When the contractor received notice of the default judgment he applied to have it set aside; his application was denied. He refused to pay, but the business had money in the bank and the sheriff

was able to collect the full judgment.

In SC24 the consumer sought \$850 because of "bad workmanship and bad material on bathroom remodeling which resulted in damage to the ceiling". The parties settled at the hearing on \$250. While I could not contact the consumer to confirm that she had received the money, since the contractor was a division of a chain of retail stores and was represented at the hearing by an attorney, the probability is very high that it paid the judgment.

In SC37 the contractor had warranted his roofing job 10 years, and a leak had developed. The consumer filed a claim on September 21, 1978 based on a job done in December 1977. She sought \$600 alleging that she had had to repair damage to a ceiling and a walk-in closet, and that the leak was continuing. After a hearing on October 26 at which the contractor was represented by an attorney, the arbitrator awarded the consumer \$150, plus \$13.40 costs, and the consumer in fact collected. I have no way to determine the basis of this award -- the consumer's expenses in repairing the damaged ceiling and closet, her likely expenses to repair the leak, and/or a rough sense that she is entitled to one-quarter of what she claimed -- much less its adequacy.

158. For example, the complaint in SC32 produced a halfway job. The consumer had paid \$1400 in May 1978 for cement work, and sued on September 15 for \$1000 alleging unsatisfactory work. The hearing before an arbitrator on October 24 was dismissed by consent, the contractor having apparently begun the process of repairing the job. The consumer's wife told me in August, 1979 that the work was done but it was not right. "We paid \$1400, and it wasn't even worth

\$400." When I asked her what they were planning on doing about it, she responded: 'My husband doesn't want to do business with him. He did the whole neighborhood -- some of it was o.k., some wasn't. Maybe it's because we're Jewish.'" I have no way to evaluate her suspicion, but this elderly couple's reluctance to follow up, probably motivated at least in part by a fear of reprisals, resonates with fears I picked up in conversations with several other consumers who had dealt with marginal contractors. These consumers, mostly women, have picked a fight in a "legal" forum with physically powerful men who have been inside their houses and whose demeanors do not necessarily suggest a commitment to resolving all disputes peaceably. A suggestion of a threat from the contractor was often enough to get these consumers to "cool it" rather than pursue further legal proceedings. Indeed, even the sudden awareness by the consumer of her vulnerability, unprovoked by anything the contractor or his men may have done, may have produced the same effect. Though my samples of course did not include cases in which these fears deterred consumers from bringing a formal complaint against a home improvement contractor in the first instance, the number of such cases must be large.

The job involved in L80 was done in July, 1978 for \$700; the leaks began again the next week. Goodman's L letter of August 14, 1978 got a reply August 29: "This has been taken care of to the consumer's satisfaction -- you can check with her." The case was closed as "resolved" August 30, with a copy of the contractor's letter going to the consumer. The consumer shot back a letter September 2: "I have not received any satisfaction. Someone came, observed the

dripping, tried to fix it, failed, and left." The case was reopened and a hearing was held October 16, at which a special inspection was ordered. Sendyka's report of his December 5 visit stated, "Skylight needs more flashing. Contractor will do that within 10 days, and put cement over a small hole. Reset for 1/17/79." The reset date in a case like this is merely precautionary, since by that date the 10 days would have passed and the contractor should have completed the necessary work per his agreement at the special inspection. In this case, however, the precaution proved necessary, since the contractor instead of just doing the work appeared at the hearing and promised to comply with Sendyka's report within 10 days of the hearing. An order that he do so issued in due course on February 1. But when I spoke to the consumer on April 13, she told me: "They didn't come. I'm not going to worry about it. I'll get someone else to do it even though I paid them \$700. I'm single and I don't want to bother these people, don't want them to come and burn my house down." As in other instances where the consumer fears physical danger from the contractor, such as SC32, I have no way to place the fears at a definite point on the continuum between paranoid fantasy and clear and present danger. But when a contractor demonstrates to a consumer his readiness to mislead officials and to ignore their orders, he demonstrates an absence of strong super-ego controls or fear of sanctions. While most people of this description would nonetheless draw the line at violence, the risk that he will not has thereby increased to a point that consumers who feel vulnerable may be wise (or at least reasonable) in giving up their right to relief in order to reduce that risk.

159. An example of a consumer who suffered for her ignorance of the DCA consumer redress process is the complainant in SC34. She was suing for the \$1000 jurisdictional limit because the cement work on her patch, steps, and walk developed serious cracks almost immediately after it was done. The arbitrator awarded her \$400 plus \$13.40 costs. When I called to check if she had received the money, she told me, "It was paid. But I thought the judgment was asinine. The defendant admitted he was guilty and offered me \$300. I had paid more than \$1000 for the job. A repairman would charge \$650 for a patch, but a patch job won't really work. It will actually cost me \$2000 since the railing came off too. I brought photos to the hearing: the whole cement is opened up, like an earthquake. The arbitrator is a dope."

The contractor in this case was licensed. Had the case been brought before DCA, the contractor would most probably have been required to redo the job -- a more satisfactory remedy from the consumer's point of view. I therefore asked the consumer why she had not filed a DCA complaint against the contractor rather than going to small claims court (where she had to compromise her claim even at the time she filed it just to get it within the jurisdictional limit). Her answer: "The man was a perfect gentleman. There had been a cement strike at the time he had done the job, so he was probably given bad cement. So I won't complain against him. But can I complain about the arbitrator?"

160. For the reasons discussed in the last section, see text at notes 127 - 133, both the consumer and the contractor should normally prefer this remedy, at least on sober second thought.

161. An example of the utility of a damage remedy as a "fall-back" is D6/D20. The contractor installed 20 windows in the consumer's home in July, 1977 at a price of \$3400. The installation was financed by a bank, which obtained a note from the consumer and advanced most of the sale price to the contractor, retaining part of it to protect itself against warranty claims by the consumer (a wise precaution, as it turned out). Beginning that fall, the consumer complained to the contractor of drafts, and when he did not come back she enlisted the bank to call him. When he still did not appear she filed her complaint with DCA on February 8, 1978, asserting that all the windows were drafty. At a hearing on March 20, a settlement was reached under which the contractor was supposed to return and recheck all of the windows within one week. He again did not appear, and this time the consumer stopped paying her bank loan beginning with her April payment "because of her complaint", as she had a right to do. She also complained again to DCA, which ordered the contractor's license suspended as of June 5, 1978. This finally elicited a visit from an employee of the contractor who, according to the consumer, looked around, said he would be back, and never reappeared. Despairing of any relief from the contractor, she contracted in June with another contractor for the replacement of the eight windows in her bedrooms at a cost of \$1,140.

Meanwhile the contractor appeared at a disciplinary hearing on June 26 at which the consumer was not present and insisted that the consumer had refused to let him make any repairs unless he replaced all the windows; accordingly, his license suspension was

lifted and a special inspection was ordered. Now the plot thickens. Sendyka visited during the summer and concluded that none of the original twenty windows were drafty. The hearing on the case was rescheduled for October 18. A few days before that date the Calendar Division received a call purportedly from the consumer requesting an adjournment; they therefore called the contractor to tell him not to appear until November 1. But the consumer appeared promptly on October 18, insisting that she had not placed the call to the Calendar Division and knew nothing about it! The consumer was told to come back November 1, and both parties were notified that the source of the mysterious phone call would be an issue at the hearing, as well as what to do about the consumer's underlying complaint. Meanwhile Sendyka did a second special inspection on October 24, coming to the same conclusion about the absence of drafts; at the inspection the contractor, perhaps sensing the wind blowing against him, offered to insulate the 12 windows that the consumer had not replaced.

The November 1 hearing was of course interesting. The consumer was represented by counsel from South Bronx Legal Aid. Both parties of course disclaimed any responsibility for the phone call. The hearing officer found that "the testimony is inconclusive, though it appears that some folly was practiced by that side most likely to gain from an adjournment." Lest there be any doubt who that is, he also found that the contractor had lied at the June 26 hearing when he testified that the consumer had given him the choice of replacing all the windows or making no repairs. But Sendyka testified firmly that there were no drafts, despite the testimony of the daughter of the consumer that

the draperies swayed with the wind, and the testimony of the consumer that she had paid \$1,140 to eliminate that problem with respect to the eight bedroom windows. DCA was now in a quandary: their only expert testimony was that the job was done perfectly, but the contractor had violated his promises and had lied to them, and had by ignoring the consumer's, the bank's, and DCA's requests that he service the job allowed the consumer to panic and spend a large amount of money in an attempt to rectify the perceived defect. Their solution, embodied in an order of November 17, was to require the contractor to correct the defect or to reimburse the consumer for the \$1,140 she spent replacing the windows on the theory that the replacement resulted from the contractor's failure to make a good faith effort to service, which breached an implied warranty.

An implied warranty of good faith effort to service, like other implied warranties, derives from an analysis of precisely what the consumer buys when she buys a particular product or service. If, in the case of replacement windows, all she has bought were the physical windows, there would perhaps be no warranties at all. Obviously, she has also bought a workmanlike installation of these windows (thereby implying a warranty), and also some protection from the maintenance problems of aging wooden windows and from the large drafts which may come through such windows (implying other warranties). But a fair reading of her reasonable expectations suggests still another element to her purchase -- the security that comes from having dealt with a contractor who "stands behind his work". Such a contractor returns when notified of a



perceived defect and either justifies the work or corrects the defect, and does not wait until he is threatened with credible sanctions before so returning.

This analysis suggests that the consumer has the right to require the contractor to attempt a "cure", relieving her of the dilemma of either suffering with the perceived defect until some tribunal decides what the contractor is obligated to do about it, or else using her own money to do something about it at the risk of not being compensated if the tribunal eventually decides that that was the wrong thing to do. This right to cure at the consumer's behest would be precisely analogous to the established right to cure, as he is clearly permitted to cure, to facilitate the prompt and economical resolution of claims, and to relieve the party invoking the right of the risk of suffering an unnecessary out-of-pocket expense if she eventually loses on the merits.

One problem with DCA having invoked this implied warranty of a good faith effort to service, this consumer's right to an attempted cure, in DC/D20 is that no legal authority was cited for it. Another problem is that, since the consumer's remedy was measured by the price charged in the replacement contract rather than in the original contract, DCA went beyond its previous, self-imposed, limitation to restitutionary remedies, in effect giving contract damages.

Not surprisingly, on December 26, 1978 the contractor's attorney filed an Article 78 proceeding. It was referred to the Appellate Division on April 10, 1979, and had the makings of a

landmark case. But in August, 1979 the contractor's attorney contacted the Corporation Counsel's office, indicating a desire to settle. The bank has apparently not paid him the remaining amount owing on the contract, and will not do so until he either satisfied the DCA order or prevails in a suit against the bank, in which he would have to establish the invalidity of the consumer's claim in order to establish his right to the withheld money. It may well turn out to be cheaper for him to pay than to continue to litigate the issue on the merits in the article 78 proceeding and/or the litigation with the bank.

162. See SC11, discussed in Note 129, and D6/D20, discussed in Note 161.

163. See note 31 and accompanying text.

164. Consumer Reports, October 1971, at 624 - 631.

165. This is not the contractors' presumed billing rate but rather an estimate of their opportunity costs in having to spend time at hearings, rather than at some more directly profitable pursuits. While billable hours, considered alone, might earn them more on average than \$15, this figure is not unreasonable when all the other time spent in running a contracting business, much of it unfruitful, is averaged in.

166. These figures are based on the 11 cases in the small claims court sample in which the consumer received monetary, or easily monetizable, relief.

167. These figures are based on the average and median contract sizes in my DCA complaints sample. Although small claims court, unlike DCA, has a \$1000 jurisdictional limit based on the size of

the damage claimed, this is not likely to have a seriously distorting effect on the comparative size of the contracts involved in the two forums since the amount in dispute is usually a small fraction of the total contract size.

168. In the case of employees the \$15/hour figure is an estimate (perhaps high) of the cost of their time to their employers. Since the point of this Chapter is to demonstrate the ranges of magnitude of the costs of these processes to consumers, contractors, and the public, so long as the various figures chosen are applied consistently and are not totally unrealistic the conclusions will not be affected.

169.  $62,463 - 3202 = 59,261$  cases handled by the 44 employees in the remaining boroughs. Assuming the same average caseload per employee, at this rate the equivalent of 2.38 people would be needed to handle Staten Island's small claims caseload of 3203.

Where I have had precise figures available I have stated and used them throughout this Chapter, rather than rounding them out to the same level of significance as the roughest approximation I have sometimes had to use. Needless to say, the accuracy of any particular calculation can be no better than the accuracy of the roughest approximation which went into it. Once again, what these calculations fairly reflect are levels of magnitude rather than precise dollar amounts.

170. In NYPIRG's surveys of Queens small claims court claimants in 1974 and in 1975, out of 129 respondents who explained what their cases were about, two of the complaints involved home improvements. Winning Isn't Everything (1976), Appendix B. This comes to 1.55%.

While my inspection of 150 random file cards in the Manhattan small claims clerk's office, and approximately 1050 in the Queens' small claims clerk's office, yielded lower proportions (0.67% and 0.48%, respectively), I did not examine the "Requests for Information" in ambiguous cases in Manhattan or Queens as I did in Brooklyn, but rather treated these as non-home-improvement cases. These lower figures are therefore not as accurate as the one I developed for Brooklyn.

171. According to Mr. John White, Assistant Chief Clerk, the clerk's office of the Bronx small claims court is presently overloaded. Interview of June 22, 1979.

172. These were the weeks beginning March 19 and 26, April 2, 9, 16, and 24, May 1, and June 4, 11, and 18, 1979.

173. See for example my suggestions for improving the remedies of both small claims courts and DCA, in sec. V.E., above.

174. See generally sec. V.E., above.

175. N.Y. City Adm. Code, sec. B32-358.0(1), in Appendix A.

176. The occupations and industries in question include dentists, doctors, lawyers, pharmacists, psychologists, veterinarians, optometrists, nurses, realtors, airlines, interstate movers, taxicab owners, insurance companies, certified public accountants, banks utilities, and others. This list could, of course, be expanded.

177. See e.g. Buffoleno v. Denning, 82 Misc. 2d 472, 369 N.Y.S.2d 600 (Civ. Ct., Queens Co. 1975).

178. DCA's advantage over the small claims court in this respect is described in sec. V.D., above, and in the illustrative cases in notes 142 through 145.

179. See sec. VI.A., above.

180. This follows from the fact that the agency's leverage over the licensee is limited by the value to him of his license. That is, if a licensee pays a \$5000 agency judgment, or obeys an order to perform \$5000 worth of work, rather than lose his license, his license must have been worth more than \$5000 to him. Since licensing agencies almost always have the power already to suspend or revoke the licenses within their jurisdiction without regard to the monetary value of these licenses, they should be permitted to issue remedial orders enforceable by proceeding against the license so long as they continue to follow appropriate procedures.

181. Examples of this are the cases discussed in note 122 in which DCA applied its three-day cancellation rule to permit consumers to obtain restitution of their deposits and rescission of the contracts. I strongly doubt that most small claims arbitrators in New York City are familiar with this rule, and consumers are not likely to know about its existence where the contractor's violation consisted of failing to mention the cancellation right in his contract. At DCA, on the other hand, the Home Improvement Division noted the violations in processing the complaints, and mentioned them in the notices of hearing. The hearing officers are also familiar with these rules, and would have picked up the violations even had the Home Improvement Division missed them.

182. For example, the contractors who failed to mention the consumers' cancellation rights on their contracts were fined as well as being forced to return the consumers' deposits and to rescind their contracts.

183. N.Y. City Adm. Code, sec. B32-357.0, Appendix A, empowers the Commissioner to fine the licensee up to \$250 or to suspend or revoke his license where "4. The business transactions of the contractor have been or are marked by a practice of failure to timely perform or complete its contracts...." A disciplinary proceeding could presumably be brought pursuant to this provision based entirely on the records of a series of consumer redress hearings in which the contractor's tardiness or failure to complete had been demonstrated. I am not, however, aware of any such proceeding having been brought.

184. In any case one was available, in the form of small claims court.

185. See the case cited in note 149, and compare the dilemma faced by the Attorney General of the State of Washington, who agreed in 1971 to dissolve a Temporary Restraining Order he had obtained against Glenn Turner's Dare To Be Great Pyramid Scheme, well aware that it would then resume its fraudulent practices, in return for obtaining \$363,000 rescission for consumers who had already been defrauded. Wexler, "Court-Ordered Consumer Arbitration", 28 The Arbitration Journal 175 (1973). See generally E. Steele, "The Dilemma of Consumer Fraud: Prosecute or Mediate", 61 A.B.A.J. 1230 (1975).

186. See note 185.

187. See the cases cited in notes 148 through 150.

188. See for example F. Hayek, The Road to Serfdom (1944); W. Gellhorn, Individual Freedom and Governmental Restraint 107 ff (1956); M. Friedman, Capitalism and Freedom, Ch. IX (1962);

W. Gellhorn, "The Abuse of Occupational Licensing," 44 U.Chi. L. Rev. 6, 15-19 (1976) (hereinafter cited as "W. Gellhorn").

189. See for example T. Moore, "The Purpose of Licensing," 4 J. Law & Econ. 93 (1961).

190. See T. Moore, op. cit.; W. Gellhorn at 13-19, and the various authorities there cited; K. Leffler, "Physician Licensure: Competition and Monopoly in American Medicine," 21 J. Law & Econ. 165 (1978); L. Shepard, "Licensing Restrictions and the Cost of Dental Care," 21 J. Law & Econ. 187 (1978); B. Pashigian, "Occupational Licensing and the Interstate Mobility of Professionals," 22 J. Law & Econ. 1 (1979).

191. See the summary of the intellectual history of the "deregulation movement" and of its principal criticisms, proposals, and achievements, in G. Robinson, E. Gellhorn, and H. Bruff, The Administrative Process (2d Ed. 1980). Its most dramatic accomplishment to date is the deregulation of commercial airlines, see Airline Deregulation Act of 1978, Pub. L. 95-504, 92 Stat. 1705.

192. See W. Gellhorn at 14-16, and the authorities there cited.

193. Compare J. Cathcart and G. Graff, "Occupational Licensing: Factoring it out," 9 Pac. L. J. 147 (1978), criticizing "(t)he present array of experience requirements among the licensed occupations in California (as) utterly chaotic and lack(ing) an overriding rationale," id. at 148, but suggesting that a rational scheme might well insist upon some prior experience in the case of contractors, id. at 156-163, especially Table B at 160.

194. See W. Gellhorn at 7-13 and 21-35, and the authorities there cited. Gellhorn has the temerity to suggest, at 7-10, that the

educational requirements even for doctors and lawyers may be a bit overdrawn.

195. See W. Gellhorn at 10-13, and the authorities there cited.

196. Compare the segmentation in the health-care field criticized by W. Gellhorn and the authorities cited at 16-17. J. Cathcart and G. Graff, "Occupational Licensing: Factoring it Out," 9. Pac. L.J. 147, 159 lists 30 health professions, each of which has separate licensing requirements (though physicians are permitted to range into the areas covered by some -- but by no means all -- of the other licenses). W. Gellhorn at 21-25 criticizes proposals for mandatory specialty certification in the legal profession.

197. See General Regulation 7, in Appendix C.

198. N.Y. City Adm. Code, sec. B32-355.0(5).

199. 1976 N.Y. Laws, ch. 931.

200. N.Y. City Adm. Code, sec. B32-350.0.

201. W. Gellhorn at 20-21.

202. See Appendix B.

203. See sec. II.D., above.

204. W. Gellhorn at 26-27. Footnotes have been omitted.

205. "On Her Majesty's Secret Service: Protecting the Consumer in New York City," 80 Yale L. J. 1529 (1971).

206. Thus, for example, in the first quarter of 1979 there were 79 consumer redress cases in which a formal decision was written. Of these, 28 were home improvement contractor cases, 17 were second-hand dealer cases (most involving automobiles), 10 were garage and parking lot cases, 9 were TV service dealer cases, 5 were locksmith



or keymaker cases, and 5 were employment agency cases. The remaining 5 cases were divided among four classes of licensees.

207. Their hearings are tape-recorded anyway (though they are rarely transcribed or even played back).

208. This individual was eventually let go.