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REDRESS BY A LICENSING AUTHORITY: SETTLING HOME IMPROVEMENT DISPUTES IN NEW YORK CITY

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I. INTRODUCTION: THE PROCESS

The difficulties faced by consumers who are unable to obtain satisfaction from sellers are well known.[1] Many consumers never see attorneys[2], and absent attorneys' fee statutes,[3] full-scale litigation is too expensive to be practicable.[4] Small claims courts are limited in both the amount[5] and the type[6] of

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1. *See* NO ACCESS TO LAW: ALTERNATIVES TO THE AMERICAN JUDICIAL SYSTEM (L. Nader ed. 1980) [hereinafter cited as NO ACCESS TO LAW]. A useful bibliography appears at p. 102-10.

2. *See generally* E. JOHNSON, JUSTICE AND REFORM (1974); H. STUMPF, COMMUNITY POLITICS AND LEGAL SERVICES (1975)(these books give general information on the percentage of the populations represented by legal services);*see also* Rhode, *A Functional Perspective on Professional Codes*, 59 TEX. L. REV. 689, 700 (1981) which states:

> The Legal Services Corporation projected that persons below the official poverty line would encounter between six and one-hundred and thirty two million legal problems in 1980, while corporation funded offices could handle at most two million matters. At best, 33% of all the poor's legal needs were addressed, at worst only 1.51%.

See also Brakel, *Judicare in West Virginia*, 65 A.B.A. J. 1346 (1979). The report states, that the plan handled (opened) more than 9,840 cases in 1976-77 and closed 12,000 cases in 1977-78. Therefore, for the 400,000 elgible persons (below the poverty level), Judicare handled one case per 35-45 eligible persons (one per nine to eleven families). Total program costs were $1,333,672 in 1977-78 (9840 cases closed multiplied by the $135 average cost per case).

3. 15 U.S.C. § 2301 (1976) (Magnuson-Moss Warranty Act); MASS. GEN. LAWS ANN. ch. 93A (West 1984). *See also* J. SHELDON, UNFAIR AND DECEPTIVE ACTS AND PRACTICES 26 (1982) (a survey of state statutes).

4. *See* Schrag, *Bleak House 1968: A Report on Consumer Test Litigation*, 44 N.Y.U. L. REV. 115 (1969); Trubek, *et al.*, *The Costs of Ordinary Litigation*, 31 U.C.L.A. L. REV. 73, 85 (1985).

5. J. RUHNKA & S. WELLER, SMALL CLAIMS COURTS: A NATIONAL EXAMINATION (1978).

relief provided, and they have an unenviable record of producing unsatisfied judgments. Other informal techniques are available only sporadically, and generally require the acquiescence of the seller to accomplish anything at all.[7] This article describes the results of a study of an alternative dispute settlement procedure within the New York City Department of Consumer Affairs which avoids some of these problems.

Home improvement contractors doing business in New York City are required to be licensed by the City's Department of Consumer Affairs (DCA).[8] A two-year license (or renewal) can be obtained by anyone "over 18 years of age and of good character",[9] who has no small claims court judgments outstanding against him,[10] fills out a few papers and pays the City $100.

Consumers may complain to DCA about a home improvement contractor, either by letter or in person at DCA offices in Manhattan, Queens, Brooklyn, or Staten Island. After the complaint is docketed and a file opened, DCA's Home Improvement Division determines if the contractor is licensed.

If the contractor is unlicensed he is informed by letter of the consumer's complaint and of his obligation to obtain a license.[11] If the contractor chooses to ignore this letter, DCA makes no further effort to resolve the dispute. If the contractor is licensed, he is notified by the Home Improvement Division of the complaint and urged to resolve it within ten days. If this does not produce a satisfied consumer, and if the complaint alleges a failure to complete the con-

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6. *Id.*

7. *See* NO ACCESS TO LAW, *supra* note 1, at 73-74 and sources cited therein.

8. The description of DCA and its procedures is accurate as of 1979, when the data for this study was collected. Since the purpose of this study is to describe a particular dispute settlement mechanism and to analyze and evaluate the results it produces, I have not attempted to update this description.

9. N.Y. CITY DEPT OF CONSUMER AFFAIRS ADMIN. CODE, HOME IMPROVEMENT BUSINESS ch. 32, art. 42 § B32-355.0(5) (1968) [herinafter DCA HOME IMPROVEMENT BUSINESS LAW].

10. Department of Consumer Affairs, General Regulation 7 *reprinted in* The City Record, Vol, CV, No. 31504, p. 2121 (June 30, 1977) [herinafter DCA Gen. Reg. 7].

11. N.Y. CITY DEPT. OF CONSUMER AFFIARS, LICENSE ENFORCEMENT LAW, Title A § 773-5.0 (1973) [herinafter DCA LICENSE ENFORCEMENT ACT] subjects unlicensed businesses to fines of between $25 and $2000, and their owners to imprisonment for up to 60 days plus civil penalties. Additionally, DCA HOME IMPROVEMENT BUSINESS LAW § B32-365.0, provides even stiffer penalties, making the unlicensed contractor guilty of a misdemeanor for which he may be imprisoned for up to six months and fined up to $1000 and the City's Corporation Counsel may seek an injunction against anyone violating these laws. Unfortunately, in reality prosecutors and judges in New York's overloaded criminal courts give low priority to these offenses. The contractor must be found by a DCA inspector and served with a summons. If he bothers to appear in Criminal Court, he will likely be fined $25. If he prefers not to respond to the summons, the court will issue a bench warrant. However, it will never be served and nothing will happen to him.

tract properly or a violation of any DCA substantive rule, the file is referred to the Calendar Division to schedule a formal consumer redress hearing. Either the Home Improvement Division or the Calendar Division may detail a special DCA inspector with construction experience to visit the site and report on the source of the consumer's problems. The inspector will report whether the work conforms to contract specifications and, if the work is inadequate, what must be done to make it conform.

Redress hearings may be conducted by full-time DCA hearing officers or by other specially assigned DCA employees. The parties and any witnesses they bring are given a turn to be heard. If an inspection has been done, the special inspector also appears as a witness. The hearing officer often tries to mediate the dispute by eliciting concessions from both sides that the other has proceeded in good faith, working out a mutually agreed upon list of outstanding problems, and suggesting specific solutions.[12] Agreements reached at the hearing are incorporated into a consent order, which has the same effect as a formal decision by the hearing officer. If the parties fail to reach an agreement during the hearing, the hearing officer drafts a decision. This decision is approved by a superior officer,[13] mailed to the parties, entered into the docket file, and placed in a book of collected DCA decisions. Appeal is possible under "Article 78"[14] to the Appellate Division of the state Supreme Court.

If a consumer complains that the contractor has not carried out his responsibilities under a DCA decision, DCA schedules a disciplinary hearing. Although this phase is formally designed to punish the licensee for his disobedience of a DCA order, in practice it is treated as a continuation of the effort to obtain redress for the consumer. Thus, unless the contractor's behavior appears flagrant, he can delay the hearing by promising to get the work done, or completely avoid the hearing by actually doing the work. Indeed, the most likely result of a disciplinary hearing is that the contractor will be fined $50 and given another fifteen days or so to carry out the original order and avoid suspension or revocation of his license.

If a contractor fails to appear at a disciplinary hearing or if a consumer reports a contractor has not complied with a second order, DCA will quickly order the contractor's license suspended or revoked. Even at this point, the contractor can, in practice, get the suspension or revocation order rescinded before it becomes effective by complying with all DCA orders then outstand-

12. One of the hearing officers who handled much of the home improvement caseload attempted to mediate whenever the contractor gave any indication of good faith. Although he was very successful, most of the others seemed less comfortable with the mediation role and tried it much less frequently.

13. During the period under study, this was done first by a Deputy Commissioner, and following an administrative reorganization by the Director of Adjudication. In either case, the review was generally limited to whether the relief granted was within DCA's jurisdiction, and to questions of writing style.

14. N.Y. CIVIL PRACTICE LAW & RULES, art. 78.

ing against him. Once his license is revoked, the price goes up. 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 substantial penalty to DCA — before he will be permitted to have another license.

This dispute resolution process is little known except by New York City home improvement contractors, and their dissatisfied customers. Nonetheless, DCA's process for providing redress to dissatisfied home improvement consumers has five structural advantages over most other dispute resolution processes. These advantages make it a promising model for providing effective relief to consumers.

First, it costs consumers almost nothing to use, since there are no filing fees and attorneys are unnecessary. Second, it offers the full relief of specific performance rather than the limited amount of damages which are allowed in small claims court. Third, it makes use of expert fact-finding in a technical area in which the typical judge or small claims arbitrator is at sea (and hence may lean too heavily on "credibility" determinations). Fourth, it is supported by a powerful sanction—license revocations—that is not available to other dispute-settlement tribunals. Finally, it is capable of handling a large number of consumer complaints at a reasonable cost.

II. How Well Does it Work?

To what extent does DCA's consumer redress process for home improvement complaints realize these apparent structural advantages in practice? Is it really cost-effective? Does it provide a service worth continuing in New York City, emulating in other jurisdictions, and extending to consumers of other goods and services?

A study designed to answer these questions needs some point of reference against which to compare DCA's performance for home improvement consumers. The obvious candidate is New York City's small claims courts. Small claims courts in general, and New York City's in particular,[15] have been widely studied and they are the alternative dispute resolution forums most often mentioned in a discussion of consumer justice. Aside from ordinary courts, the small claims court provides the only forum other than the DCA in which a dissatisfied New York City purchaser of home improvement can obtain a remedial order which is legally binding upon the contractor. Finally, comparing the results obtained in the two forums may bring into focus some of the relative strengths and weaknesses of judicial versus administrative tribunals.

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15. *See, e.g.*, Sarat, *Alternatives in Dispute Processing: Litigation in a Small Claims Court*, 10 Law & Soc'y Rev. 339 (1976); Note, *How to Defeat the Jurisdiction (and Purpose) of Small Claims Court for Only Fifteen Dollars*, 44 Brooklyn L. Rev. 409 (1978).

This study begins by comparing the results of ninety-two complaints against home improvement contractors filed with DCA with the results of fifty-three complaints filed in Brooklyn with New York City's small claims court in 1978.[16] The files were carefully checked to determine the fate of the complaint, and where the file left open any doubt the consumer was contacted by telephone. In addition, during 1978 I examined thirty-nine formal DCA decisions issued in home improvement cases and sat through forty-three DCA hearings.

A. *The Reference Point: Results in Small Claims Court*

Since the DCA procedures for dealing with licensed and unlicensed contractors are so different, the cases in each sample have been grouped separately for licensed and unlicensed contractors to increase comparability. Table 1 describes how the consumers in the small claims court sample fared at each stage of that process.

16. Once I had rejected the Manhattan court because of its likely paucity of home improvement claims, I chose the Brooklyn Small Claims Court, more formally the "Civil Court of the City of New York, Small Claims Part, Kings County," because it was the most accessible to my temporary office at DCA. I examined 4500 sequentially numbered claims, which were filed over a three month period.

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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*							
	Inquest[d]	Notice Returned —Undelivered, Unclaimed	Dismissed —No Appearance Either Side	Settled in Court	Dismissed —No Appearance Claimant	Judgment for Claimant	Other	Total
Received Substantial Redress, due to Filing Claim[a]	2	0	4	3	0	1	0	10
Received No Redress, though Presumably Entitled[b]	0	0	0	0	1	0	0	1
No Information	1	1	3	1		1	0	7
Other[c]	—	—	1	—	1	1	1	4
Total	3	1	8	4	2	3	1	22

TABLE 1B: Cases Where Contractor is *Not* Licensed

Did the Consumer Receive Redress?	*Legal Disposition of the Case*							
	Inquest[d]	Notice Returned —Undelivered, Unclaimed	Dismissed —No Appearance Either Side	Settled in Court	Dismissed —No Appearance Claimant	Judgment for Claimant	Other	Total
Received Substantial Redress, due to Filing Claim[a]	0	0	1	1	0	0	0	2
Received No Redress, though Presumably Entitled[b]	3	5	0	0	0	1	1	10
No Information	5	6	1	2			2	16
Other[c]	0	2	0	0	1	0	0	3
Total	8	13	2	3	1	1	3	31

TABLE 1C: All Cases Combined

Did the Consumer Receive Redress?	*Legal Disposition of the Case*							
	Inquest[d]	Notice Returned —Undelivered, Unclaimed	Dismissed —No Appearance Either Side	Settled in Court	Dismissed —No Appearance Claimant	Judgment for Claimant	Other	Total
Received Substantial Redress, due to Filing Claim[a]	2	0	5	4	0	1	0	12
Received No Redress, though Presumably Entitled[b]	3	5	0	0	1	1	1	11
No Information	6	7	4	3	0	1	2	23
Other[c]	—	2	1	0	2	1	1	7
Total	11	14	10	7	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.

[b] This classification includes only cases where the consumer received nothing, and only where there was no adjudication adverse to the consumer.

[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] An "inquest" is an *ex parte* proceeding which occurs when the defendant does not appear. The claimant is required to introduce sufficient evidence for a *prima facie* case, and is given a default judgment for whatever damages he proves.

Table 2 summarizes the results achieved. Since in twenty-three of the fifty-three sample cases the available information was inadequate to determine whether the consumer received substantial redress, I experimented with increasing the data base by making some educated guesses. Thus, on the basis of my experience with other cases, I tried reallocating the "Notice Returned, Undelivered" cases to the "Received No Redress" category, and the "Dismissed, No Appearance Either Side" cases as well as the "Settled in court" cases to the "Received Substantial Redress" category. As Table 2 indicates, this reallocation makes little difference in the results achieved. Overall, the process achieved indifferent success, but the effect of whether or not the contractor was licensed was remarkable. Consumers who complained against licensed contractors ordinarily obtained substantial redress, but those who complained against unlicensed contractors received satisfaction only occasionally.

TABLE 2: Analysis of Table 1 by Proportion Receiving Substantial Redress (Excluding "No Information" and "Other"), With and Without Reallocation of "No Information"

Did the Consumer Receive Substantial Redress)?	Proportion* Receiving Substantial Redress, (*No Reallocation*)	Proportion* Receiving Substantial Redress, (*With Reallocation*)
(CASES WHERE CONTRACTOR IS LICENSED)		
YES	91% (10/11)	88% (14/16)
NO	9% (1/11)	13% (2/16)
(CASES WHERE CONTRACTOR IS NOT LICENSED)		
YES	17% (2/12)	24% (5/21)
NO	83% (10/12)	76% (16/21)
(ALL CASES COMBINED)		
YES	52% (12/23)	51% (19/37)
NO	48% (11/23)	49% (18/37)

*Note to Table 2: Proportions rounded to the nearest percent.

B. *Success of Consumers at DCA*

Table 3 details the results achieved by home improvement consumers who complained to DCA.

TABLE 3: Results of Complaints to DCA Contractor's Status[a]

Did the Consumer Receive Redress[b]?	Unlicensed	Licensed	Total
RECEIVED SUBSTANTIAL REDRESS, DUE TO FILING COMPLAINT			
Hearing Not Involved	7	16	23
After Notice of Hearing, but Before Hearing	n.a.[c]	5	5
At or After Hearing	n.a.	5	5
[Total]	[7]	[26]	[33]
RECEIVED NO REDRESS, THOUGH PRESUMABLY ENTITLED			
Contractor Out-of-Business[d]	10	3	13
Remainder	18	2	20
[Total]	[28]	[5]	[33]
OTHER			
No Information	2	2	4
Consumer Not Seeking Redress	2	1	3
Resolved Independently of DCA	3	2	5
Complaint Dismissed	n.a.	4	4
Complaint Apparently Without Merit	1	2	3
Partial Redress	2	5	7
[Total]	[10]	[16]	[26]
TOTAL	45	47	92

Footnotes to Table 3:

[a] "Licensed" means the contractor was licensed both at the time the contract was made and at the time the complaint was filed. All other contractors are classified as "unlicensed." It is possible to divide the latter category into those who were never licensed (34 in the sample), those who were licensed when the contract was made but were no longer licensed at the time of the complaint (7), and those who had not been licensed at the time of the complaint but obtained a license thereafter (4). Preliminary statistical analysis demonstrated that the behavior of the contractors in the sample who had licenses at some but not all points in the process was indistinguishable from that of contractors who were never licensed.

[b] 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.

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

[d] This category includes only cases where a DCA inspector determined that the contractor had actually moved without forwarding address or gone entirely out of this business, and excludes cases where the contractor continues on with a new trade or corporate name. I have separated out this 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.

Table 4 summarizes the success achieved by DCA complainants. Since there were only four "No Information" cases in this sample (as opposed to twenty-three in the small claims court sample), no attempt has been made to redistribute these.

Table 4: Analysis of Table 3 by Proportion Receiving Substantial Redress (Excluding "Other")

Did the Consumer Receive Substantial Redress?	Proportion Receiving Substantial Redress
(CASES WHERE CONTRACTOR IS LICENSED)	
YES	84% (26/31)
NO	16% (5/31)
(CASES WHERE CONTRACTOR IS UNLICENSED)	
YES	20% (7/35)
NO	80% (28/35)
(ALL CASES COMBINED)	
YES	50% (33/66)
NO	50% (33/66)

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 proceeded against licensees, getting what they wanted five-sixths of the time. Conversely, they did extraordinarily poorly when they pursued unlicensed contractors, obtaining redress only one-fifth of the time.

C. *Comparison of Results Obtained in the Two Forums*

In comparing Table 2 with Table 4, it is clear there is no significant difference between the results obtained in the two forums, irrespective of whether one focuses on cases involving licensed contractors, unlicensed contractors, or both. The fact that two quite different processes produce such similar results suggests that they are pressing asymptotically against some externally imposed limits. The fact that both forums do equally well in dealing with licensed contractors, and equally poorly in dealing with unlicensed contractors, suggests that these limits derive from distinguishing characteristics of the contractor population which go beyond merely possessing or not possessing a DCA license. Although whether or not one has a license is a critical variable for the DCA process, it is almost irrelevant to the small claims court process.[17]

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17. "Almost," because DCA Gen. Reg. 7, *supra* note 10, requires licensees either to pay, arrange for the payment of, or appeal small claims court judgments within thirty days of their entry; however, it is unlikely that fear of DCA sanctions for violating this rule is a significant motivating factor for the good faith and compliance generally shown by licensed contractors who are brought into small claims court.

This is because the rule is enforced in two ways: by the contractors' certifications in their biennial license renewal applications that they are not presently in violation, and by consumers' complaints to DCA that the rule has been violated in their own cases (which result in DCA orders that the judgments be paid). This enforcement scheme is loose enough that a recalcitrant licensee could in practice avoid paying some of his judgments without facing any sanctions, and could delay paying any judgments until either the consumer brought a DCA complaint or the biennial renewal time was upon him. But as Table 1 demonstrates, licensees rarely drag out the small claims

Although a license is not a cause of subsequent behavior, the decision of a contractor whether or not to obtain the legally requisite license appears to be an index of his underlying character and willingness to comply with social demands. Although it is illegal, it is possible 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 licensed and unlicensed contractors in the combined small claims court and complaints sample.[18] An unwillingness to obtain a license is a good predictor of an unwillingness to bear the usually greater expenses of rectifying consumers' justified complaints since a two-year license could be obtained for $100 and the bother of filling out a few forms.

D. *Quality of Remedies Provided in the Two Forums*

In terms of remedies, the same rules apply in small claims court as in a court of general jurisdiction except that the judge or arbitrator hearing the case can award only money up to $1000 plus court costs. If the claim is worth more than $1000 the consumer must either write off the amount above $1000 or hire a lawyer to bring the case in Civil Court. If there really is no adequate remedy at law, the consumer must look elsewhere for relief.

While small claims remedies look like those of a common law court, DCA's remedies are rather like those of a court of equity. The Commissioner of Consumer Affairs is empowered by the New York City License Enforcement Law of 1973 "upon due notice and hearing" to determine whether the City's licensing laws and regulations have been violated and to "arrange for the redress of injuries caused by such violations."[19] The Home Improvement Business Law of 1968 is a licensing law under which home improvement contractors are prohibited 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

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process or fail to pay settlements or judgments.

Furthermore, my strong impression after talking with many consumers who have received redress from licensees is that the principal reason that 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 responses of licensees whom I interviewed; as well as by my own response to observations of licensees in the 43 DCA hearings I attended; and by the correspondence in the 82 additional case files I examined.

18. Other than the barely enforced criminal sanctions discussed at *supra* note 11, unlicensed contractors also face an inability to obtain building permits. But many home improvements do not require building permits even in theory, and most do not require them in practice.

19. DCA LICENSE ENFORCEMENT LAW, *supra* note 11, at Title A § 773-4.0(e).

specifications in any material respect without the consent of the owner."[20]

There is no definition of "redress of injuries" in the statute nor in any DCA regulation. Neither is "redress of injuries" a legal term of art which imports an intent by the City Council to incorporate by reference a system of legal orequitable remedies. Nonetheless, DCA hearing officers firmly believe that they are without authority to award "damages."[21] They are, however, perfectly willing to award restitution and specific performance, and (unlike equity courts) [22] will do so regardless of whether there would also be an "adequate remedy at law."

Typical consumer relief awarded by DCA includes specific performance [23] or restitution.[24] On the other hand, the restriction against awarding "damages" prevents any consequential damages,[25] incidental damages,[26] or liquidated damages,[27] even if those amounts would be less than the total amount the contractor has received from the consumer. Most important, the restriction precludes remedial orders requiring the contractor to pay the consumer what

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20. DCA HOME IMPROVEMENT BUSINESS LAW, *supra* note 9.

21. Perhaps this belief reflects a sense deeply ingrained in lawyers that awarding damages is the core function and peculiar province of courts. This is demonstrated by the logical evasions and legal fictions which courts have used to approve the administrative determination of workers' 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.M. 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).

22. Equity courts historically would not grant any remedies if there were an adequate remedy at law available. Of course, equitable remedies and legal remedies are now usually administered by the same courts, but the courts apply the traditional rules of equity courts in determining when equitable remedies are appropriate.

23. "Specific performance" generally took the form of ordering the contractor 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.

24. "Restitution" took the form of an order requiring repayment 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.

25. "Consequential damages," in this context, refers to harm to *other* property of the consumer resulting from the contractor's breach.

26. "Incidental damages," in this context, refers to awards measured by wages lost or frustration incurred while waiting futilely for the contractor to appear.

27. "Liquidated damages," in this context, refers to awards measured by an agreed-upon penalty for missing a deadline.

another contractor would charge to finish or repair the job.

Thus, each of the two jurisdictions is hobbled in a different and complementary way. Hypothetically, a sophisticated consumer could choose his forum based on the preferred remedies but, in reality, few consumers are aware of the range of remedies offered by each forum. Perhaps, the remedial policies of each forum should be changed to include the most useful remedies offered by the other. As things now stand however, even if a consumer gets a remedy, the value of that remedy depends on chance: the accident of how closely the remedies offered in the forum the customer picked fit the needs of his particular situation.

In most circumstances, the specific performance remedy offered by DCA is preferable to the damage remedy offered in small claims court. If the remedy is effective, the consumer gets what he contracted for without having to prove the market value of the work or finding some other contractor to actually do it for that price. The contractor is better off with this remedy than with contract damages, which would require him to pay another contractor's retail price. An order to complete or to repair can be satisfied by the contractor for the cost of labor and materials, or perhaps for even less where only his personal efforts are involved and he is less than fully employed. The original contractor also has an advantage over another contractor because he has already completed the time-consuming step of learning the job requirements. Indeed, in the DCA cases I studied specific performance was the usual relief granted and the typical settlement agreed to by the parties at DCA hearings. Furthermore, the work was almost always carried out.[28]

There are four potential problems with the use of the specific performance remedy in home improvement cases. The first problem is determining precisely what remains to be done. The second is determining if the order was ever properly carried out. The third is guaranteeing that the contractor is paid once he does the required work. The fourth is reassuring the consumer about continuing to deal with a contractor with whom he has developed an adversary relationship. The DCA process deals effectively with each of these problems.

The first and second problems go to the nature of the fact-finding process. Small claims court judges and arbitrators must rely on the testimony of the parties to the action, lay and occasional expert witnesses brought in by the consumer and the contractor's employees. 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 the cause of any problems occurring after the job was completed. The contractor, his employees, and any

28. In 21 of the 37 DCA decisions which I sampled, DCA ordered the contractor (usually after a special inspection and/or a settlement) to do further work on the job. Of the 17 of these in which I could confirm whether the ordered work was done, the work had indeed been completed in 16 cases. The only reason the work had not been done in the remaining case was that the consumer had refused to pay the *quid pro quo*.

experts whom the parties produce *may* have accurate knowledge, but it is frequently difficult for the fact finder to assess their accuracy and it is usually impossible for him to know whether or not they are telling the truth. DCA, on the other hand, has the benefit of its special inspector who is experienced and knowledgeable in construction matters. This DCA employee can visit the job site and testify as to 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.

In a number of cases in my sample, the critical factor in the success of DCA's mediation efforts and its mandatory remedial processes appeared to be the availability of the special inspector. At hearings in which the special inspector testified or where his reports were accepted into evidence without objection, the inspector's judgments, though not always undisputed, were always the best evidence available on contract compliance and problem causation. The only case in my sample in which the special inspector's judgment was not accepted by the hearing officer involved a disagreement over the "legal" question of the appropriateness of a remedy in a given factual situation, not a disagreement over the issue of causation and compliance.

The third problem, the contractor's concern over whether the now alienated consumer will pay, is handled by DCA in a number of ways. One method, which is described below, actually works to reduce the level of antagonism between the parties. If, however, the hearing officer shares the contractor's concern that the consumer may not pay, the officer may make the order requiring the contractor to perform conditional upon the consumer paying the contractor in advance or placing the remainder of the price in escrow. Under another option, the DCA special inspector may be required to certify the completion of payment. Finally, DCA may deny relief entirely where it is convinced of the bad faith of the consumer.

Nonetheless, the antagonism between the parties is the principal deterrent to an order for specific performance and a major impediment to obtaining the benefit of such an order where it is issued. One or both parties may be irritated, frustrated, disappointed, or even frightened, as a result of the other party's past performance. Typical consumer complaints include missed appointments, unanswered phone calls, and sloppy work. Contractors complain of belated changes of mind, unreasonable interpretations of the contract specifications, and 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 remedial problems posed by continued antagonism between the parties are greater where specific relief is ordered than where legal damages are involved. Specific performance requires that the parties once more deal with each other, usually face-to-face, whereas legal damages can be satisfied with a check in the mail or through the intervention of a third party, like a sheriff or marshal. The consumer who is awarded specific performance but not reassured

about the intentions of the contractor is unlikely to feel he is getting much relief. Similarly, settlements are unlikely where mutual suspicion is high, and an order to the contractor to resume a relationship with someone whom he distrusts is likely to be viewed as foolish or unfair, and tempt him to ignore, evade, or subvert it. Therefore, it is important that DCA hearing officers do their best to reduce the antagonism between the parties.

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

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

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; 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.

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 showing of very poor previous behavior. 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. While the advantages of specific performance and the possibility for conciliation at a properly run hearing are sufficiently great that damages should generally be avoided initially, it is unfair to make a consumer who has already been wronged endure more of the same 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, 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 the 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, the 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 order].

The initial order at DCA could provide that:

> The licensee shall take the following steps within ____ days:
>
> ---
>
> The consumer may any time thereafter notify the Calendar Division if the specified work has not been properly done. The Calendar Division may, in consultation with the hearing officer who heard the complaint initially, schedule a Special Inspection and a rehearing as soon as possible thereafter; otherwise, it shall schedule a rehearing as soon as possible. If upon rehearing the Department concludes that the specified work has not been properly done, it shall order the licensee to pay the consumer the sum of $____[the best estimate of the cost of procuring the specified work and materials should be entered here as part of the initial order], and shall also order the licensee to pay the Department a civil penalty of $200. The failure of the licensee to pay both sums within 15 days of the order to do so shall result in the revocation of his license.

Although legislation is needed to grant small claim courts the power to make and enforce the above orders, DCA probably has this power already.

The proposed procedure would improve the responsiveness of contractors in both forums because the $200 penalty, which would be assessed if the work is not done within the specified time, regardless of the contractor's excuse, is likely to reduce foot-dragging. This procedure would not, however, affect contractors who are effectively outside the jurisdiction of both tribunals: unlicensed contractors who are difficult to locate for service of process [29] or who have no substantial easily identified assets. I know of nothing, short of unreasonably expensive public education or law enforcement campaigns, to put these contractors out of business or to make them amenable to consumer redress efforts.

III. Is It Worth The Costs?

A. *What Are The Costs?*

The previous sections of this article have described DCA's redress procedure for home improvement cases and compared its effectiveness with that of small claims courts. The evidence suggests that DCA produces substantial redress for the same proportion of consumer complaints as does the small claims

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29. *See supra* notes 17-18 and accompanying text.

court, that DCA's fact-finding process is more accurate, and that DCA's remedies are somewhat preferable, although still imperfect. The question of how efficient DCA's redress mechanism is in light of its costs to consumers, contractors, and taxpayers remains. This section will attempt to evaluate the costs and benefits of this procedure and compare them with the costs and benefits of small claims court in an effort to determine whether DCA's redress mechanism is worth maintaining and emulating.

Cost and benefit data are calculated on a weighted basis reflecting the distribution of total cases in the sample at the different stages of the processes at which they were resolved (or came to grief). Only monetary costs and benefits are considered; the costs of time spent or the disappointment and frustration where no effective remedy was forthcoming, and the benefits—such as a sense of vindication or satisfaction at one's personal effectiveness, or the reduction in tension where a reconciliation occurred—are left to the reader to estimate and factor in. Even monetary costs are squishier than my numbers would suggest, since they are based in part on estimates of the wages and profits foregone in pursuing or responding to these procedures. The numbers are, however, valuable for purposes of comparison and as indications of orders of magnitude.[30]

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[31] and the average benefit to a claimant was $88.20.[32] From the consumer's point of view, small claims court is a good financial investment. The average cost to a consumer of following the DCA route was $5.80,[33] about 60% of the $9.53

30. Both costs and benefits are stated in terms of 1978 prices. While it would be easy to update the cost estimates, the benefits at least in small claims court are measured by the actual amount received in 1978. It is reasonable to assume that costs and benefits in each forum have been affected about equally by inflation, and that the ratios of costs and benefits in each forum, as well as the comparisons between the two forums, will remain relatively stable.

31. The total cost of $476.40 divided by the 50 cases which were not voluntarily removed by the claimants from small claims court, yields an average cost to the consumer of $9.53 per case. This breaks down to 22 cases at $4.40 in which the case never went to hearing ($2.00 filing fee, $1.40 certified mail notice fee, and a $1.00 round-trip on the subway to file the complaint); four cases at $6.00 each ($1.00 for transportation to file the claim and $5.00 estimated costs for attending the hearing) where the consumer definitely recouped his fees but only after attending a hearing (perhaps accompanied by a friend or witness); 16 cases in which the consumer appeared at a hearing but probably did not recoup her fees (at $4.40 + $5.00 = $9.40 per case); six cases which required two appearances (at $14.40 per case); two cases requiring three appearances (at $19.40 per case); plus $80 in unrecouped sheriff's and process server's costs for the entire sample.

32. Based on recoveries in 11 of the 50 cases in which the consumer definitely received either monetary or easily monetized redress. The average recovery in these 11 cases was $401; the median recovery was $270.

33. Based on $36 in subway tokens for the 36 consumers in the complaints sam-

average cost of pursuing a similar case in small claims court against a similar defendant.[34]

Defendants' procedural costs (costs other than damages paid to claimants) in small claims court ranged from nothing, for defendants who settle before the hearing or evade notice or execution, to as high as $163.40 for a defendant who appears at a hearing with an employee-witness and an attorney—and loses.[35] The cost to the average defendant who actually appears at one or more small claims court hearings is $88.70, but the cost to the average defendant in the small claims court group (most of whom never appear in court) was $29.20. These figures seem reasonable in relation to the average ($401) and median ($270) recoveries where the consumer prevails, as well as to the average ($2,091) and median ($1,536) contract sizes.

Procedural costs for contractors brought before DCA range from zero for unlicensed contractors who are totally unmoved by DCA's letters and summonses, through a few dollars for time spent writing letters or making phone calls to explain that the problem had been or was being resolved, to $215.50 for a lawyer, two partners, and an employee-witness. [36] The cost to the average contractor who appears at one or more DCA hearings was $47.43, but the average cost to a responding contractor (licensed or unlicensed) was $9.93,[37] which is substantially below the contractor's $29.20 cost in small claims court. The cost difference is fully accounted for by the fact that contractors felt obliged to bring lawyers much more frequently in small claims court than at

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ple who filed their complaints in person; $28 (in postage and xeroxing) spent by the 56 consumers who filed their complaints by mail; $30 in tokens spent by the 12 consumers (accompanied on average by one other person) in the sample who attended a total of 15 hearings; $300 in lost wages (on the assumptions that for half the hearings either the consumer or someone in his party was losing a half day's wage; $40 for the plumber whom one consumer brought with him, and $100 for the attorney whom another consumer brought along). The $534 total, divided by the 92 complaints, yields an average costs per complaint of $5.80.

34. Benefits from the DCA process, unlike those from small claims court, are not easily quantifiable, since DCA decisions do not speak in quantitative terms.

35. Based on $30 each for two hours of the contractor's and his employee's time, $100 for the attorney, and $3.40 for court costs.

36. These calculations do not include any fraction of each contractor's $50 per year license fee. This fee is not directly related to DCA's consumer redress procedure, and is similar to license fees for occupations in which redress hearings are rare. The fee does however produce some revenue even after subtracting licensing costs: this revenue *may* be seen as contributing to the taxpayers' cost of operating the consumer redress mechanism. *See infra* note 39 and accompanying text.

37. Based on $1 average cost per complaint of responding to DCA's initial letter for each of the 92 cases in the complaints sample; $22.50 in time lost attending a special inspection in one case; and $799.02 total hearing and special inspection costs for the fourteen contractors who attended such a hearing (involving a total of 18 hearings, at $36.89 per hearing, plus six special inspections). Dividing the total by the 92 complaints yields $9.93 in contractor's procedural costs per complaint.

DCA.[38]

The cost to the taxpayers is often ignored in evaluating consumer remedies. I estimate that New York City's small claims courts cost the taxpayers $1,738,302 in 1979.[39] When divided by the 62,463 claims filed there in 1978, the cost per claim was $28.55. After subtracting the $2.00 filing fee paid by the claimant, the taxpayers picked up $26.55 per case. Of 4,500 consecutive cases filed in the Brooklyn small claims court, 53 were consumer claims against home improvement contractors. If this proportion (1.178%) holds true for the City as a whole, approximately 736 cases would be of this variety. If each one cost the taxpayers $26.55, the total public subsidy for claims brought in small claims court would have been $19,541. While higher filing fees would have reduced this subsidy, substantially higher fees would tend to defeat the purpose of small claims courts.

Table 5A presents the cost to the taxpayers of operating DCA's redress mechanism for home improvement consumers in more detail. For each function (docketing, Home Improvement Division, field offices, Calendar, hearing officers, and Director of Adjudication), cost data for: (1) personnel (including an additional 40.5% for fringe benefits and municipal personnel services); (2) other-than-personnel-services (OTPS) plus departmental overhead, based on the fraction of the 325 DCA employees assigned to that function multiplied by the total departmental OTPS plus overhead ($750,000 OTPS $427,120 overhead); (3) the number of employees assigned to that function (i.e. the numerator of the previous fraction); (4) total yearly costs; (5) the proportion of costs attributable to home improvement consumer redress functions; and (6) the amount of costs so attributable, are given.

Table 5B computes 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 $30,000 cost of the transcription contract; (3) the entire $17,000 cost of the contract with the special inspector; plus (4) $12,000, representing a rough estimate of the portion devoted to home improvement redress cases of the costs of the City Corporation Counsel's Office (which supposedly prosecutes unlicensed contractors), of DCA's Consumer Advocate's Office, and of the person at DCA who works as liaison with the Corporation Counsel's Office. The result-

38. In five of the 16 cases in which a contractor appeared in small court court he was accompanied by his lawyers, whereas in only two of the 41 cases in the DCA hearings sample did a lawyers for the contractor appear. It seems 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.

39. This is based on a detailed breakdown of personnel and other costs. It includes an allocation of general New York City Civil Court expenses based on the proportion of specifically detailed Civil Court personnel who are assigned to small claims functions. The precise calculations are on file with the MO. J. DISPUTE RESOLUTION.

ing figure, the total yearly cost of DCA's home improvement consumer redress functions (excluding licensing costs), is then divided by the number of complaints against home improvement contractors in 1978 (1,841) to produce a figure for average costs 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 taxpayer in small claims court ($26.55), it appears that the DCA process is much more expensive. *Such a comparison would, however, be premature.* The license fees paid by home improvement contractors 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 5A: DCA Costs of Handling Home Improvement Consumer Redress Cases

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

Function	(1) Personnel	(2) OTPS + DCA Overhead	(3) (# of Employees)	(4) Total Costs	(5) Portion Attributable	(6) Amount Attributable
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	115,200	25,353	(7)	140,563	30%	42,169
Hearing Officers	56,200	7,244	(2)	63,444	30%	19,033
Director of Adjudication & 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)	12,000
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

Journal of Dispute Resolution, Vol. 1985, Iss. [1985], Art. 7

The cost of operating DCA's Licensing Division, including attributable overhead, was $1,262,914 in 1978 and 13.19% of the licenses issued went to home improvement contractors and licensees. Assuming the complexity of the processes for issuing home improvement licenses is about average for DCA (they may in fact be somewhat less complex than most), the share of the cost attributable to home improvement licenses in $166,578. To this should be added the $19,428 cost of 25% of the efforts of the Home Improvement Division and the $8,000 cost for the combined efforts of people elsewhere in DCA, the Corporation Counsel's office, and the Criminal Court which are devoted to pressuring unlicensed contractors to obtain licenses. These calculations yield a gross cost to the taxpayers of $194,007 for requiring home improvement contractors and salesmen to be licensed.

Annual licensing revenues, at the existing fees of $50 for a contractor's license and $25 for a salesman's license, yielded $235,175 in 1978. This left a $41,168 surplus to be applied to the cost of operating the consumer redress mechanism with respect to these categories. If 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 per year, and no change were made in the license fee for salesmen, the total revenue from these two categories of licensees in 1978 would have been $352,875 (on the assumption that demand for contractor's licenses would drop by 10%).[40] Even subtracting the full $194,007 licensing costs from this leaves $158,868 to be applied against the $197,579 cost of operating the consumer redress mechanism, leaving only $38,711 to be covered by the taxpayers. Dividing this by the 1,841 complaints brought to DCA against home improvement contractors in 1978 yields an average cost per complaint to the taxpayers of $21.03. This latter figure is 20% less than the $26.55 per claim which taxpayers foot for small claims court.

As the results of my complaints sample demonstrate, it is perfectly appropriate for home improvement contractors to bear the additional $50 per year burden of helping to support this process. 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 licensed contractors was the complaint either dismissed or apparently without merit. There is no reason why businesses should not bear the major part of the cost of a mechanism designed to insure that they carry out their obligations. Even in those cases where the contractor prevails, he has generally received a benefit—a public vindication, which decreases the

40. Given the fact that the average contract size for licensees in my complaints sample was $2,832 (compared with $1,565 for unlicensed contractors), the additional $50 per year seems an insignificant increase in their cost of doing business, making the assumption of demand inelasticity plausible.

likelihood that the consumer will pursue him in other forums or will disparage his reputation to potential customers.

B. *Why Have A DCA-Type Redress Mechanism When We Already Have A Small Claims Court*

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,[41] for a total cost to all concerned of $100.69. These amount to 61% of the cost to consumers in small claims court,[42] 34% of the cost to contractors, 320% of the cost to taxpayers, and 154% of the total costs in small claims court.

Why then should this service be preserved, or instituted in a jurisdiction which does not have it, if existing small claims courts provide a similar service at a somewhat lower total cost per complaint? There are several answers to this question.

First, although the proportion of consumers whose complaints were substantially satisfied was approximately the same for either process, 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.

Second, many more consumers who have had problems with home improvements make use of DCA than make use of small claims court where both forums are available.[43] The two processes are presented very differently to consumers—DCA as "Call in (and then write us) about your consumer complaints and we'll enforce the City's consumer protection laws on your behalf," small claims court as "If you want to sue someone this is the place to do it." There is no reason to assume that most consumers who let DCA "carry the ball" for them would be willing or able to take the initiatives of suing the contractor (requiring at a minimum traveling to the court clerk's office and laying out $3.40), assembling legally sufficient evidence, 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) which are necessary to prevail in small claims court. Nor is there any reason to abandon the consumers who are not sufficiently aggressive to navigate small claims court successfully. After all, the great majority of the consumers are victims of injustices; they should not be expected to make additional investments and learn new skills simply to

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41. As concluded in Section A, *supra*, much of the taxpayers' burden might properly be shifted to the contractors.

42. The DCA process is also significantly less bother, since unlike at small claims court the consumer need not travel to a DCA office to file his complaint, and he is only 27% as likely to have to attend a hearing.

43. In this study, 1,841 (250%) utilized DCA versus 736 for small claims court.

obtain what they are due.

Third, DCA's consumer redress hearings are an inextricable part of its process for enforcing behavioral standards upon home improvement contractors. The Home Improvement Business Law,[44] DCA's Regulations Relating to the Home Improvement Business, and DCA's General Regulation 7,[45] 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 technical requirements, such as those requiring certain information to appear on the contracts, without providing further involvement and redress for the consumer, substantive requirements, such as those requiring the contractor to refrain from "Abandonment or wilful failure to perform, without justification, any home improvement contract. . .",[46] can hardly be enforced without the consumer's active cooperation. It is difficult to imagine a more effective incentive for this kind of cooperation than the consumer's belief that he will personally benefit from demonstrating the contractor's misfeasance. True, the practice of ordering consumer redress in individual cases does not guarantee that contractors will adhere to legal standards in future jobs, since they can continue to do nothing until a complaint is brought, or even until a DCA sanction is about to be imposed.[47] Nonetheless, the process serves as both 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, 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 their 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 complaints generally by directing them to the DCA field offices or to the Complaints Division. Either way, DCA not only dockets 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. 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

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44. DCA HOME IMPROVEMENT BUSINESS LAW, *supra* note 9, at § B32-358.0(1).

45. *See supra* note 11.

46. DCA Gen. Reg. 7, *supra* note 10.

47. *See supra* note 17.

cost of $24.67 for handling a complaint.[48] 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 per year.

C. *Should Licensing Authorities Offer Consumer Redress in Other Contexts?*

1. The Advantages

A consumer complaint resolution process culminating in consumer redress hearings, decisions, and enforcement activity, which is administered by the authority which licenses the businesses being complained against, has several advantages over other kinds of consumer dispute resolution processes.

First, the licensee's 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.[49] 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: in the three DCA samples none of the home improvement contractors who had once bothered to obtain a license was indifferent to the prospect 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 like 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 penalties actually imposed on persons convicted of operating without a license, or publicizing the fact that unlicensed contractors are not pemitted to use the courts to recover from the consumer for unpaid work.[50]

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48. Docketing and field office expenses attributable to home improvement cases total $25,425. Inspectors were paid about $20,000 with fringes. $25,425 plus $20,000 divided by 1,841 (the number of home improvement complaints) equals $24.67.

49. The occupations and industries in question include dentists, doctors, lawyers, pharmicists, 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.

50. *See, e.g.*, Buffoleno v. Denning, 82 Misc. 2d 472, 369 N.Y.S.2d 600 (N.Y. Civ. Ct. 1975).

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.

Third, it is a very inexpensive forum for consumers. DCA's procedure is 40% less expensive for consumers than that of small claims court, but only a small fraction of the cost of hiring a lawyer and going to a court of general jurisdiction which, absent DCA, a consumer would have to do if his claim exceeded the small claims court's $1,000 monetary limit. DCA has no upper monetary limit on its subject matter jurisdiction, and there is no reason why one should be imposed. True, decisions requiring the licensee to spend substantially more than $1,000 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.

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.

Sixth, the agency is 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 are prime candidates for further investigations and possible disciplinary actions because they repeatedly commit the same violations and make the same excuses.[51]

2. 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

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51. HOME IMPROVEMENT BUSINESS LAW OF 1968, *supra* note 9 at § 332-357.0 empowers the Commissioner to fine the licensee up to $250 or to suspend or revoke his license where "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.

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, this cost could, and should, frequently be covered by a modest license fee. [52]

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 on what is already in place. Even if a new bureaucracy is entailed, it would be a combination of a court and law enforcement agency—two exceptions to the current popular distaste for expanded government. Furthermore, DCA tends to both relieve court congestion and provide 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 aginst the small business. The very reasons why the licensee has to take this process seriously can to used as an argument against the process. However, this argument is not valid if the procedure is fair. DCA's process, with its detailed notice well before 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 witnesses, 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. For example, DCA's special inspector and its hearing officers hold a lower performance standard for aluminum replacement windows than the consumers who appear complaining of condensation and drafts. Consumers tended to view the official's acceptance of the inevitability of certain problems with this type of window (an acceptance which apparently followed years of experience with the problems) with great 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. There may, on the other hand, be more serious problems of "capture" in industries in which powerful and prestigious companies, trade associations, and

52. *See supra* note 39 and accompanying text.

law firms are involved.

Fifth, the agency may be distracted by the consumer redress cases from its more basic law enforcement mission. Although there may be a problem of resource allocation, several of the "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 if it is at the expense of permitting a dishonestly inclined business to continue in operation. 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. Furthermore, limitations on prosecutorial resouces will rationally lead to focusing 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 utter 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. On the other hand, the reminders of the law's requirements and of its possible sanctions which are provided in the course of consumer redress proceedings are usually enough to ensure greater adherence by the relatively law-abiding businessman in the future.

IV. Conclusion: Evaluating the DCA Process in Light of 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, [53] that the consumer protection functions which their supporters claim may have little reality other than as public relations, [54] and that their principal effects are typically to protect licensees from

53. *See, e.g.*, Gellhorn, *The Abuse of Occupational Licensing*, 44 U. Chi. L. Rev. 6, 15-19 (1976) [herinafter cited as Gellhorn]. *See generally* M. Friedman, Capitalism and Freedom (1962); W. Gellhorn, Individual Freedom and Governmental Restraint 107 (1956); F. Hayek, The Road to Serfdom (1944).

54. *See, e.g.*, T. Moore, *The Purpose of Licensing*, 4 J. Law & Econ. 93 (1961).

competition at the consumer's expense.[55] These criticisms are similar to those which have been made, to great intellectual and political effect, of the role of federal regulation in transportation, banking, and other industries.[56]

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 controversial licensing schemes, there are no requirements that the applicant: be a citizen of the United States or a resident of the licensing jurisidiction,[57] have prior experience in the business,[58] have formal training,[59] or pass an examination.[60] Nor has the contracting field been divided into specialties which require a multiplicity of licenses (or of licensees within one's employ) to carry on a non-specialized home improvement business.[61]

DCA requires a modest license fee ($50 for a two-year salesman's license, $100 for a two-year contractor's license), three photographs of the applicant, a trip to a police station to get fingerprinted (permitting DCA to check for a possible criminal record), a simple application form, and a trip to DCA headquarters to file the form. In addition, applicants for contractors' licenses file copies of their trade name or partnership certificates or corporate papers—documents which state law other than the licensing law require them to have. Licenses can be denied only for failure to meet these requirements, for failure to pay any small claims court judgment outstanding for more than

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55. *Id.*; Gellhorn, *supra* note 53, at 13-19; Leffler, *Physician Licensure: Competition and Monopoly in American Medicine*, 21 J. LAW & ECON. 165 (1978); Pashigian, *Occupational Licensing and the Interstate Mobility of Professionals*, 22 J. LAW & ECON. 187 (1979); Shepard *Licensing Restrictions and the Cost of Dental Care*, 21 J. LAW & ECON. 187 (1978).

56. *See* G. ROBINSON, E. GELLHORN, AND H. BRUFF, THE ADMINISTRATIVE PROCESS (2d ed. 1980) (summary of the intellectual history of the "deregulation movement" and of its principal criticisms, proposals, and achievements).

57. *See* Gellhorn, *supra* note 53, at 14-16.

58. *Cf.* Cathcart and Graff, *Occupational Licensing: Factoring It Out*, 9 PAC. L. J. 147 (1978) [herinafter cited as Cathcart and Graff] "[T]he present array of experience requirements among the licensed occupations in California [are] utterly chaotic and lack[ing] an overriding rationale." *Id.* at 148. The authors suggest that a rational scheme might well insist upon some prior experience in the case of contractors. *Id.* at 156-163.

59. *See* Gellhorn, *supra* note 53, at 7-13. Gellhorn has the temerity to suggest that even the educational requirements for doctors and lawyers may be a bit overdrawn. *Id.* at 7.

60. *Id.* at 10-13.

61. *See* Cathcart and Graff, *supra* note 58, at 159 (listing 30 health professions which have separate licensing requirements); *cf.* Gellhorn, *supra* note 53, at 16-17 (criticism of segmentation in the health-care field and proposals for mandatory specialty certification in the legal profession).

thirty days at the time of the application,[62] or if the applicant is not "over 18 years of age and of good character."[63] 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."[64] While these requirements are all restrictions upon the liberty to engage in the legitimate occupation of one's choice, none of them are unjustifiable.

Second, if there was any doubt before this study of the consumer protection function 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.[65]

Everything I observed while gathering data for this study, including my conversations with DCA personnel, consumers, and contractors, and my observations of DCA files, hearings, and decisions, is consistent with a shared understanding that the above stated purpose is the *sole* purpose which should guide the agency in interpreting and enforcing the licensing law.

Third, because the application requirments 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 anti-competitive effect. Furthermore, the discretionary authority which exists 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,"[66] there is little likelihood that the regulations adopted or procedures followed by DCA will take an anti-competitive turn. Presently, there is not detectible anti-competitive bias or effect in the DCA regulations [67] or procedures [68] applicable to those engaged in the home improvement business.

In a leading critique of "the abuse of occupational licensing," Professor Walter Gellhorn concludes:[69]

> To say that licensing has been abused and overused is not to say that prophylactic administration should be abandoned. I do not advocate reviving

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62. *See* DCA Gen. Reg. 7, *supra* note 10.
63. HOME IMPROVEMENT BUSINESS LAW OF 1968 § B32-355.0(5).
64. 1976 N.Y. LAWS, ch. 931.
65. HOME IMPROVEMENT BUSINESS LAW OF 1968, *supra* note 9, at § 832-350.0.
66. Gellhorn, *supra* note 53, at 20-21.
67. *See* N.Y. DEPT OF CONSUMER AFFAIRS, HOME IMPROVMENT BUSINESS AMENDED REGULATIONS, *reprinted in* The City Record (Aug. 15, 1975).
68. *See supra* text accompanying notes 1-14.
69. *See* Gellhorn, *supra* note 53, at 26-27.

> 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 unwieldly 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 self 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.