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TWO PROPOSALS FOR CHANGE IN VIRGINIA LAW—A CLASS ACTION PROCEDURE AND A CONSUMER FRAUD LAW†

Henry E. Howell, Jr.*

I.

Introduction

This article encompasses two proposals for change in the law of the Commonwealth of Virginia, one procedural and the other substantive. A proposed class action procedure law and a substantive consumer fraud law are set forth in the appendix and discussed, herein. Credit law reform is beyond the scope of this article.1 The proposals are independent, although similar, in that they are designed to help the small claimant obtain relief for injuries for which there is presently no practical remedy under Virginia law.

While class action procedure is known to the common law of Virginia, its scope is very limited. A law in this area could expand the class action device in Virginia to cover cases involving damages and would give the Virginia courts guidance in handling all class actions.

The proposed consumer fraud remedy attempts to modify the law of fraud to adjust to the special factors present in retail transac-

† The author gratefully acknowledges the research assistance and writing contribution of J. Reuben Rigel, a 1973 graduate of the University of Virginia School of Law and presently a staff attorney with the Legal Aid Society of Louisville, Inc., Louisville, Kentucky, in the formulation of this article.

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1. This should not be taken to imply that reform in this area is not important.
tions. The paradigm transaction involves the purchase of goods for consumption by the average citizen. The merchant is usually in a position to take advantage of the consumer by superior bargaining power. The common law remedy for fraud is inadequate to redress the imbalance of bargaining power among the parties to the paradigm consumer sales transactions—nor does the Virginia Commercial Code reach the subtle forms of deceptive sales practices, providing remedies only for breaches of warranties and express contract terms.\(^2\)

The proposed class action and consumer fraud laws would be complementary, the class action providing a practicable remedy for a substantive right, and the consumer fraud law giving substantive meaning to the class action law. Generally, common law fraud is not considered an appropriate subject for the class action device.\(^3\) However, a recent California case allowed a class action in a fraud case, where the fraud involved was almost identical in each situation.\(^4\) An action based upon common law fraud may be brought in Virginia in federal court as a Rule 23 class action in very limited circumstances. Adoption of the state fraud law and class action procedure would provide comprehensive protection to Virginia’s consumers in their own state courts.

The General Assembly of Virginia need not shrink from either of these proposals, for they constitute moderate and measured reform. Each should be introduced as a separate bill and considered on its own merits. The class action bill would merely change procedures, rather than substance, adopting a device familiar to most Virginia lawyers from their practice in the federal courts in our state. The consumer fraud bill merely requires merchants to tell the truth; thus, the overwhelming majority of merchants, as well as the Retail Merchants Association of Virginia, should want to remove the occasional bad apple from the barrel. With these modest parameters in mind, the business and legal communities of Virginia are invited to consider the specific elements of these two proposals.

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2. See VA. CODE ANN. §§ 8.2-701 to -725 and 8.2-312 to -318 (1965).
4. Vasquez v. Superior Court of San Joaquin County, 4 Cal. 3d 800, 94 Cal. Rptr. 799, 484 P.2d 964 (1971).
II.

A. The Need for a Class Action Procedure

At least twelve states\(^5\) have adopted a class action procedure based on the scheme of Federal Rule 23 (adopted in 1966) applicable in the federal courts. The fifteen states\(^6\) who have class action procedures based on "old" Federal Rule 23 are expected to update their procedures soon. The significant innovations of "new" Rule 23 are its provisions for class suits for damages and for a binding effect on all who do not "opt out" of such suits. Many of the other types of class actions were recognized at common law, so the new Rule has no impact beyond damage suits. There are three principal arguments for expansion of the federal class action device, which have application to the adoption of a state class action law. The class action device is an efficient means of litigating issues; it gives meaning to many existing laws by providing a full remedy; and, finally, it gives a group of small claimants a realistic chance of recovering for injuries caused by a common defendant. The current debate on the proposed federal consumer class action\(^7\) provides a full discussion of the factors that ought to be considered before enacting a state class action procedure, since a state class action procedure would be used quite often to redress wrongs to retail consumers in similar circumstances.

Those who feel that the class action device should not be expanded to the consumer situation present various arguments against class action suits for damages. It is said that the procedure allows plaintiffs' lawyers to blackmail defendants. Defendants will be afraid to litigate otherwise valid legal issues because of the fear of losing and thereby being subjected to a very large judgment. Plaintiffs will be able to assert questionable claims in a class action

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6. Alabama, Alaska, Georgia, Idaho, Iowa, Louisiana, Michigan, Missouri, Nevada, New Jersey, New Mexico, North Dakota, Texas, West Virginia, and Wyoming. Id. at 626 n.94.

suit for damages, and they will be able to recover something, even though their claims may have little merit. Opponents also argue that the only valid claims will be against "fly by night" companies and corporations with a low capitalization; therefore, since a class action would not solve the problems caused by these companies, it would be an ineffective device. Critics further contend that it will not effectively bring about recovery for small claimants, citing various lengthy federal cases on this point.\(^8\) They also point to class action cases where plaintiffs have sought to represent extremely large groups to show the disruptive or disastrous results a class action procedure can produce.\(^9\) Finally, the opponents predict that a class action law, applicable to retail fraud, will inhibit legitimate business from developing and selling new products and operating in a creative and flexible manner.

Those who favor the class action device submit that many of the problems previously identified can be managed by the courts in their administration of class actions.\(^{10}\) An "unmanageable" class can be subdivided into smaller classes or the entire class action can be dismissed as unmanageable. The courts can handle unwarranted class suits as they do other unwarranted suits, through their summary judgment power and with their other discretionary powers.\(^{11}\) Proponents of the class action device argue that it will have a salutary effect on law enforcement, in that individuals and corporations will become much more careful in their activities when there is a possible legal challenge. Such a reduction in questionable activities clearly will be beneficial. Advocates also marshal the fact that a class action procedure does not change the substantive law, but merely provides a remedy for an existing substantive right. Finally, they challenge the allegation that large, well-capitalized businesses

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\(^8\) Eisen v. Carlisle & Jacquelin, 391 F.2d 555 (2d Cir. 1968) (Eisen II), after remand, 41 U.S.L.W. 2586 (2d Cir. May 1, 1973) (Eisen III).

\(^9\) The so-called Smog cases against the automobile manufacturers brought on behalf of all residents of the United States are employed effectively in the argument against expansion of the class action device. See also Special Committee of the American College of Trial Lawyers, The Report and Recommendations on Rule 23 of the Federal Rules of Civil Procedure, 6 (1972). It is to be expected that attorneys who normally defend against consumer-oriented class actions have a natural bias against the maintenance of such actions.

\(^{10}\) This has been the practice under Rule 23 in federal courts. See West Virginia v. Charles Pfizer & Co., 314 F. Supp. 710 (S.D.N.Y. 1970) ("The Drug Cases"), aff'd, 440 F.2d 1079 (2d Cir. 1971).

never or rarely are involved in sharp, possibly illegal practices; advocates prefer to provide consumers their day in court, as a class, to test the legality of retail practices.

The arguments favoring a broad and flexible class action device persuade one to recommend the adoption of a state class action law, applicable to the vindication of consumer fraud. Where there are substantive laws that our legislators and courts have promulgated as public policy, there ought to be practical procedures for enforcement of these laws when they are violated. As the Chancellor is wont to chant, "For every right, there must be a remedy." This principle is no less applicable when the violations have been suffered by a class of persons. Although there might be plaintiffs bringing unwarranted suits for their settlement value, the courts and bar associations are capable of policing such conduct. The slight possibility of abuse is heavily outweighed by the value of providing relief for the great majority of our citizens, in their capacity as consumers. A legal system that provides legal relief only for large claimants and none for those with small claims is inadequate, since the essence of justice is equal treatment.\(^{12}\)

B. Virginia Law on Class Actions

Virginia has no statute or court rule on representative or class suits. Using their common law power, courts have allowed such suits in some of the traditional class action situations. Suits for injunctive relief against illegal taxes\(^ {13}\) or an administrative order\(^ {14}\) have been allowed. It has been said that a group of policyholders can be bound by prior representative adjudication.\(^ {15}\) Creditors, although their interests were not exactly the same, were allowed to sue as a class to obtain a new trustee under a deed of trust.\(^ {16}\) This sparse summary indicates the extent of the case law in Virginia on class actions. It is clear that the actual contours of the current Virginia class action

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12. See the author’s recent contribution on this subject, in the context of providing utility consumers with as much access to appeals from rate making decisions as the utility companies enjoy. Howell, Financial Barriers To Public Participation In The Regulatory Process, 14 WM. & MARY L. REV. 567 (1973).
procedures have not been defined. Legislative action in this area would, at the least, eliminate the need for expensive litigation to clarify the powers and limitations of our State's courts.

C. The Class Action Procedure Proposal

While the class actions proposal in Appendix A is based upon Federal Rule 23, it does modify the Federal Rule as it relates to the prerequisites for bringing an action under Subsection (b)(3) and the notice requirements. Because the proposed law is based on Federal Rule 23, the experience of federal courts can serve as a source of information for Virginia courts in their management of class actions. Federal court experience demonstrates that the Federal Rule, despite its intimidating appearance, is quite workable.

The proposed law includes explanatory sections to clarify the ultimate purposes of the law. Inclusion of these "purpose" and "comments" sections conveys an implied request that the courts be flexible and imaginative in the management of class actions. A negative attitude could effectively defeat the proposal after enactment, because much discretion is reposed in the trial court.

The requirement of Rule 23, in actions under Subsection (b)(3), that the common questions predominate over the individual issues, seems to be a harsh standard. Such a requirement could be

17. Fed. R. Civ. P. 23 (b)(3) provides that a class action is maintainable if:
   [T]he court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy. The matters pertinent to the findings include: (A) the interest of members of the class in individually controlling the prosecution or defense of separate actions; (B) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class; (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; (D) the difficulties likely to be encountered in the management of a class action.

18. The notice requirement of Rule 23 provides:
   [I]n any class action maintained under subdivision (b)(3), the court shall direct to the members of the class the best notice practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort. The notice shall advise each member that (A) the court will exclude him from the class if he so requests by a specified date; (B) the judgment, whether favorable or not, will include all members who do not request exclusion; and (C) any member who does not request exclusion may, if he desires, enter an appearance through his counsel. Id. § (C)(2).

19. See note 17 supra.
the basis for an ill-founded, but discretionary decision to dismiss a
meritorious class action. Therefore, the proposed law contains modi-
fications of the requirements of Federal Rule 23(b)(3), set forth in
Subsection II (C)(3), in Appendix A. Under the proposal, a (C)(3)
type class action ((b)(3) under Federal Rule 23) can be brought if
the common issues are a significant part of the action and all of the
other conditions are met. A court, in deciding whether or not to
allow a (C)(3) type class action, must consider, not only the form
factors given in Federal Rule 23 (b)(3), but, additionally, the plain-
tiff's chance of obtaining a legal remedy if the class action is not
allowed. Thereby, the proposal attempts to provide a presumption
in favor of a class action when significant common issues are pres-
ent, especially if the plaintiffs otherwise cannot obtain relief. The
proposed modification may constitute a recognition of current Fed-
eral Court practice under Federal Rule 23(b)(3). In Gold Strike
Stamp Co. v. Christensen,20 the court held that the common issues
predominated where the common issue was liability and the indi-
vidual issue was damages. In Green v. Wolf Corp.,21 the court said
that, even though there might be a question of the degree of individ-
ual entitlement by each plaintiff to establish his federal statutory
claim, the common issues predominated sufficiently for the case to
go forward under Federal Rule 23(b)(3). These cases constitute sub-
stantial authority for codification of the change embodied in
Subsection (C)(3) of the proposed state law.

D. The Notice Requirement in the Proposal

The notice provisions of this proposal are probably the most novel
contribution the author has attempted. They are keyed to the Fed-
eral Rule 23 requirements, but attempt to be more flexible than
under Federal Rule 23 (b)(3) type actions. Of most concern are the
basic and indispensable requirements of due process derived from
the Constitution of the United States22 and the Virginia Constitu-
tion,23 with regard to notice in class actions. The two United States
Supreme Court decisions relevant to this question are Hansberry v.

20. 436 F.2d 791 (10th Cir. 1970).
22. U.S. Const. amend. XIV.
Lee24 and Mullane v. Central Hanover Bank & Trust Co.,25 which speak to the application of due process in representative litigation.

Hansberry, which involved the binding effect of a preceding judgment, held that the defendants in the case before it were not bound by the preceding judgment, to which they had not been parties, because their interests were not adequately represented in the preceding action. The Court implied that adequate representation for absent parties in a class suit would be sufficient grounds to bind them in a later action. In reaching its decision, the Court explained that states enjoy flexibility in providing for res judicata effect in class actions, saying in dictum:

. . . [T]he Fourteenth Amendment does not compel state courts or legislatures to adopt any particular rule for establishing the conclusiveness of judgments in class suits; . . . , nor does it compel the adoption of the particular rules thought by this Court to be appropriate for federal courts. With a proper regard for divergent local institutions and interests . . . , this Court is justified in saying that there has been a failure of due process only in those cases where it cannot be said that the procedure adopted, fairly insures the protection of the interests of absent parties who are to be bound by it . . . .26

The Court expressly limited its holding in Hansberry to the proposition that inadequate representation in the class action would defeat the operation of res judicata effects against an absent party.

Mullane involved a common trust fund under which an accounting was sought by the bank trustee. The statutory procedure provided for appointment of a guardian to protect the interest of the beneficiaries in the legal proceedings and for notice to the beneficiaries by newspaper publication. The Supreme Court held that due process, under the fourteenth amendment, requires individual notice to known beneficiaries, whereas publication notice will suffice only for unknown or possible beneficiaries. The wording of Mullane suggests that notice was required, in part, because the case involved "substantial property rights."27 The drafters of Federal Rule 23 ap-

24. 311 U.S. 32 (1940).
parently felt that *Mullane* required individual notice to known plaintiffs in situations that typically involve damages. As a result, Federal Rule 23 includes required notice for class actions brought under Subsection (b)(3). The position advanced herein is that *Mullane* does require notice in (b)(3) situations, but that the constitutional requirement for notice is not as rigid as the wording of (c)(2). The *Mullane* court speaks in terms of practical considerations, which allow the trial court to dispense with individual notice to absent parties where it is clear that their interests will be protected by others. *Mullane* should be read as saying due process requires reasonable notice under the circumstances of the case. The effect of the case is limited factually to a requirement of individual notice to known beneficiaries of a common trust fund. Because *Mullane* is merely a "representative action," commentators have argued that the apparently rigid requirements for notice in *Mullane* should not be applied to a true class action.

Reconciling *Hansberry* and *Mullane* presents difficulties. Some of the language of *Hansberry* suggests strongly that a state procedure that fairly protects the interests of absent class members would be permissible under due process even if notice is not given to the absent members. *Mullane* clearly holds that, where "substantial property rights" are involved, notice to the interested parties is required. A reading of the cases in this manner supports a rule dispensing with notice in Subsections (b)(1) and (b)(2) cases, but requiring notice in Subsection (b)(3) cases. The question remains as to what type of notice is required by *Mullane* in Subsection (b)(3) cases. A rule requiring "individual notice to known members" apparently pursuant to Federal Rule 23 (c)(2) reflects a rigid reading of *Mullane*. If such a rule is required by due process, then in situations involving small claims and numerous known claimants, the claimants would often be precluded from legal relief because they would be unable to risk the cost of notice that they would be required to provide. Such a requirement reduces, logically, to the

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30. 311 U.S. at 42-43.
proposition that due process requires that the claimants be left without relief, a ridiculous result.

Lower federal courts have discussed the notice requirements for class actions with different conclusions. In *Eisen v. Carlisle & Jacquelin (Eisen II)*, the Second Circuit, in reversing a class action dismissal, said, in dictum, that due process required notice in all class actions.

In the newest development in this protracted anti-trust class action, *Eisen III*, the same Second Circuit panel enforced its earlier dictum and held that notice was required for all members of a class who can be identified through a reasonable effort. The court decided that the failure to give notice, based on the inability of the plaintiff-class representative to bear the expenses of notifying over 6 million class members (approximately 2,250,000 of them known), and the unlawfulness of requiring the defendants to share most of that burden, rendered the case "unmanageable" as a class action (a Rule 23 consideration). Thus, the case was dismissed except as an individual action.

The *Eisen III* court pointed out that the *per capita* expenses of notice (as required by Rule 23) and the expenses of disbursement of any possible award to members of the class, would exceed the projected average claim of each of the 6 million members of about $3.90 each. The court took a strict approach in construing Rule 23, without any direct reference to the *Mullane* or *Hansberry* decisions, with their more flexible approaches to class representation. Additionally, the court did not choose to take a position which would allow it to take a more flexible approach to the notice requirement in order to facilitate a remedy for an arguable wrong where expenses exceed damages and present parties can adequately protect absent members. Where notice would be an unreasonable burden, and the absent parties would not be prejudiced by lack of notice, constitutional due process considerations should not require such individual notice.

Since *Eisen III* speaks only to the requirements of Federal Rule 23, and not directly to the constitutional requirements of notice, and

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31. 391 F.2d 555 (2nd Cir. 1968).
32. Id. 564.
33. See note 8 supra.
since there are contrary decisions in other jurisdictions, the case may proceed to an en banc Second Circuit decision, and possibly to decision in the United States Supreme Court. In the meantime, Eisen III should not affect the General Assembly's deliberation, especially in view of the contrary decisions.

Significantly, the Fourth Circuit, in Hammond v. Powell, held that notice is not required in a class action under Federal Rule 23 (b)(2). Clearly, then, the lower federal courts have not treated dis-positively the constitutional due process requirements of notice in all types of class action cases.

The approach adopted in the proposed state class action law is based on the above interpretation of Hansberry and Mullane. It is very similar to the approach adopted in Federal Rule 23, except that it attempts to give the court more discretion where notice is mandatory thereby conforming to Federal practice, as discussed above. While Rule 23 requires notice to those class members who can be identified through “reasonable effort,” the proposal herein would require notice to those “members who can be notified through reason-able effort.” Such an approach constitutes substantial compliance with due process requirements.

III.

A. The Need for a Consumer Fraud Law

The purchase of consumer goods in our society is a cornerstone of its economic structure. The theory of our free enterprise system is that competition and informed decision-making by purchasers will produce an ever-improving flow of goods. A seller producing a better product or selling at a lower price will attract more customers (assuming a good flow of information) and thereby will be rewarded for his better effort. Merchants who lose business will be encouraged to attract new business. This ideal system will not operate optimally, where (a) participants can combine together in anticompetitive agreements, and (b) sellers can deceive purchasers into buying their products by using untrue statements. The Sherman Antitrust Act

34. Johnson v. City of Baton Rouge, 50 F.R.D. 295 (E.D. La. 1970) and Pasquier v. Tarr, 318 F. Supp. 1350 (E.D. La. 1970). These cases add little since they are both from the same court, and in both, the judges were more interested in the results than any theoretical base. 35. 262 F.2d 1053 (4th Cir. 1972).
makes such agreements illegal\textsuperscript{36} and allows treble damage civil suits by aggrieved parties\textsuperscript{37} to carry out the Act's purpose. There is no similar federal or Virginia legislation with regard to deceptive practices.\textsuperscript{38} Common law fraud, with all of its special rules, is designed to cover persons in relatively equal bargaining positions, providing adequate relief in transactions involving wholesalers, dealers, middlemen, and other distributors. When the retail consumer is involved, he is often poorly informed and lacks any special knowledge about the products he buys. His seller often holds superior knowledge about the products he sells, has greater resources, and thus holds a superior bargaining position in the transaction with the consumer. Although consumer groups have made strides in assisting individual consumers to make informed judgements before purchase, a seller typically knows the demands of the market and the law, while the consumer knows very little about either. A comprehensive fraud law for consumers, including civil suits for injured consumers, would be an effective device to make the system work optimally, thereby eliminating fraudulent and deceptive practices.

It is appropriate to consider examples of situations to be covered by the proposed law, but which are not now covered by the common law of fraud. An occasional salesman may sometimes deceive a consumer about the meaning of a written form or contract. It is rare for a consumer to challenge the salesman, or attempt to read and interpret the document at the time of the transaction. Such a practice by a salesman would not be actionable under common law since the consumer did not \textit{justifiably} rely, since the law requires the consumer to read the form. A store through its advertisements or salesmen's statements may say that an appliance is a "good buy" at its price, when, in fact, the price is excessive. A misrepresentation of opinion is not actionable under common law fraud, but could give rise to a cause of action under a consumer fraud law. Consumers sometimes are misled into purchasing an item on the pretense that they have won a contest and they are thereby entitled to a reduced price. While such a scheme might not amount to a common law

\textsuperscript{38} There was an unsuccessful attempt in the 1973 session of the General Assembly to provide for attorney's fees in consumer actions and to set venue for such actions in House Bills 1401 and 1403. While the Federal Trade Commission can prosecute for deceptive advertising, under Federal law, consumers cannot. 15 U.S.C. §§ 52-56.
fraud, but it certainly is very deceptive to many consumers, and would be actionable under the proposed law.

There is precedent for developing a specialized fraud law to cover a defined subject area, and allowing civil suits for damages. A whole body of "securities fraud law" has developed under Rule 10b-5 of the Securities Exchange Act of 1934, including the remedy of civil suits for damages for vindication of abuses of the superior position of "insiders" in this specialized area. The Federal Trade Commission regulates advertising "affecting commerce", and prosecutes those who broadcast or publish deceptive claims.

Other states have developed special schemes for handling the consumer fraud problem. California law provides a list of deceptive practices that are made illegal, and allows consumer suits for damages flowing from these practices, including punitive damages. This type of approach gives merchants a fair warning but it seems unlikely that all possible deceptive practices can be enumerated. Before suit, under the California law, the consumer must request adjustment from the merchant and thereby give him a chance to remedy the alleged abuse. Under New Jersey law, deceptive practices are made illegal. Consumer suits are allowed without condition and the Attorney General can obtain injunctions against the unlawful practices in a summary action. A consumer fraud law in Kentucky is similar to the one in New Jersey. Since other states have provided their consumers with the protection of a specialized consumer fraud law, it is modest to propose that the consumers of Virginia be provided similar relief.

B. Virginia Law on Fraud

A detailed analysis of the Virginia law on fraud is not necessary;

41. CAL. CIVIL CODE § 1770 (West 1973).
42. Id. § 1780.
43. Id.
44. Id. § 1782.
46. Id. § 56:8-19.
47. Id. § 56:8-8.
48. KY. REV. STAT. § 367.120 et seq. (1972).
but, a brief overview will assist in the analysis of the consumer law proposal. The law of fraud in Virginia departs from the majority common law rule of fraud, in that scienter is not required. The law requires that there be a material misrepresentation of a fact, on which the plaintiff justifiably relies and is thereby damaged. The misrepresentation must be of a contemporary fact and not as to an anticipation of future events. A misrepresentation by a statement of an opinion or a future promise generally will not amount to fraud. As an exception to the non-scienter rule, silence must be willful to be a misrepresentation. Finally, in order to have actionable fraud, the reliance on the misrepresentation of the defendant by a plaintiff must be reasonable or justifiable.

C. The Consumer Fraud Law Proposal

The fraud law proposal provides for an expanded definition of fraud applicable in the consumer context, civil suits for damages thereunder, awards of attorney's fees and costs to winning consumers, punitive damages for knowing violations, suits for injunctions by the Attorney General against fraudulent practices, and an exemption of advertisers from civil liability.

The proposed law modernizes the fraud law applicable to the consumer transaction. Scienter is not required, consistent with the current Virginia fraud law, rendering merchants strictly liable for their deceptive practices. A negligence standard could have been employed, but such a standard would have imposed an additional burden on the consumer plaintiff. Furthermore, strict liability will


53. Id.


55. See note 51 supra.
provide a strong incentive for the elimination of arguably deceptive practices. However, a misrepresentation must be material for civil liability to arise, so strict liability is not as harsh a rule to the merchant as it might appear. Since reliance is irrebuttably presumed, materiality is a minimum requirement, which is also consistent with the Virginia common law of fraud. The proposed consumer fraud law also departs from the common law by defining misrepresentations as including misrepresentations of other than current facts. Since the purpose of the law is to prevent deceptions causing actual injury to consumers, a common sense approach to the term "deception" is adopted. Finally, consumers need not be required to show reliance to recover under the proposed law, thus eliminating the obstacle in common law fraud of "justifiable" reliance. Under the common law, when consumers are deceived, they cannot recover if the law postulates that they should not have relied. The proposed law presumes the reliance of a consumer when a deceptive practice is directed at him. The law has a prophylactic effect, assuring that a merchant who deceives will lose under any circumstances. The assurance of recovery to deceived consumers and the salutary effects on merchants' practices outweigh the negative factor of possible, but unlikely, recovery by uninjured plaintiffs.

In summary, the proposed law requires as a condition to recovery, that a consumer must show that a materially deceptive practice was aimed at him, and that because of such deception he was injured. If the deception was not directed to him, he must also show reliance.

An understanding of the proposed law can be obtained by considering a few examples. Egregious cases of consumer deception are now covered by common law fraud, but the proposed law would make proof easier for plaintiffs in such cases. For example, a misrepresentation by a salesman of the contents or effect of a form or contract to be signed would be actionable under the proposal if it were material. A false sales price or a false discount, such as a "contest prize," would probably be a material misrepresentation and therefore actionable. Sometimes sellers attempt to make the distribution of their product look like something other than a mere selling scheme. The seller may state that the product is being placed in the consumer's house for advertisement purposes, and that the householder will be liable only for costs. In fact, the consumer is buying the product at a retail price and the seller is not concerned about the advertisement. Such schemes would be actionable.
Various mechanisms are available for controlling conduct in our society, including criminal sanctions, civil liability, and administrative orders and fines. While there is a Virginia statute making deceptive or misleading advertising a misdemeanor, the activities within the scope of the proposed law are not the type that should be stigmatized with the criminal sanction. Often, when business practices are criminalized, prosecutors fail to prosecute under such laws. The power of administrative agencies in stopping consumer fraud has often been questioned. It has been said that the work of the Federal Trade Commission in the area of consumer protection, while praiseworthy, is not sufficient to protect the public from deceptive practices. Administrative agencies, subject to funding, staff and policy limitations, often are not as aggressive as necessary and their cost is passed along to the consumer. In contrast, civil suits, unlike criminal sanctions and administrative procedures, provide monetary relief for parties injured by past practices, and impose a meaningful deterrent to such deceptive practices.

Allowance of civil remedies, along with awarding attorney's fees and costs to the winning injured party, has proven to be an effective means in other areas of enforcing laws. Such a procedure taps the skills of the private bar in a way that benefits society, the injured party, and the private attorneys. Awarding of fees and costs only on the side of the winning consumer provides incentive for the challenging of questionable commercial tactics. Unwarranted suits and the conduct of irresponsible attorneys should be handled in a separate procedure, not by punishing injured plaintiffs through the denial of their remedy.

The punitive damages for a knowing violation attempts to penalize defendants in egregious cases. A treble damage award in all cases would increase deterrence, but it could be unfair in an action based upon a rule of strict liability. Any undue harshness in the proposed

56. Va. Code Ann. § 59.1-44 (1973 Repl. Vol.). The author acknowledges the effort of the General Assembly in the area of consumer protection reflected in several provisions in Title 59.1 of the Code of Virginia. However, these existing laws are not sufficiently comprehensive to cover the full range of deceptive practices that confront the consumer. For an example of the range of typical deceptive practices, see H.R. 14931, 91st Cong., 1st Sess. § 201 (1969).

57. See note 6 supra.

law may be modulated by the discretionary powers of the courts in identifying knowing violations and setting damages.

Under the proposal, the Attorney General may seek *ex parte* orders when deceptions are in progress, a measure designed to be prophylactic and to encourage the Attorney General’s staff to develop expertise in this area of the law.

Finally, the proposed law exempts the communication media from civil liability when they publish a merchant’s misrepresentations. This exception may be redundant, since, to be liable, a person must “use” an illegal practice. However, it is important to assure that the media is relieved of the undue burden of legally scrutinizing its advertisements for deceptive practices. The principal thrust of the law is to hold unethical sellers liable, thus reaching the source of the problem.

IV.

*Conclusion*

The two proposals developed above, in support of the appended legislation, are intended to provide important protection to the pecuniary and proprietary interests of everyone who resides in our Commonwealth, from the laborer to the corporate president, from the student to the retired pensioner. The government is ordained not only to serve and protect the majority, the strong and the wealthy, but also to make the system work for everyone, including the poor, the weak, and the uneducated. This principle of government was articulated long ago by the great Virginian, George Mason. His words have found expression in our state Constitution, Article I, Sections One and Three. They serve as the lodestar for all public servants of this Commonwealth and are an implicit mandate for the passage of these and similar laws designed to protect the consumer.

Section 1. Equality and rights of men.

That all men are by nature equally free and independent and have certain inherent rights . . . namely, the enjoyment of life and liberty, with the means of acquiring and possessing property, and pursuing and obtaining happiness and safety.

Section 3. Government instituted for common benefit.

That government is, or ought to be, instituted for the common benefit, protection, and security of the people, . . . that is best which is capable of producing the greatest degree of happiness and safety. . . .
APPENDIX A

Class Action Procedure Law

I. Purpose.

This law is designed to give Virginia courts a procedure that they can use in order to provide remedies to small claimants who would otherwise be unable to secure them because of the smallness of their claims or the cost of litigation. It will also assist the courts in handling cases efficiently and in avoiding unnecessary litigation.

II. The Procedure.

A. Coverage. This procedure may be used in any legal or equitable proceeding in the courts of Virginia where the requirements of the rule are met.

B. Prerequisites of a Class Action. One or more members of a class may sue or be sued as representative parties on behalf of all, only if (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.

C. Class Actions Maintainable. An action may be maintained as a class action if the prerequisites of subdivision B are satisfied, and in addition:

(1) the prosecution of separate actions by or against individual members of the class would create a risk of
   (a) inconsistent or varying adjudications with respect to individual members of the class which would establish incompatible standards of conduct for the party opposing the class, or
   (b) adjudications with respect to individual members of the class which would as a practical matter be dispositive of the interests of the other members not parties to the adjudications or substantially impair or impede their ability to protect their interests; or
(2) the party opposing the class has acted or refused to act on
grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole; or

(3) the court finds that a significant part of the action involves questions of law or fact common to the members of the class, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy. The matters pertinent to the court's findings include: (a) the interest of members of the class in individually controlling the prosecution or defense of separate actions; (b) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class; (c) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; (d) the difficulties likely to be encountered in the management of a class action; (e) the difficulties likely to be encountered by members of the class or the party opposing the class in obtaining adequate equitable or legal relief if a class action is not allowed.

D. Determination by Order Whether Class Action to be Maintained; Notice; Judgment; Actions Conducted Partially As Class Actions.

(1) As soon as practicable after the commencement of an action brought as a class action, the court shall determine by order whether it is to be so maintained. An order under this subdivision may be conditional, and may be altered or amended before the decision on the merits.

(2) In any class action maintained under subdivision C(3) the court shall direct to the members of the class the best notice practicable under the circumstances, including individual notice to all members who can be notified through reasonable effort. In determining what notice is practicable under the circumstances, the court shall consider the size and importance of the individual interests of each member of the class and the difficulties these members will have in obtaining equitable or legal relief under a particular notice requirement. The notice shall advise each member that (a) the court will exclude him from the class if he so requests by a specified date; (b) the judgment, whether favorable or not, will include all members who do not request exclusion; and (c) any member who does not request exclusion may, if he desires, enter an appearance through counsel.
(3) The judgment in an action maintained as a class action under subdivision C(1) or C(2), whether or not favorable to the class, shall include and describe those whom the court finds to be members of the class. The judgment in an action maintained as a class action under subdivision C(3), whether or not favorable to the class, shall include and specify or describe those to whom the notice provided in subdivision D(2) was directed, and who have not requested exclusion, and whom the court finds to be members of the class.

(4) When appropriate (a) an action may be brought or maintained as a class action with respect to particular issues, or (b) a class may be divided into subclasses and each subclass treated as a class, and the provisions of this rule shall then be construed and applied accordingly.

E. Orders in Conduct of Actions. In the conduct of actions to which this rule applies, the court may make appropriate orders: (1) determining the course of proceedings or prescribing measures to prevent undue repetition or complication in the presentation of evidence or argument; (2) requiring, for the protection of the members of the class or otherwise for the fair conduct of the action, that notice be given in such manner as the court may direct to some or all of the members of any step in the action, or of the proposed extent of the judgment, or of the opportunity of members to signify whether they consider the representation fair and adequate, to intervene and present claims or defenses, or otherwise to come into the action; (3) imposing conditions on the representative parties or on intervenors; (4) requiring that the pleadings be amended to eliminate therefrom allegations as to representation of absent persons, and that the action proceed accordingly; (5) dealing with similar procedural matters. The orders may be combined with a pre-trial order formulating issues, and may be altered or amended as may be desirable from time to time.

F. Dismissal or Compromise. A class action shall not be dismissed or compromised without the approval of the court, and notice of the proposed dismissal or compromise shall be given to all members of the class in such manner as the court directs.

G. Jurisdiction. Jurisdiction for any action brought as a class action shall be based on the underlying cause of action and the aggregate amount of claims asserted where appropriate.
III. Comments on the Class Action Procedure Law.

The rule given draws heavily on Federal Rule of Civil Procedure 23. Reference can profitably be made to the Advisory Committee's Note at 39 F.R.D. 98-107. Also the courts in working under the rule can look to federal precedent for guidance. It should be kept in mind, however, that the rule given is a Virginia rule and therefore Virginia courts will be the final authority on what it means.

The major change made by the rule in Virginia law is that the appropriateness of a class action is determined by a functional analysis. Suits for damages can be brought if they meet the criteria of C(3). The rule also gives courts guidance in handling all class actions.

Section A indicates that the class action procedure is available for all types of claims.

Sections B, C(1), C(2), D(1), D(3), D(4), E and F are the same as (a), (b)(1), (b)(2), (c)(1), (c)(3), (c)(4), (d) and (e) respectively of Federal Rule 23. They are designed to give the trial court maximum flexibility in processing a class action case. This flexibility should be used to carry out the purpose for which the legislation is enacted.

Section C(3) modifies (b)(3) of Federal Rule 23 somewhat. Common questions of law or fact have to be a significant part of the action but do not have to necessarily predominate over individual questions as required by (b)(3) of Rule 23. In making a determination as to the maintenance of a class action under C(3), a court must consider the chance that the plaintiffs' claim may never be asserted if a class action is not allowed.

Section D(2) modifies (c)(2) of Rule 23 significantly. Under D(2) notice is required in C(3) actions but flexibility is allowed. Even though members of the class can be easily identified, individual notice will not be required unless it is reasonable considering the circumstances.

The two changes made to Rule 23, spoken of above, may be close to what the federal courts have interpreted the actual wording of Rule 23 to mean. In any case the changed wording clarifies the situation.

Section F attempts to prevent any jurisdictional problem that might otherwise develop.
APPENDIX B

Consumer Fraud Law

I. Purpose.

This law is designed to provide consumers with comprehensive protection from and a remedy for those practices of their sellers that are fraudulent, deceptive or unfair. It attempts to modify the law of fraud otherwise applicable to the consumer situation to more accurately reflect the reality of that situation.

II. Illegal Practices; Suits by Injured Persons.

It shall be illegal for any person in a retail transaction involving the purchase, sale or lease of goods or services by a retail consumer to use any fraudulent, deceptive or unfair practice. Any retail consumer who shall be injured by reason of the use by a person of any such practice may sue such person in any appropriate court of Virginia and shall recover damages sustained by him or shall obtain such other relief that may be appropriate.

III. Attorney’s Fees and Costs.

In any suit hereunder in which relief is awarded to the retail consumer, the court shall award to him attorney’s fees and the reasonable costs of litigation.

IV. Punitive Damages.

In any suit in which it is found that the defendant has used a fraudulent, deceptive or unfair practice against a retail consumer and that such defendant knew that the practice was fraudulent, deceptive or unfair, then the retail consumer shall be awarded in addition to his actual damages an additional amount equal to two times such damages as punitive damages against the defendant.

V. Injunction Against Unlawful Practices.

Whenever the Attorney General has reason to believe that any person is using, has used, or is about to use any practice declared by Section II to be illegal, and that proceedings would be in the public interest, he may immediately move in the name of the Commonwealth in an appropriate court for a restraining order, or tempo-
rary or permanent injunction to prohibit the use of such practice. A restraining order shall be granted whenever it reasonably appears that any person will suffer immediate harm, loss, or injury from an illegal practice. If the defendant moves for the dissolution of a restraining order, the court shall hold a hearing within five business days of defendant’s motion. If such hearing does not occur through no fault of the defendant, then the restraining order shall be dissolved automatically. In order to obtain a temporary or permanent injunction, it shall not be necessary to allege or prove that an adequate remedy at law does not exist, or that irreparable injury, loss, or damage will result if the injunctive relief is denied.

VI. Definitions.

The following definitions apply to the Consumer Fraud Law:

A. A retail consumer is one who obtains goods or services through purchase or lease in a commercial setting not for resale or leasing to others but for his or his household’s or friend’s use.

B. A fraudulent, deceptive or unfair practice shall be any deception, fraud, false pretense, false promise or misrepresentation, whether or not innocently done. An omission, concealment or suppression may be a fraudulent, deceptive or unfair practice. A false or deceptive practice as to present or future opinions, facts or laws may be a fraudulent, deceptive or unfair practice. In order for a practice to be actionable under Section II, it must be deceptive as to a material aspect of the retail transaction. If an illegal practice has been proven and the practice was directed at a retail consumer, then the reliance of such consumer on such practice shall be presumed and no evidence will be allowed to rebut such reliance.

VII. Exception.

No owner, publisher or operator of any communications media shall be held liable for injuries under Section II for any advertisement in such media unless such person had knowledge of the fraudulent, deceptive or unfair intent, design or purpose of the advertiser.

VIII. Comments on the Consumer Fraud Law.

The law attempts to stop consumer frauds through civil suits and
orders obtained by the Attorney General and to provide relief for injured parties.

The Attorney General will primarily be concerned with stopping frauds before they occur or before many people are injured. It should be noted that he can obtain orders against deceptions that are not material. Civil suits would not be allowable in such cases. VI B.

Any party who uses an illegal practice which results in injury can be sued except advertisers. VII. Judicial limitations on this provision would be appropriate if they are consistent with the purpose of the law.

An injured party hereunder must show significantly less than is required by the common law of fraud in order to get relief. He must show (1) a deception or fraud, (2) its materiality and (3) that it was directed toward him. (If he cannot show (3) but can show his reliance, then he can recover.)

Most of the law is direct and clear and the courts will be carrying out its intent if they adhere strictly to the express terms of the law.