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DUE PROCESS AS CONSUMER PROTECTION: STATE REMEDIES FOR DISTANT FORUM ABUSE

by

ALAN K. CHEN*

For nearly two decades consumer protection laws have grown tremendously, with a corresponding expansion in the range of activities which fall within the scope of such laws. From the earliest notions of common law fraud in simple sales transactions has evolved a conglomeration of statutes, administrative rules and case law which is directed at the protection of the consumer from the point of initial solicitation or advertising to the post-sale matters of debt collection. Of particular interest in past years has been a common method of collecting allegedly overdue consumer debts which involves the creditor, who may often be the seller as well, suing upon consumer obligations in forums far from the place of the consumer's residence or from where the consumer signed the original contract. Although this practice, often called "distant forum abuse," has been declared unfair under federal law, at least with respect to interstate debt collection¹ and is prohibited with respect to third-party collection agencies,² there remains a largely unprotected area where astute business operators can avoid these restrictions. The primary areas of concern where consumers in many states are still without protection are intrastate debt collection suits filed by companies collecting their own debts or the debts of an affiliated company under common ownership, or by "debt servicing" companies. Moreover, there are practical limitations upon the enforcement of federal remedies, both in terms of available resources and remedial options. These limitations give rise to the necessity of a broad remedy in state courts which can be exercised by both state consumer protection officials and individual citizens.

This article takes the position that distant forum abuse is a practice which should be and can be halted by the employment of state consumer protection statutes. The article first lays out a history of distant forum abuse and its role as a tool for debt collection harassment. Next, it examines legal developments in this area at both the federal and state levels, and explains the need for a more wide-reaching remedy in most jurisdictions. The third section briefly addresses important aspects of procedural waivers under contract law which must be taken into account by policy-makers when fashioning new remedies for distant forum abuse. Finally, there will be a discussion of the use of the Ohio Consumer Sales Practices Act as a remedy for distant forum abuse in Ohio. Ohio is a good example on which to focus because it is a jurisdiction

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¹Spiegel, Inc. v. FTC, 540 F.2d 287 (7th Cir. 1976).

²Fair Debt Collection Practices Act, 15 U.S.C. § 1692i (1982).

where the issue is still being litigated, and the question of statutory coverage in Ohio is indicative of common problems in statutory interpretation which confront consumers in other states who wish to invoke consumer protection statutes against distant forum debt collectors.

HISTORICAL BACKGROUND

In the late 1960s and early part of the 1970s, policy-makers at both the federal and state levels began to express an interest and concern with the problems of the consumer-debtor. Though part of a larger consumer protection movement, the consumer credit issue began to generate a great deal of interest in and of itself. In 1969, the President and Congress established the National Commission on Consumer Finance (NCCF) which was charged with the responsibility of studying various factual, economic and legal aspects of the condition of consumer credit in the United States at that time.³ From a more academic standpoint, what is considered by many to be the definitive sociological study on consumer debtors in this country was published in 1974.⁴ Moreover, the first pieces of major consumer credit legislation were enacted during this period.⁵

The aftermath of this period has resulted in alleviation of several problematic areas of consumer credit law, yet consumers remain vulnerable in many circumstances. Among the problems which have yet to be sufficiently remedied is the practice of collecting allegedly defaulted debts by filing lawsuits in forums far distant from the consumer's residence. It is a practice which received recognition, but little study during the early 1970s. Furthermore, although the practice, known as "distant forum abuse," has been proscribed by federal law in certain circumstances and by some states' laws, it continues to exist within the technical bounds of the law in many jurisdictions.

There are many variations on the practice, but a brief overview of how it works may be helpful at this point. The initial aspect of distant forum abuse is the consumer transaction which gives rise to the creditor's alleged cause of action. Ordinarily, this will involve either a consumer's purchase of goods, services, or both, payment for which is arranged on credit terms (e.g., a retail installment sale), or it will involve a consumer loan.⁶ Often the sales will be the result of a home, telephone or mail solicitation by a company representative of

³CONSUMER CREDIT IN THE UNITED STATES. National Commission on Consumer Finance, (1972). Indeed, this study is still the basis of consumer credit policies being developed currently. See American Financial Services Ass'n v. FTC, 767 F.2d 957, 962 (D.C. Cir. 1985), cert. denied, 106 S. Ct. 1185 (1986).

⁴D. CAPLOVITZ, CONSUMERS IN TROUBLE: A STUDY OF DEBTORS IN DEFAULT (1974) (This book is actually a compilation of the study data. The actual final report is D. CAPLOVITZ, DEBTORS IN DEFAULT, from the Bureau of Applied Social Research, Columbia University (Vol. 1 1970; Vol. 2 1971).

⁵See, e.g., Consumer Credit Protection Act, Subch. 1, Consumer Credit Cost Disclosure Act, 15 U.S.C. §§ 1601-1667e (1982 & Supp. II 1984) (The Truth-in-Lending Act, effective 1968).

⁶Though discussed on a peripheral basis, distant forum abuse involving alleged defaults on consumer loan transactions will not be the major emphasis of this paper.

the seller.⁷ These representatives may be from a company which maintains a central location for business operations, but they travel to all parts of the state (or in some cases, other states) in order to facilitate business. Whether or not the goods or services sold are needed by the consumer, the solicitations may result in the signing of a formal contract by the consumer. As one witness who testified before the NCCF observed “[m]any low-income consumers are deluged by door-to-door salesmen whose sole purpose in selling goods is to get the consumer to sign a credit agreement.”⁸ Indeed, low-income neighborhoods can be specifically targeted by these businesses in order to engage in these transactions.

The next important stage in the development of a distant forum situation is the signing of the contract. While the consumer probably signs the contract at her residence, the selling company’s agent may not sign the contract until it has been returned to the home office. This may become important later in determining where the contract was “made.” Where legal under state law, the contract may contain a clause which designates a specific county as the venue of consent for both parties should a suit arise from the transaction. In the alternative, there may be a contractual provision which establishes the “understanding” of the parties that the legal “place of performance” of the contract is in a particular county. This “place of performance” may have no relation to the actual performance of the contract, and will most likely be the county where the seller maintains its central office.

A third important variable in the process is the type of business entity which initiates the legal action upon the alleged default. This is a crucial factor in determining the applicability of existing distant forum prohibitions and in evaluating the potential applicability of other statutes which may provide a remedy for these practices. In many cases, the seller or supplier of goods or services may extend its own credit to the purchasing consumer and collect its own debts through an “in-house” collector. Another option, often employed by smaller businesses, is to hire an independent debt collection agency, or “third-party” debt collector. These are companies or individuals which engage in the practice of tracking down and collecting past due accounts from consumer-debtors. The abuses of members of this industry first called to Congress’ attention the problems of debt collection activities⁹ and prompted it to pass the Fair Debt Collection Practices Act (FDCPA).¹⁰ Another option sellers have is to hire companies to “service” their accounts. This practice involves turning over

⁷Such solicitations have presented their own consumer protection problems which have been addressed by federal and state laws and regulations. See, e.g. Cooling-Off Period For Door-To-Door Sales, 16 C.F.R. § 429 (1986); Home Solicitation Sales Act, OHIO REV. CODE ANN. §§ 1345.21-1345.28 (Page 1979 & Page Supp. 1985); OHIO ADMIN. CODE § 109:4-3-11 (1977).

⁸*Summary of Hearings on Debt Collection Practices, National Commission on Consumer Finance*, 88 BANKING L.J. 291, 319 (1971) (paraphrased testimony of Charles Baron).

⁹See 123 CONG. REC. 10240-10241 (1977) (remarks of Rep. Annunzio).

¹⁰15 C.F.R. §§ 1692-1692.1 (1982 & Supp. II 1984).

accounts for regular collection *before* there is any default on consumer payment. The accounts may be sold or assigned, and the servicing companies may actually be owned and operated by the same people who own and operate the seller company. While the Federal Trade Commission's (FTC) Holder-in-due-course rule preserves the consumer's right to assert all valid claims and defenses which could have been asserted against the original seller against any holder of a consumer credit contract,¹¹ this protection is meaningless where the fundamental issue is the consumer's inability to defend in the lawsuit at all.

The final option sellers and other creditors have is the type of court in which to file their suits. In the past, small claims courts have been a favorite forum for suing on alleged consumer defaults, provided the amount of recovery sought was under the jurisdictional maximum.¹² Otherwise, the business plaintiffs may sue in lower-level county or municipal courts, or in the highest-level state trial courts (usually labeled "Superior" or "Common Pleas"), assuming other jurisdictional prerequisites have been met. As will be illustrated below, if the state venue rules for courts at these levels vary, the options may be more limited.

A typical case of distant forum abuse, then, might involve the sale of a set of encyclopedias to a low-income family. The sale, initiated by a door-to-door solicitation, is financed by the seller at a high annual percentage rate with a low initial payment required of the consumer. However, given dire financial circumstances, or perhaps because of some contract breach by the seller (non-delivery, breach of warranty, etc.), the consumer stops her monthly payments.¹³ The seller, its assignee or other agent, or an independent debt collection agency initiates suit in a county far from the consumer's residence or from where she signed the contract (usually the same place). Though the consumer receives service of process at her residence, she may have little or no idea how to file an answer or otherwise respond. Location of this forum may be a foregone conclusion due to contractual provisions or liberal state venue laws. Ignorance of valid defenses or fear of commercial ostracization may also inhibit the consumer from responding. More importantly, at least with respect to remediable offenses, the tremendous expense, inconvenience and difficulty of defending a legal action in a distant forum is likely to be prohibitive. Obtain-

¹¹FTC Holder-In-Due-Course Rule, 16 C.F.R. § 433 (1986).

¹²See Note, *The Ohio Small Claims Court: An Empirical Study*, 42 U. CIN. L. REV. 469 (1973); Note, *The Persecution and Intimidation of the Low-Income Litigant as Performed by the Small Claims Court in California*, 21 STAN. L. REV. 1657 (1969).

¹³Of course, it is possible that the consumer may simply refuse to pay. However, studies have shown that the case of the so-called "deadbeat" is extremely rare and that a large majority of defaults by consumers is the result of unexpected occurrences such as unemployment, emergency medical expenses, overextension and marital problems. CAPLOVITZ, *supra* note 4, at 47; S. Rep. No. 95-382, 95th Cong., 1st Sess. 3, reprinted in 1977 U.S. CODE CONG. & AD. NEWS 1695, 1697; *FTC Credit Practices Rule: Statement of Basis and Purpose and Regulatory Analysis*, 49 Fed. Reg. 7740, 7747-48 (1984) (rule codified at 16 C.F.R. § 444 (1986)); see also *American Financial Services Ass'n v. FTC*, 767 F.2d 957, 977-78 (D.C. Cir. 1985), cert. denied, 106 S.Ct. 1185 (1986).

ing the default judgment becomes nothing more than a mere formality for the business plaintiff where it is probable that the consumer-defendant will not file a formal answer.

Filing debt collection actions against consumers who may have been unable to afford the underlying purchase anyway may, at first glance, seem counterintuitive. But incentives remain for the pursuit of these debts. First, once a default judgment has been obtained, the creditor may invoke the traditional post-judgment remedies of attachment and wage garnishment. Where permissible under state law, liens may be placed on certain items of the consumer-debtor's property followed by the execution of lien sales to satisfy the judgment. The wage garnishment option will yield continual payments for very little effort on the part of the seller or debt collector. Regular collection of these relatively small amounts on a high-volume basis may be financially desirable. Furthermore, even if the debt ultimately becomes uncollectible after judgment, there are significant tax advantages to having the claim reduced to judgment. Bad debt losses are allowed as deductions from taxable income on federal income taxes for certain business entities.¹⁴ Although the latter point is not a concern to the ordinary consumer, it does provide another incentive for debt collectors to engage in this practice.

While the above examples may seem like outlandish consumer advocate hyperbole to the uninitiated person, the nature and existence of distant forum abuse is well-documented. Evidence that the problem is considered to be of national importance was manifested by the enactment of a federal statute prohibiting independent debt collection agencies from bringing legal actions in places other than where the consumer resides at the time action is initiated, or where the consumer signed the contract underlying the action.¹⁵ However, there was little discussion of distant forum abuse in the congressional hearings, reports or floor debates on the bills which eventually became the FDCPA, since the primary focus of the act was on more direct methods of harassment undertaken in the collection of debts.

Earlier hearings held by the Federal Trade Commission's (FTC) New York Regional Office did reveal some of the problems with the existence of distant forum abuse. The staff report produced as a result of these hearings concluded that the practice imposed great hardship on consumer-debtors.¹⁶

The plaintiff, having selected a forum convenient to himself, may have at the same time imposed a hardship upon the defendant as far as travel and expenses are concerned. The defendant may have to lose a day's salary which he can ill afford. In addition, the defendant who has retained a

¹⁴26 U.S.C. § 166 (1982).

¹⁵15 U.S.C. § 1692i (1982).

¹⁶FTC Staff Report on Debt Collection Hearings (April, 1973), quoted in *In re Spiegel, Inc.*, 86 F.T.C. 425, 441-43 (1973).

private attorney, may have to pay additional expenses to have the attorney travel to defend. Or, if the debtor desires to be represented by a legal services agency, he may find that the local legal services office may have to refer him to the legal services office in the county of suit because the local office is not physically equipped to handle the defense properly. This, in turn, imposes other hardships, it becomes more difficult and more expensive to prepare a defense. It may be possible for the defendant to make a motion for a change of venue . . . but where the defendant is without counsel, he would probably be unaware of this, and, in any event, technicalities of motion practice may make it too difficult for the consumer-debtor to accomplish on his own. Thus, while the plaintiff may bring the action in a forum inconvenient for the consumer with respect to venue, unless the defendant moves for a change of venue, the action may still proceed there.

Furthermore, the NCCF recommended imposed limits on the forum for suits against consumers for non-payment. In its report, the NCCF recognized that, at the time, many states permitted distant forum suits creating high potential for abuse.¹⁷ It also noted that “[t]he practice *usually* results in the entry of a default judgment and, in effect deprives the debtor-defendant of a reasonable opportunity to defend against the underlying claim.”¹⁸ Moreover, the extent to which this collection tactic may be used can be quite high. One of the hearings held by the NCCF in order to gather information for its report revealed at least one report of an attorney who had obtained ten thousand default judgments in one year by using the distant forum approach.¹⁹

While no new national studies have been done in recent years, evidence of continued distant forum abuse exists, though the extent of the problem is difficult to measure. In fact, one of the inherent problems in studying distant forum cases is the inability to collect complaints from consumers who have been victimized by debt collectors. Many factors contribute to this situation. First, and foremost, is that the consumer-debtor is unlikely to know that there is anything about which to complain. Not only will consumers be ignorant of the possible defenses to the action and the fact that the choice of forum may be in violation of some laws, but also they have the related fear stemming from the fact that it is the consumer-debtor who has defaulted for whatever reason. This element of complaining without “clean hands” may discourage consumers with valid complaints from exercising their legal rights. Furthermore, it may blind public officials to the existence of this abusive debt collection practice.

The issue of unreported complaints arose at the House hearings leading to

¹⁷NCCF Report, *supra* note 3, at 41.

¹⁸*Id.* (emphasis added).

¹⁹*Summary of Hearings on Debt Collection Practices, National Commission on Consumer Finance*, 88 BANKING L.J. 291, 293-94 (1971) (testimony of Richard A. Givens).

the passage of the FDCPA. There, an industry representative of the debt collection agencies attempted to disavow any notion that abusive debt collection practices in general are hard to discover and often go unreported.²⁰ He also testified that attempts to publicize debt collection abuse in order to generate more complaints had failed to significantly increase the complaint rate.²¹ However, in the same hearings, the Director of the Minnesota Office of Consumer Services testified that people are often reluctant to complain because their debts are often really owed and they are simply unaware of their rights.²² This latter point is even more prevalent in the area of distant forum abuse since people are more likely to complain of direct harassment or threats than about the more technical issue of propriety or fairness of "venue."

While not as blatantly offensive as some of the direct harassment methods employed by unethical debt collectors, the practice of distant forum abuse is more insidious. It engages an ostensibly legitimate legal process to deprive consumers of basic opportunities which should be afforded all litigants, thus defying basic notions of due process in a very realistic sense. When a consumer, whether or not she has a valid defense, finds that the cost of hiring legal counsel, the expenses incurred in traveling to a distant court, the lost income from work days spent in court or out on other matters related to litigation and the tremendous inconvenience involved in appearing and defending, greatly outweigh the amount in controversy, the choice becomes a foregone conclusion. At best it is fundamentally unfair; at worst it is oppressive. Furthermore, a clear potential exists for harsh injuries to be incurred by consumers who are victimized by distant forum abuse. Not only can money or property be drawn off with the post-judgment remedies available to creditors, but also consumer credit records can be forever ruined. Expenses relating to the defense, if the consumer by any chance chooses to challenge the collection suit, can be quite high. Moreover, inequality in bargaining position may produce the ideal scenario for the creditor or other debt collector who is interested in obtaining assembly-line default judgments as a regular business practice. Finally, there is a presumptive element of extreme unfairness to the low-income litigant in this practice of distant forum abuse. The disproportionate impact upon the poor points up even more potently the necessity for an effective remedy. It was concern for such consumers that led, in the past decade, to some legal developments designed to deal with the problems of collection suits filed in distant forums.

²⁰*The Debt Collection Practices Act: Hearings on H.R. 29 Before the House Subcomm. on Consumer Affairs of the House Committee on Banking, Finance and Urban Affairs*, 95th Cong., 1st Sess. 171 (1977) (statement of John W. Johnson, Executive Vice President, American Collectors Association, Inc.).

²¹*Id.* One example cited by the witness was the fact that nationally-syndicated columnist Jack Anderson's article which lambasted professional collection services for their abusive tactics generated only two-thousand complaints. It was not, however, explained how widely read Mr. Anderson's column is among the class of debtors who are most often subject to debt collection abuse.

²²*Id.* at 367-68 (statement of Sherry Chenoweth, Director, Minnesota Office of Consumer Services).

EXISTING FEDERAL AND STATE REMEDIES

Distant forum abuse has not gone unnoticed in the seventeen years that have passed since the NCCF was commissioned. In fact, federal and state laws have been enacted to address the problem by various approaches. Nevertheless, an overview of the new development of legal solutions to this unfair collection practice will quickly illustrate the inadequacy of their scope. A more effective and far-reaching approach would be to use as a statutory basis various state consumer protection laws to condemn the practice of distant forum abuse as an unfair or deceptive act or practice.

Federal Trade Commission

The Federal Trade Commission (FTC) was one of the first governmental entities to take any positive action to eliminate the practice of distant forum abuse. In fact, it was the FTC's "fair venue standards" which Congress adopted when it enacted the distant forum provision in the Fair Debt Collection Practices Act (FDCPA).²³ During the past decade, the FTC has brought several complaints against parties engaged in collecting debts by filing lawsuits in forums far from the consumer-defendant's residence or from where she signed the initial contract. These complaints have resulted in consent orders or other Commission orders which have instructed the defendants to cease and desist from this "unfair" debt collection practice.²⁴

The FTC complaints were filed under section 5 of the Federal Trade Commission Act²⁵ (FTCA), and asserted that distant forum abuse is an unfair practice. The respondents were either collection agencies, loan companies or general retail merchandisers who extended credit to facilitate their sales. The respondent companies were ordered to cease and desist from filing distant forum suits. The orders also restricted the respondents' successors, assigns and agents, including independent debt collection agencies.²⁶ Furthermore, these orders all required the respondent companies to terminate any existing suits that were filed in a county other than where the consumer resided at the time of the suit's commencement or where she signed the contract, or in the alternative, to effect a change to the appropriate forum.²⁷ Respondents also were ordered to vacate any default judgments obtained after the date of the Com-

²³ 15 U.S.C. § 1692i (1982); S. REP. NO. 95-382, 95th Cong., 1st Sess. 5, *reprinted in* 1977 U.S. CODE CONG. & AD. NEWS 1695, 1699.

²⁴ *In re* Marathon Oil Co., 92 F.T.C. 422 (1978) (consent order); *In re* S.S. Kresge Co., 90 F.T.C. 222 (1977) (consent order); *In re* New Rapids Carpet Center, Inc., 90 F.T.C. 64 (1977); *In re* Spiegel, Inc., 86 F.T.C. 425 (1975), *enforced as modified*, *Spiegel, Inc. v. FTC*, 540 F.2d 287 (7th Cir.), *modified* 88 F.T.C. 1001 (1976); *In re* Commercial Service Co., 86 F.T.C. 467 (1975) (consent order); *In re* Montgomery Ward & Co., 84 F.T.C. 1337 (1974) (consent order); *In re* West Coast Credit Corp., 84 F.T.C. 1328 (1974) (consent order) [hereinafter cited collectively as FTC Distant Forum Orders].

²⁵ 15 U.S.C. § 45 (1982 and Supp. II 1984).

²⁶ FTC Distant Forum Orders, *supra* note 24.

mission's order which were not obtained in compliance with that order.²⁸

Only one of the FTC's distant forum orders was appealed,²⁹ and that appeal eventually provided the Commission with strong judicial approval for its actions against distant forum abusers.³⁰ In *Spiegel Inc. v. FTC*, the FTC had filed a complaint against a large catalogue retail merchandiser located in Chicago. The company had a nationwide business and regularly received mail-order purchase requests from consumers in many different states for which consumer credit was regularly extended.³¹ Apparently, consumers executed either purchase orders or contracts in their home states.³² However, the Commission complained that Spiegel had made it a practice to consistently file lawsuits in Cook County, Illinois against consumers who were allegedly in default without regard to the consumers' place of residence.³³ The FTC's complaint argued that this practice was unfair under the FTCA because it effectively deprived out-of-state consumers of a reasonable opportunity to appear, answer and defend.³⁴

The Commission's decision in *Spiegel* affirmed an administrative law judge's findings and order which declared the company's practice unfair and halted the further filing of distant forum suits.³⁵ It found that Spiegel's use of the Illinois long-arm statute, which provided for *in personam* jurisdiction over out-of-state parties, fell short of the constitutionally required "minimum contacts" necessary to establish personal jurisdiction over the out-of-state consumers.³⁶ Furthermore, the FTC found that Spiegel's practice was oppressive and injurious to consumers.³⁷ The Commission's decision described Spiegel's distant forum practice as "patently offensive to clearly articulated public policy, intended to guarantee all citizens a meaningful opportunity to defend themselves in court."³⁸

After modifying the Commission's decision, the United States Court of Appeals for the Seventh Circuit enforced the Commission's order.³⁹ The court declared that almost all of the out-of-state consumers sued by Spiegel had no pertinent contact with Illinois, but declined to decide the issue of whether per-

²⁸ *Id.*

²⁹ *In re Spiegel, Inc.*, 86 F.T.C. 425 (1975).

³⁰ *Spiegel, Inc. v. FTC*, 540 F.2d 287 (7th Cir. 1976).

³¹ *In re Spiegel, Inc.*, 86 F.T.C. 425, 437 (1975).

³² *Id.*

³³ *Id.* at 426.

³⁴ *Id.*

³⁵ *Id.* at 437-38.

³⁶ *Id.* at 441. See also *International Shoe Co. v. Washington*, 326 U.S. 310 (1945).

³⁷ *In re Spiegel, Inc.*, 86 F.T.C. 425, 441 (1975).

³⁸ *Id.*

sonal jurisdiction was proper under the Illinois long-arm statute.⁴⁰ Instead, the court held that the FTC had the power to enjoin the company from bringing distant forum suits against out-of-state consumers regardless of whether jurisdictional concerns had been satisfied.⁴¹ The Commission's implicit finding that Spiegel's practice was a *per se* violation of the constitutional right to due process was rejected by the court, which observed that administrative agencies are not generally authorized to determine the constitutionality of administrative or legislative actions.⁴² However, the Commission's order was enforced since the court agreed that distant forum suits against out-of-state consumers were in violation of the FTCA prohibition against "unfair practices."⁴³

The Seventh Circuit limited the FTC's order, which proposed to prohibit Spiegel from filing any collection suit other than where the defendant resides or where she signed the contract.⁴⁴ Noting that the Commission had neglected to allege or prove that Spiegel was abusing Illinois venue laws, the court held that "the Commission's order should not be enforced insofar as it relates to Illinois consumers who are sued in a county courthouse which is a reasonable distance from their place of residence."⁴⁵ The FTC modified its order in accordance with the Seventh Circuit's opinion later that year.⁴⁶

Although the *Spiegel* decision strongly condemned distant forum abuse, there are substantial limitations both on the decision and on the FTC's authority which leave room for further remedial power at the state level. The first important limitation is with respect to the scope of distant forum abuse as an "unfair" practice under the FTCA. The appeals court's opinion in *Spiegel* did not go so far as to say intrastate distant forum suits are *per se* unfair. This was primarily a result of the Commission's failure to raise the issue of abuse of Illinois venue laws in its complaint or decision.⁴⁷ However, the court's opinion left open the FTC's option to further complain and prove any intrastate distant forum abuse it may have discovered.⁴⁸ Even here, the implication was that intrastate suits would have to be considered on a case-by-case basis. In a footnote, the court explained that "the FTC argues that if the order is not enforced in toto Spiegel could sue a Cook County resident in Cairo, Illinois, hundreds of miles away from his residence. In this extreme example, such conduct by

⁴⁰*Id.* at 291-92.

⁴¹*Id.* at 292.

⁴²*Id.* at 294.

⁴³*Id.*

⁴⁴*Id.* at 296.

⁴⁵*Id.* The logic in this restriction is somewhat evasive since it is equally conceivable that an out-of-state consumer from, for example, southern Wisconsin, would actually be closer to Cook County than an Illinois consumer from the state's southernmost part.

⁴⁶*In re Spiegel, Inc.*, 88 F.T.C. 1001 (1976).

⁴⁷*Spiegel, Inc. v. FTC*, 540 F.2d 287, 295-96 (7th Cir. 1976).

Spiegel would amount to a violation of Section 5⁴⁹ of the FTCA.⁴⁹ Had the issue been before it, it is questionable whether the court would have declared all distant forum suits to be unfair.

But even beyond the shortcomings of the *Spiegel* opinion, there is a separate limitation on the scope of the FTC's authority to reach all business operators who employ the distant forum practice. In each of the Commission's distant forum cases the complaints clearly set forth that the respondent businesses had operations which extended beyond state lines,⁵⁰ even if the collection suits were only within one state.⁵¹ This criterion is crucial to the FTC's jurisdictional authority since the FTCA mandates that the Commission's power is maintained only with respect to unfair acts or practices "in or affecting [interstate] commerce."⁵² So while it is clear from the *Spiegel* opinion that the FTC can monitor intrastate debt collection suits,⁵³ it is equally clear that the businesses must be operating in or affecting interstate commerce before the FTC may take action.⁵⁴ This may exclude from the Commission's jurisdiction any business which consciously operates within only one state. Included in this category would be many of the smaller, home solicitation sellers described earlier, as well as a large number of finance companies and debt collection agencies. Notably, this is precisely the area in which state agencies charged with enforcement of consumer protection laws can most effectively operate.

Also significant is the limitation on the FTC's resources. Even if all business entities instituting distant forum suits were within the FTC's jurisdictional reach, it would be impractical for the FTC to file complaints against any but the most egregious, high volume violators. As it is, the FTC's past complaints and orders in distant forum cases have been against larger companies engaging in a great deal of distant forum litigation,⁵⁵ including one of the largest retail merchandisers in the country.⁵⁶ This would, and most likely does, leave a significant portion of distant forum plaintiffs free to operate without the FTC's scrutiny.

Furthermore, the remedies available under the FTCA are inadequate to compensate for the lack of resources. The FTC does have the power to enjoin unfair or deceptive acts or practices,⁵⁷ as well as to recover civil penalties for

⁴⁹*Id.* at 296 n.12 (emphasis added).

⁵⁰FTC Distant Forum Orders, *supra* note 24.

⁵¹*See, e.g.*, In re Montgomery Ward & Co., 84 F.T.C. 1337, 1338 (1974).

⁵²15 U.S.C. § 45(a)(1) (1982).

⁵³*Spiegel, Inc. v. FTC*, 540 F.2d 287, 297 (7th Cir. 1976).

⁵⁴Compare the broad, congressionally-authorized FTC enforcement jurisdiction established under the Fair Debt Collection Practices Act, 15 U.S.C. § 1692(d) (1982).

⁵⁵FTC Distant Forum Orders, *supra* note 24.

⁵⁶*In re Montgomery Ward & Co.*, 84 F.T.C. 1337 (1974).

knowing violations of its rules, final orders and cease and desist orders.⁵⁸ And in certain situations, the Commission may bring civil actions for violations of its rules or cease and desist orders in which a federal district court may, at its discretion, grant consumer relief such as rescission, refund and damages.⁵⁹ But if the FTC cannot enforce the FTCA because of limited resources, then it will remain unenforced since there is no right to private action under the FTCA,⁶⁰ and the courts have been unwilling to read one into the Act.⁶¹ So the concept of the "private attorney generals" filling in the gaps where the government is unable to take action is unavailable to the victims of distant forum abuse under current federal law.

Finally, the FTC has failed to promulgate a rule specifically prohibiting distant forum suits, although it has issued other rules regarding debt collection and credit practices.⁶² Moreover, its rulemaking power is somewhat restricted since the Commission has no authority to promulgate rules under the Fair Debt Collection Practices Act (FDCPA),⁶³ or with respect to banks and savings and loan associations,⁶⁴ which are also potential collection suit plaintiffs.⁶⁵

For these reasons, the FTC and the FTCA do not provide sufficient or complete coverage of the distant forum practice. Broader coverage with respect to creditors and other collectors who operate only within one state as well as provisions for a private cause of action in which damages are recoverable are necessary elements of an effective program for the elimination of this unfair practice. Ultimately, it is at the state level that these loopholes have to be closed.

Fair Debt Collection Practices Act

The first congressional recognition that distant forum abuse represented an unfair collection practice came in the same year as the *Spiegel* decision, when four bills were introduced to regulate the practice of independent debt

⁵⁸ 15 U.S.C. § 45(1)-(m) (1982).

⁵⁹ 15 U.S.C. § 57b(b) (1982).

⁶⁰ 15 U.S.C. §§ 41-77 (1982 & Supp. II 1984). An attempt to amend the Act to include a private right of action was defeated in 1977. Originally contained in H.R. 3816, the provision would have allowed private class action suits to enforce the FTCA. 123 Cong. Rec. 34594 (1977).

⁶¹ *Holloway v. Bristol-Myers Corp.*, 485 F.2d 986, 988-89 (D.C. Cir. 1973).

⁶² 16 C.F.R. § 237 (1986); 16 C.F.R. § 444 (1986).

⁶³ 15 U.S.C. § 1692(1)(d) (1982).

⁶⁴ 15 U.S.C. § 57a(f) (1982).

⁶⁵ Banks and savings and loan associations are specifically exempted from the FTCA. 15 U.S.C. § 45(a)(2) (1982). However, the Act orders the Board of Governors of the Federal Reserve System and the Federal Home Loan Bank Board to promulgate regulations applicable to these financial institutions which are substantially similar to FTC trade regulation rules. 15 U.S.C. § 57a(f) (1982). Although these federal agencies have yet to comply with the statutory order, inclusion of a distant forum prohibition in the ultimately issued rules would be of great help to consumer-defendants with respect to litigation involving financial institutions. However, it is not clear to what extent these institutions contribute to the distant forum problem.

collection agencies.⁶⁶ In the following year, 1977, Congress enacted the Fair Debt Collection Practices Act (FDCPA) in order “to eliminate abusive debt collection practices by debt collectors . . . and to promote consistent State action to protect consumers against debt collection abuses.”⁶⁷ The FDCPA addresses major concerns with the debt collection industry, including restrictions on communication with the consumer and with third parties in relation to the alleged debt,⁶⁸ proscription of harassment⁶⁹ and false or misleading representations,⁷⁰ and prohibition of unfair or unconscionable practices pursued in the collection of debts.⁷¹ In addition, section 811 of the FDCPA requires that:

- (a) Any debt collector who brings any legal action on a debt against any consumer shall —
 - (1) in the case of an action to enforce an interest in real property securing the consumer’s obligation, bring such action only in a judicial district or similar legal entity in which such real property is located; or
 - (2) in the case of an action not described in paragraph (1), bring such action only in the judicial district or similar legal entity —
 - (A) in which such consumer signed the contract sued upon; or
 - (B) in which such consumer resides at the commencement of the action,
- (b) Nothing in this subchapter shall be construed to authorize bringing of legal actions by debt collectors.⁷²

Thus the FDCPA embodies what is generally considered to be a fair standard for debt collection suits on consumer debts, and closely tracks the FTC orders in its distant forum cases.⁷³

Unfortunately, the persons covered by the FDCPA represent only a small part of all debt collection plaintiffs in consumer credit suits. The Act applies only to a narrowly defined class known as “debt collectors.”⁷⁴ Basically, this term, as defined by the FDCPA, encompasses any person whose “principal purpose” is the collection of any debts, or who “regularly collects or attempts to collect, directly or indirectly, debts owed or due, or asserted to be owed or due another.”⁷⁵ It also includes creditors collecting their own debts by another

⁶⁶H.R. 11969, H.R. 13720, S. 3652, and S. 3838 were all introduced in the Second Session of the 94th Congress. H.R. 13720 passed the full House, but the 94th Congress came to a close before the Senate could take action.

⁶⁷15 U.S.C. § 1692(e) (1982).

⁶⁸15 U.S.C. § 1692c (1982).

⁶⁹15 U.S.C. § 1692d (1982).

⁷⁰15 U.S.C. § 1692e (1982).

⁷¹15 U.S.C. § 1692f (1982).

⁷²15 U.S.C. § 1692i (1982).

⁷³FTC Distant Forum Orders, *supra* note 24.

⁷⁴15 U.S.C. § 1692a(6) (1982).

name such that would suggest that a third party is collecting the debt.⁷⁶ Among those exempted from the term "debt collector" are in-house debt collectors, attorneys-at-law and persons acting as a debt collector for another person where both are related by common ownership or affiliated by corporate control.⁷⁷

The reason Congress limited the statutory definition of "debt collector" was that there seemed to be a strong need to regulate the practices of independent collection agencies, rather than merchandisers and other direct extenders of credit. The rationale underlying this was explained on the Senate floor by Senator Biden, who introduced one version of the FDCPA in both 1976 and 1977. He stated that "[t]he independent collectors, by common practice, are recognized as a separate industry. They have no particular concern for maintaining good customer relations with the debtors they pursue. And, above all, the independent debt collectors generate a disproportionate number of the complaints about collection practices."⁷⁸

While members of Congress felt the need to enact a statute which covered at least the independent collection agencies, others recognized the limited scope which this entailed. One of the sponsors of the House version which was eventually passed remarked that "[t]he provisions of this bill do not apply to a bank, a financial institution, department stores, a record club or any business that attempts to collect its own debt. Provisions of the bill only apply to about 1 percent of the debts collected in the country, and maybe that will have to be expanded a little later on."⁷⁹ Perhaps if the definition had not been so restrictive, other state remedies might be unnecessary. But as the FDCPA currently stands, its ameliorative effects are quite limited.

At least with respect to the businesses that the FDCPA does cover, the Act provides strong and effective remedies. For example, although administrative enforcement of the Act is the responsibility of the FTC,⁸⁰ consumers who have been injured by debt collectors in violation of any FDCPA provision may recover their actual damages, up to one thousand dollars in additional damages and attorneys' fees.⁸¹ The Act also authorizes private class action suits to enforce its provisions.⁸² Furthermore, the FDCPA applies to any debt collector who "uses any instrumentality of interstate commerce or the mails" in the process of collecting debts.⁸³ Unlike the FTCA, the FDCPA covers "debt collec-

⁷⁶ *Id.*

⁷⁷ *Id.*

⁷⁸ 123 CONG. REC. 31,493 (1977) (remarks of Sen. Biden). Two proposed bills, S. 656 and S. 918, would have also held jointly liable those creditors who had knowledge of the debt collector's violation of the debt collection practices act. Neither version prevailed. 123 Cong. Rec. 6337 (1977).

⁷⁹ 122 CONG. REC. 22,502 (1977) (remarks of Rep. Wylie). This statement was made in regard to the original House bill passed by the 94th Congress, but is equally relevant to the FDCPA as it exists.

⁸⁰ 15 U.S.C. § 1692i (1982 & Supp. II 1984).

⁸¹ 15 U.S.C. § 1692k(a) (1982).

⁸² 15 U.S.C. § 1692k(a)(2) (1982).

⁸³ 15 U.S.C. § 1692a(6) (1982).

tors" who operate solely within one state, since it is inevitable that debt collectors cannot avoid using the telephone or mail in their businesses. The congressional findings and declaration of purpose state that "[e]ven where abusive debt collection practices are purely intrastate in character, they nevertheless directly affect interstate commerce."⁸⁴ These jurisdictional declarations make it relatively easy to bring any "debt collector" who violates the FDCPA into court and seek damages under the Act's provisions.

Though the FTC's powers were slightly expanded by this statute in an indirect manner, the Commission was specifically prohibited from promulgating rules pursuant to FDCPA provisions.⁸⁵ This was probably included to appease factions of Congress which were concerned that the Act would greatly increase the bureaucracy already in place, and perhaps lead to much more detailed and expansive restrictions on debt collection.⁸⁶ Some members of Congress were concerned that the Act would preempt state policy-makers from acting independently to regulate debt collection practices. Because of these concerns, section 817 of the Act was included to provide that the FTC may grant exemptions from the FDCPA for any class of debt collection practices within any state if it determines that state law effectively regulates such activity.⁸⁷ This was intended to facilitate the expansion of state interest in the regulation of debt collection practices.⁸⁸ Yet with only a few exceptions, little has been done at the state level to deal with the problem of distant forum abuse since the enactment of the FDCPA.

State Remedies

Ironically, it was the inadequacy of state laws regulating debt collectors which was one of Congress' primary reasons for enacting the FDCPA.⁸⁹ But as a result of the limited scope of the FDCPA with respect to types of debt collection entities, and the "interstate commerce" jurisdictional prerequisites of the FTCA, remedies are still necessary at the state level to completely eliminate distant forum abuse. In Texas, California and Massachusetts, either the legislature or the court of last resort has spoken out against distant forum suits. An overview of the prohibitions in these three jurisdictions may provide some hints regarding effective approaches toward eradicating this unfair practice in other states.

It is natural that intrastate distant forum abuse was recognized as a prob-

⁸⁴15 U.S.C. § 1692(d) (1982).

⁸⁵15 U.S.C. § 16921(d) (1982).

⁸⁶123 Cong. Rec. 10,244 (1977) (remarks of Rep. Wylie).

⁸⁷15 U.S.C. § 1692o (1982).

⁸⁸123 CONG. REC. 10,242 (1977) (remarks of Rep. Annunzio).

⁸⁹S. REP. NO. 95-382, 95th Cong., 1st Sess. 2-3, *reprinted in* 1977 U.S. CODE CONG. & AD. NEWS 1695,

lem of significance in Texas, which is, by geographical area, the second largest state in the Union.⁹⁰ Apparently in response to a persuasive law review article,⁹¹ the Texas legislature addressed the problem of distant forum abuse by enacting an amendment to the state venue statute.⁹² This amendment became section 5(b) of Article 1995 of the Texas Civil Statutes (currently § 15.035(b) of the Texas Civil Practice & Remedies Code), and provided that in creditors' suits upon contractual obligations of a consumer to pay money arising out of a "consumer transaction" for goods, services, loans, or extensions of credit intended primarily for personal, family, household or agricultural use, the venue may be either in the county where the consumer resides at the time the suit is commenced or where the consumer signed the contract.⁹³ It also prohibited the inclusion of waiver provisions in these contracts which would destroy the consumer's rights under this subsection.⁹⁴

This provision was necessary because the first part of this statutory section, which was formerly the only part, allowed suits on written contracts whenever the contract expressly stated the particular county in which the contract was to be "performed" to be brought in that county.⁹⁵ Thus, any business which desired to use a distant forum for its collection suits could invoke this statutory venue provision merely by using standard form contracts designating the county of its choice as the place of performance, even if that place had no significant connection to the transaction underlying the suit.⁹⁶ While this provision is still contained in the venue statute, it is now subject to the limitations imposed by section 15.035(b).

In 1977, however, a Texas state appellate court partially undercut the impact of section 15.035(b) in dictum from its opinion in *Vargas v. Allied Finance Co.*⁹⁷ *Vargas* involved an appeal from summary judgment entered against a Texas consumer who had filed a class action suit pursuant to the

⁹⁰U.S. Bureau of the Census, STATISTICAL ABSTRACT OF THE UNITED STATES: 1985, 191 (105th ed. 1984).

⁹¹Sampson, *Distant Forum Abuse in Consumer Transactions: A Proposed Solution*, 51 TEX. L. REV. 269 (1973).

⁹²TEX. CIVIL PRACTICE & REMEDIES CODE ANN. §§ 15.001-15.040 (Vernon Supp. 1986) (formerly TEX. REV. CIV. STAT. ANN. art. 1995).

⁹³TEX. CIVIL PRACTICE & REMEDIES CODE ANN. § 15.035(b) (Vernon Supp. 1986). This subsection states: "In an action founded on a contractual obligation of the defendant to pay money arising out of or based on a consumer transaction for goods, services, loans, or extensions of credit intended primarily for personal, family, household, or agricultural use, suit by a creditor on or by reason of the obligation may be brought against the defendant either in the county in which the defendant in fact signed the contract or in the county in which the defendant resides when the action is commenced. No term or statement contained in an obligation described in this section shall constitute a waiver of these provisions." Though the court in *Vargas v. Allied Finance Co.*, *infra* note 97, was interpreting the almost identically-worded Section 5(b), for purposes of consistency, the discussion of this case in the text is in terms of the current numbering.

⁹⁴*Id.*

⁹⁵TEX. CIVIL PRACTICE & REMEDIES CODE ANN. § 15.035(a) (Vernon Supp. 1986) (formerly § 5(a) of art. 1995).

⁹⁶Sampson, *supra* note 91, at 272-73.

Texas consumer protection statute⁹⁸ to enjoin Allied Finance Company (AFC) from bringing distant forum collection suits. Class certification had been denied, and both the summary judgment and the appeal were treated as if the case were an individual action. The consumer purchased a television and stereo set from AFC's assignor and executed a promissory note and retail installment contract to finance the transaction. Both documents contained provisions that they were payable or performable in a specific county different from that of the consumer's residence and the place of sale. AFC sued the consumer upon allegedly delinquent payments in a Justice Court located in the contractually-designated county of performance. The consumer's plea of privilege to have the suit transferred to the county of his residence was denied.

Justice Courts in Texas are governed by a venue statute⁹⁹ different from that which controls venue in District and County courts. At the time of the *Vargas* case, though the Justice Court venue statute had a provision equivalent to section 15.035(a), permitting contractually-designated venue, it did not have a distant forum prohibition such as section 15.035(b).¹⁰⁰ The court ruled that the consumer had no ground for injunctive relief since then Article 2390, the Justice Court venue statute, permitted the suit to be maintained in the county of designated performance, and therefore the consumer protection statute could not be interpreted to have manifested legislative intent to repeal Article 2390 by implication.¹⁰¹

But the court went beyond its initial holding to declare that even after the enactment of section 15.035(b), the Texas consumer protection statute did not authorize injunctive relief to a consumer sued in distant District or County courts.¹⁰² Arguing that section 15.035(b) constituted only permissive venue which afforded a consumer the right to have a distant forum suit transferred, rather than an explicit prohibition of distant forum suits, the court stated that application of the consumer protection statute to enjoin distant forum suits "would amount to a material alteration of the [venue] statute and would constitute an unauthorized intrusion into the legislative process by the judiciary."¹⁰³

Probably in frustration over the judiciary's subversion of the true intent underlying section 15.035(b),¹⁰⁴ the Texas legislature finally enacted an amend-

⁹⁸TEX. BUS. & COM. CODE ANN. §§ 17.41-17.63 (Vernon Supp. 1986). The provisions authorizing class action suits were repealed by Acts 1977, 65th Leg. p. 605, ch.216. §§ 10-11, effective as of May 23, 1977.

⁹⁹TEX. CIVIL PRACTICE & REMEDIES CODE ANN. §§ 15.081-15.100 (Vernon Supp. 1986).

¹⁰⁰In 1977, the Texas legislature amended the Justice Court venue statute to include a distant forum prohibition in consumer contract suits. TEX. CIVIL PRACTICE & REMEDIES CODE ANN. § 15.092(c)-(d) (Vernon Supp. 1986).

¹⁰¹*Vargas*, 545 S.W.2d at 233-34.

¹⁰²*Id.* at 234.

¹⁰³*Id.*

¹⁰⁴Compare the Texas legislature's original attempt at stopping distant forum suits in the 1973 amendment to Article 1995 (consumer debt collection suits "may be brought against the defendant" at her residence or 17

ment to its consumer protection statute in 1977 which declared distant forum suits to be a false, misleading, or deceptive act or practice.¹⁰⁵ This provides distant forum suit victims in Texas with various remedial options such as injunctive relief, actual damages (plus double damages for that portion of actual damages not exceeding one thousand dollars), costs and attorneys' fees.¹⁰⁶ Furthermore, the state consumer protection division has broad authority to take action against any person in violation of the distant forum prohibition.¹⁰⁷ Even more appealing is the fact that the Texas' consumer protection statute is not limited in any way as to the type of debt collectors whose activities fall within its scope. Thus, the same problems which significantly restrict the federal FDCPA do not hinder the Texas consumer statute.

The only possible drawback to the Texas legislative scheme involves the fact that if a consumer-defendant is sued in a distant forum and files a motion to transfer venue (until recently, known in Texas as a "plea of privilege") to the county of her residence, the plaintiff can file a controverting affidavit and force the consumer to come to the county where the suit was filed for a venue hearing.¹⁰⁸ At least one commentator has proposed that this seriously limits the effectiveness of the prohibitions in the venue statutes.¹⁰⁹ However, with the mandatory venue dictated by the Justice Court venue statute, it would be difficult for a plaintiff to file any type of controverting affidavit sufficient to sustain a hearing. With respect to the district and county courts, the creditor-plaintiff might be able to get a hearing, but filing of the suit in a distant forum would still be actionable under the Texas consumer protection law. It is inexplicable that the legislature failed to make the district and county court consumer venue statute mandatory following the *Vargas* decision. Despite these problems, it is probably safe to say that Texas now has the best and most comprehensive protection against distant forum abuse of any state in the country,¹¹⁰ and can be a model for other states to follow.

where the contract was signed), TEX. CIVIL PRACTICE & REMEDIES CODE ANN. § 15.035(b) (Vernon Supp. 1986), with its post-*Vargas* amendment to the Justice Court venue statute (consumer debt collection suits "may be brought *only*" in the county or precinct where defendant resides or signed the contract), TEX. CIVIL PRACTICE & REMEDIES CODE ANN. § 15.092(c) (Vernon Supp. 1986) (*emphasis added*).

¹⁰⁵TEX. BUS. & COM. CODE ANN. § 17.46(b)(22) (Vernon Supp. 1986). "(b) . . . the term 'false, misleading, or deceptive acts or practices' includes . . . (22) filing suit founded upon a written contractual obligation of and signed by the defendant to pay money arising out of or based on a consumer transaction for goods, services, loans, or extensions of credit intended primarily for personal, family, household, or agricultural use in any county other than in the county in which the defendant resides at the time of the commencement of the action or in the county in which the defendant in fact signed the contract; provided, however, that a violation of this subsection shall not occur where it is shown by the person filing such suit he neither knew or had reason to know that the county in which such suit was filed was neither the county in which the defendant resides at the commencement of the suit nor the county in which the defendant in fact signed the contract; . . ."

¹⁰⁶TEX. BUS. & COM. CODE ANN. § 17.50 (Vernon Supp. 1986).

¹⁰⁷TEX. BUS. & COM. CODE ANN. § 17.47 (Vernon Supp. 1986).

¹⁰⁸See TEXAS R. CIV. P. 86-87; Guittard & Tyler, *Revision of the Texas Venue Statute: A Reform Long Overdue*, 32 BAYLOR L. REV. 563, 566-67 (1980).

¹⁰⁹Dorsaneo, *Creditors' Rights*, *Annual Survey of Texas Law*, 32 SW L.J. 245, 263 n.159 (1978).

¹¹⁰Texas also has statutes regulating debt collection agencies (TEX. REV. CIV. STAT. ANN. art. 5069-11.01-5069-11.04 (Vernon Supp. 1986)) and the use of retail installment sales (TEX. REV. CIV. STAT. ANN. art. 18

California also has an arsenal of statutory provisions which can be used to prevent businesses from engaging in distant forum abuse. Furthermore, in 1972, the California Supreme Court reached a decision which provides basic support for the idea that distant forum suits used in a regular course of business should be prohibited.¹¹¹ In 1965, the California legislature amended its statute regulating retail installment sales (the Unruh Act) to include a provision which prohibited distant forum suits on retail installment *contracts*.¹¹² The statute was later amended to include lawsuits on retail installment *accounts*.¹¹³ These provisions, along with the available statutory remedies under the Unruh Act, establish a quite effective policy against distant forum suits, since such suits inevitably arise from a transaction involving some sort of installment payment arrangements as defined by the Act.

The California Code of Civil Procedure also contains provisions which protect consumers from distant forum suits. Section 395 of the Code, establishing the proper place of trial for judicial actions, was amended in 1971 and 1972 to prohibit distant forum suits against consumers not already covered by the Unruh Act.¹¹⁴ Now buttressing this section is a provision which requires plaintiffs in such cases to include in their complaints, or in affidavits accompanying these complaints, facts which verify that the court where the complaint has been filed is the proper court.¹¹⁵ Moreover, the trial court has the authority to raise sua sponte the impropriety of the forum selected by the plaintiff and transfer the action to the proper court, unless the defendant-consumer otherwise consents to the forum chosen by the plaintiff.¹¹⁶ These provisions protect California consumers from the problem in Texas where consumers may be forced to appear in distant venue hearings.

While California law maintains these strict limitations on distant forum practices, its consumer protection statutes do not contain a condemnation of distant forum abuse as "unfair."¹¹⁷ In fact, the Consumers Legal Remedies Act

5069-6.01-5069-6.09 (Vernon 1971 & Vernon Supp. 1986)), but neither provides any restriction on distant forum suits.

¹¹¹Barquis v. Merchants Collection Ass'n, 7 Cal. 3d 94, 496 P.2d 817, 101 Cal. Rptr. 745 (1972).

¹¹²CAL. CIV. CODE § 1812.10 (West 1985). For original version of bill as enacted in 1965, see Stats. 1965, c. 792, p. 2382, § 1.

¹¹³CAL. CIV. CODE § 1802.7 (West 1985).

¹¹⁴CAL. CIV. PRO CODE § 395(b) (West Supp. 1986). This section provides: "(b) Subject to the power of the court to transfer actions or proceedings as provided in this title, in an action founded upon an obligation of the defendant for goods, services, loans or extensions of credit intended primarily for personal, family or household use, other than an obligation described in Section 1812.10 or Section 2984.4 of the Civil Code, the county in which the defendant in fact signed the contract, the county in which the defendant resided at the time the contract was entered into, or the county in which the defendant resides at the commencement of the action is the proper county for the trial thereof."

¹¹⁵This provision formerly applied only to retail installment transactions subject to the provisions of § 1812.10 of the Civil Code. However, in 1982 it was extended to include all consumer obligations as defined in § 395 of the Civil Procedure Code. CAL. CIV. PRO. CODE § 396a (West Supp. 1986).

¹¹⁶*Id.*

does not even contain a general prohibition of unfair or deceptive acts or practices.¹¹⁸ The Unfair Practices Act has such a general prohibition, but its remedial provisions are limited to injunctive relief, and in certain situations, civil penalties.¹¹⁹ These statutory omissions are, of course, mitigated by the stern prohibitions of distant forum suits discussed above.

Against this statutory backdrop, a look at the major state court decision in California, *Barquis v. Merchants Collection Association*,¹²⁰ may be helpful in pulling together the extent of California's distant forum law. This case was a class suit by consumers who sought to enjoin the distant forum practices of a large collection agency, and to have set aside as void all judgments obtained by the agency through distant forum suits in the two years preceding the suit. The defendant collection agency's demurrer was sustained by the trial court and affirmed by a state court of appeals,¹²¹ after which the consumers appealed to the state supreme court. The original consumer action was based on statutory provisions of Civil Code Section 3369 (current version contained in sections 17200-17205 of the California Business & Professions Code¹²²), Civil Code Section 1812.10 and Code of Civil Procedure Sections 395 and 396a.

Because of California's special procedural rules, the court only needed to base its decision reversing the demurrer on the fact that the agency's activities, as pled by the consumers, constituted an "unlawful" business practice.¹²³ The plaintiff consumers had alleged that the agency was intentionally bringing suits in improper forums under state law, and that the form complaints used to file the suits failed to state sufficiently the facts necessary for the trial court to ascertain the propriety of venue. Rather than declare the distant forum suits to be an unfair practice, the court avoided the issue by deciding that the pattern and practice of the agency (*i.e.*, the alleged activities in conjunction with each other) were enjoined as an "unlawful business practice" in that they failed to comply with state venue statutes.¹²⁴

Unfortunately for the *Barquis* plaintiffs, at the time their suit was commenced, section 1812.10 of the Unruh Act only applied to retail installment

¹¹⁸CAL. CIV. CODE § 1770 (West 1985). This section provides a laundry-list of all practices specifically declared to be unfair or deceptive by the legislature.

¹¹⁹CAL. BUS. & PROF. CODE §§ 17204, 17207 (West Supp. 1986).

¹²⁰*Barquis v. Merchants Collection Ass'n*, 7 Cal. 3d 94, 496 P.2d 817, 101 Cal. Rptr. 745 (1972).

¹²¹*Barquis v. Merchants Collection Ass'n*, 16 Cal. App. 3d 793, 94 Cal. Rptr. 500 (1971), *vacated*, 7 Cal. 3d 94, 496 P.2d 817, 101 Cal. Rptr. 745 (1972).

¹²²CAL. BUS. & PROF. CODE §§ 17200-17205 (West Supp. 1986).

¹²³*Barquis*, 7 Cal. 3d at 98, 496 P.2d at 820, 101 Cal. Rptr. at 748.

¹²⁴*Id.* at 112, 496 P.2d at 830, 101 Cal. Rptr. at 758. "In the instant case, . . . we need not undertake the task of determining the 'fairness' of defendant's alleged conduct in light of contemporary standards, because insofar as defendant's alleged practice involves the repeated violation of specific venue statutes, the practice is enjoined under section 3369 as an 'unlawful . . . business practice,' totally apart from its inherent fairness."

contracts, so the court concluded that this part of the statute was inapplicable to the "open book accounts" on which the agency was collecting.¹²⁵ Thus, the consumers were denied a private cause of action for damages incurred as a result of the defendant agency's practices. A further limitation on the case's precedential value was the court's holding that the venue requirements of section 396a of the Civil Procedure Code were not "jurisdictional" so that the agency's violation of these provisions did not render the obtained judgments void such that they could be set aside.¹²⁶

There are a few limitations on the extent to which the court's opinion in *Barquis* may be helpful in future California distant forum cases. First, since the context in which the appeal was heard was the review of a demurrer, the court had to assume the truth of all facts alleged in the complaint.¹²⁷ Thus, all assertions of intentional behavior for the purpose of obtaining default judgments were considered. Evidence of this intent may not be present in many cases, yet a trial court following the *Barquis* decision might read it narrowly and require an element of intent to be shown before injunctive relief could be granted. Also, since the court determined the twofold practice of (1) intentionally filing suits in distant forums and (2) filing form complaints with insufficient factual allegations in violation of procedural rules, to be an "unlawful" practice, trial courts might require both elements to be present before issuing an injunction. However, where a company does file distant forum suits it is unlikely that it will also file a complaint stating the facts of the case such that a trial court could determine the case was improperly before it, so the two practices may indeed occur together more often than not. Nevertheless, a more sweeping decision regarding distant forum suits would have provided a more solid basis for using California's Unfair Practices Act to enjoin distant forum suits as an *unfair* practice.

Fortunately, the statutory provisions of California law now govern a wide range of consumer transactions. Since section 1812.10 was amended to include suits on retail installment accounts, most consumer contracts fall within its proscriptions. Furthermore, the venue rules in sections 395, 296a and 396b provide additional opportunities for the detection of distant forum suits. Although the statutory scheme for distant forum abuse is not as clear in California as it is in Texas, the former still has a strong approach to the problem.

In a case more recent than *Barquis*, the Massachusetts Supreme Court cleared the way for consumers to employ the Massachusetts Consumer Protec-

¹²⁵ *Id.* at 123-24, 496 P.2d at 838-39, 101 Cal. Rptr. at 766-67.

¹²⁶ *Id.* at 119-22, 496 P.2d at 835-38, 101 Cal. Rptr. at 763-66. For a general critique of this aspect of the court's opinion, see *The Supreme Court of California 1971-1972. Foreword The State Constitution: A More Than "Adequate" Nonfederal Ground* (Part IIB, "Purposely Filing Actions in Improper Venue"), 61 CALIF. L. REV. 334 (1973).

¹²⁷ *Barquis*, 17 Cal. 3d at 99, 496 P.2d at 820-21, 101 Cal. Rptr. at 748-49.

tion Act (MCPA)¹²⁸ to sue debt collecting parties who engage in distant forum abuse.¹²⁹ In *Schubach v. Household Finance Corp.*, the court ruled that an act or practice which is permitted by state law can nevertheless be an unfair or deceptive act under the MCPA.¹³⁰ Like *Barquis*, this case was brought by consumers against whom distant forum suits were filed by the defendant. The consumer-plaintiffs sought to have a distant collection suit against them dismissed and to recover damages for the additional expenses incurred in defending the collection suit, as well as attorneys' fees and costs. They also asked to have a class certified for which both retroactive (vacating default judgments) and prospective (permanent injunction) relief was requested, but certification was not ruled upon before the supreme court ruled. The trial court denied the defendant's motion to dismiss for failure to state a claim, after which defendants appealed.

While Massachusetts has no specific statutes restricting the distant forum practice as do California and Texas,¹³¹ it does have a broad consumer protection act which authorizes private actions for damages, injunctive relief and costs and attorneys' fees by consumers who have been injured by "unfair" practices.¹³² The MCPA also references FTC and federal court interpretations of section 5(a)(1) of the FTCA for aid in construing the meaning of "unfair or deceptive acts or practices."¹³³

In affirming the lower court's denial of defendant's motion to dismiss, the supreme court took into account the plaintiffs' allegation that the defendant "has a *policy and/or regular practice* of filing collection actions in inconvenient fora in Massachusetts with the *intent and effect of inconveniencing defendants, precipitating default judgments and/or securing more favorable judgments . . .*"¹³⁴ Because of liberal Massachusetts venue rules in effect at the time, the creditors were able to bring collection suits in Boston Municipal Court notwithstanding the lack of any connection between Boston and the consumers sued.¹³⁵ The defendant's only argument on appeal was that an act

¹²⁸MASS. ANN. LAWS ch. 93A (Michie/Law. Co-op 1985 & Michie/Law. Co-op Supp. 1986).

¹²⁹*Schubach v. Household Fin. Corp.*, 375 Mass. 133, 376 N.E.2d 140 (1978).

¹³⁰*Id.* at 137, 376 N.E.2d at 142.

¹³¹None of the Massachusetts consumer statutes or procedural rules specifically addresses the distant forum problem. Though the state has laws on retail installment sales (MASS. ANN. LAWS, ch. 255D, §§ 1-32 (Michie/Law. Co-op 1980 & Michie/Law. Co-op Supp. 1986)), and debt collection practices (MASS. ANN. LAWS, ch. 93, §§ 24-28 (Michie/Law. Co-op 1985 & Michie/Law. Co-op Supp. 1986)), neither prohibits distant forum abuse.

¹³²MASS. ANN. LAWS, ch. 93A, § 9 (Michie/Law. Co-op 1985).

¹³³*Id.* § 2(b) (Michie/Law. Co-op 1985).

¹³⁴*Schubach*, 375 Mass. at 134, 376 N.E.2d at 141 (citing plaintiffs' complaint) (emphasis added).

¹³⁵See MASS. ANN. LAWS, ch. 223, §§ 1-15 (Michie/Law. Co-op 1974 & Michie/Law. Co-op. Supp. 1986). Section 1 of this statute was amended in 1985 to place certain restrictions on venue where the "instrument of the crime" is a negotiable instrument. MASS. ANN. LAWS, ch. 223, § 1 (Michie/Law. Co-op. Supp. 1986). This amendment also limits assignees of negotiable instruments to those venues where the assignor-creditor could have brought the suit. *Id.* Actions in Massachusetts small claims courts must be brought in the judicial district where the defendant lives or has her usual place of business or employment. DISTRICT/MUNICIPAL COURTS SUPPLEMENTAL RULES OF CIVIL PROCEDURE 183 (Michie/Law. Co-op 1982).

which is permitted by state law cannot be "unfair" under the MCPA.¹³⁶ Once the court disposed of the defendant's argument, it did not need to speak further, and it declined to make a ruling of law which would declare distant forum suits "unfair" per se.¹³⁷

Despite the limited nature of this holding, it is clear that the court felt that this practice very well could be considered unfair upon a full examination and proof of the facts. This case was an important breakthrough for Massachusetts consumers, and it has the potential to deter any debt collector from taking advantage of the loosely constructed state venue laws. The Massachusetts courts have also been willing to read a wide scope of business entities to be within the MCPA's purview. For example, a few years after the *Schubach* case, the Massachusetts high court held that banks and other financial institutions are engaged "in trade or commerce" such that their activities are subject to the stringent controls imposed by the MCPA.¹³⁸ This sets the stage for the MCPA to be invoked against any party which attempts to collect allegedly overdue debts through lawsuits in distant forums.

Texas, California and Massachusetts provide examples for other states on different approaches to regulating distant forum practice. Texas provides direct protection through its venue laws and its consumer protection statute, as well as authorizing private damage actions for injured consumers. California has similarly restrictive statutes, and, through the Unruh Act, provides a statutory basis for recovery of damages. And in Massachusetts, the open-ended law prohibiting "unfair or deceptive acts or practices" has, through judicial interpretation, been endorsed as a possible vehicle for retaliation against collectors who file distant forum suits.

THE PROBLEM OF CONTRACTUAL WAIVERS

The legal fiction of equality of bargaining position in contractual relationships has become an anachronism in the modern era of strong consumer protection remedies. It is for this reason that a brief digression into the validity of certain contractual waivers will be undertaken here. For if finely-printed terms on form contracts can divest consumers of their otherwise valid rights, these provisions may, too, have to be addressed by policy-makers interested in ending the distant forum practice. The statutory remedies being discussed herein would be meaningless if they could be abrogated by astute business operators and freely waived by unsuspecting consumers.

The first, and most restrictive, of these contractual terms is the cognovit

¹³⁶*Schubach*, 375 Mass. at 135, 376 N.E.2d at 141.

¹³⁷"We do not express a view whether, on all the circumstances which may be disclosed at trial, HFC's commencing its collection action against the plaintiffs in Suffolk County, rather than in Hampden County, constituted an unfair act or practice under G.L. c. 93A, § 2(a)." *Id.* at 137-38, 376 N.E.2d at 142.

¹³⁸*Raymer v. Bay State Nat'l Bank*, 384 Mass. 310, 424 N.E.2d 515 (1981).

note, which authorizes creditor attorneys to confess judgment against the maker (consumer). The note is contained within the obligation upon which judgment is taken, and the creditor's attorney need only appear in a court of competent jurisdiction (venue being irrelevant) and enter judgment against the debtor without first notifying or serving the debtor.¹³⁹ The cognovit note has long been banned in many states, yet in others it remains a statutorily-authorized means of obtaining judgments.¹⁴⁰ Fortunately, even in these states there have been recent statutory amendments or court decisions limiting the extent to which cognovit notes may be used in contracts underlying consumer transactions.¹⁴¹ The new FTC Credit Practices Rule, which became effective on March 1, 1985, bans the cognovit or confession of judgment clause in connection with consumer transactions in or affecting interstate commerce.¹⁴² Furthermore, in the major United States Supreme Court decision regarding cognovits, the Court made implicit references to the potential unfairness and unconstitutional imposition on due process where such notes are used in "adhesion contracts."¹⁴³ It seems that, at least with respect to consumer transactions, the cognovit is nearing its common law death, and rightfully so.

Still other means exist by which creditors and debt collectors can take advantage of consumer ignorance and circumvent the legal restrictions on the appropriate forum for collection suits. First, the contracts used by retail sellers and other extenders of credit may, in some states, contain clauses which manifest the consumer's consent to be sued in a particular venue, which in many cases has no other connection to the transaction. These "venue waiver" clauses, if permitted, may to a certain extent allow creditors and collectors to maintain suits in courts far from the consumer's residence regardless of any statutory prohibitions. Professor Sampson aptly described the problem with these often unnoticed clauses.

In making the purchase or loan, the consumers may try to bargain to a limited extent about the price or the terms of payment. Rarely, however, do the parties discuss any other aspect of the transaction. The consumers routinely sign a printed contract or note, ignoring the fine print or failing to understand its legal implications. If they are bold enough to question the language in the contract or to attempt to bargain, they soon discover that the fine print terms are fixed and that the creditor will not negotiate. Except for the purchase price and repayment terms, a form contract is of-

¹³⁹D.H. Overmyer Co., Inc. v. Frick Co., 405 U.S. 174, 176 (1972); *FTC Credit Practices Rule: Statement of Basis and Purpose and Regulatory Analysis*, 49 Fed. Reg. 7740, 7748 (1984) (codified at 16 C.F.R. § 444 (1986)).

¹⁴⁰See, e.g., OHIO REV. CODE ANN. § 2323.12 (Page 1981).

¹⁴¹See, e.g., OHIO REV. CODE ANN. § 2323.13 (Page 1981) (prohibiting use of warrants of attorney to confess judgment in claims arising out of consumer transactions).

¹⁴²*FTC Credit Practices Rule*, 16 C.F.R. § 444 (1986).

ferred on a take-it-or-leave-it basis.¹⁴⁴

In the alternative, the contract may designate a particular county or judicial district as the formal "place of performance" of the contract as in *Vargas v. Allied Finance Co.*¹⁴⁵ Since most venue statutes would permit a contract suit to be brought where the contract was to be performed,¹⁴⁶ this type of clause has the same effect as if there had been a venue waiver.

Recognizing the potential unfairness of such clauses in consumer contracts some courts have been unwilling to enforce these provisions. Traditionally, one of the distinctions between jurisdiction and venue has been the issue of waiver. Jurisdiction, in the fundamental sense, is an absolute prerequisite to valid judgment, and any judgment entered by a court without proper jurisdiction is void ab initio.¹⁴⁷ Venue, on the other hand, is in most cases waivable, and a failure to object to improper venue, or to move for change of venue, may be considered a general waiver.¹⁴⁸ However, there may be a distinction between waiver at the time of suit and waiver predesignated by contractual "agreement." The latter will be treated with more scrutiny because of the inherent potential for abuse of such clauses.

As with cognovits, the problem of contractual venue waiver provisions has been addressed by some legislative limitations. States which have adopted the Uniform Consumer Credit Code have specific prohibitions of clauses fixing venue in consumer credit contracts.¹⁴⁹ The California Code of Civil Procedure contains a provision which allows a suit to be brought in the contractually-designated place of performance, *except* in those cases involving contracts for consumer transactions.¹⁵⁰ Furthermore, any waiver of the venue provision contained in section 395(b) of the Code is void and unenforceable.¹⁵¹ Additionally, under California law, section 1812.10 of the Unruh Act¹⁵² which designates the proper forum for suits on retail installment sales and accounts has been declared to be jurisdictional.¹⁵³ This is an important point since it thereby permits collateral attacks on judgments obtained in violation of the Unruh Act.

In Texas, there are restrictions on designating the place of performance in

¹⁴⁴Sampson, *supra* note 91, at 269.

¹⁴⁵*Supra* note 97.

¹⁴⁶*See, e.g.*, OHIO R. CIV. P. 3.

¹⁴⁷*Barquis*, 7 Cal. 3d at 114, 496 P.2d at 831, 101 Cal. Rptr. at 759.

¹⁴⁸*Id.* at 114, 496 P.2d at 831, 101 Cal. Rptr. at 759. There will be certain circumstances where venue will rise to the level of jurisdiction, as in lower-level state courts where venue may be commensurate with territorial jurisdiction.

¹⁴⁹UNIFORM COMMERCIAL CREDIT CODE, 7A U.L.A. § 1.201(8)(d) (West 1985).

¹⁵⁰CAL. CIV. PRO. CODE § 395(a) (West Supp. 1986).

¹⁵¹CAL. CIV. PRO. CODE § 395(d) (West Supp. 1986).

¹⁵²CAL. CIV. CODE § 1812.10 (West 1985).

¹⁵³51 Ops. Cal. Atty. Gen. 179 (1968).

consumer contracts comporting with those in the California procedure rules. Though the Texas venue statute provides that suits may be brought in the contractually-designated place of performance, the provision is limited to non-consumer transactions.¹⁵⁴ The Texas Supreme Court has held the fixing of venue by contract invalid except in the narrowly-prescribed instances authorized by that statute.¹⁵⁵

It is important for state policy-makers to be wary of these contractual waivers when attempting to create remedies for distant forum abuse. Otherwise, strong legislation restricting distant forum suits may become useless and legislative intent will have been circumvented.

THE OHIO CONSUMER SALES PRACTICES ACT

Finally, it will be helpful to examine the law on distant forum abuse in a state with less developed law in this area. Ohio is a particularly interesting state in which to explore potential remedies for distant forum abuse for several reasons. First, Ohio venue rules¹⁵⁶ are broad enough to permit collection suits in counties other than where the defendant resides or does business if the cause of action has even a minimal connection with the forum county. Second, Ohio is one of the few states which has no statute whatsoever purporting to regulate debt collection practices. Third, Ohio's Consumer Sales Practices Act (CSPA),¹⁵⁷ which declares unlawful any unfair or deceptive acts or practices, presents some difficult issues of statutory interpretation which put into question the applicability of the statute to distant forum suits and their perpetrators. Finally, a state court of appeals in Ohio recently ruled that distant forum abuse is an "unfair" practice under state consumer protection laws.¹⁵⁸ The importance and impact of this decision will be assessed, as will its implications for the future.

Ohio adopted, with minor revisions, the Uniform Consumer Sales Practices Act¹⁵⁹ in 1972. The CSPA's basic provisions set forth that "[n]o supplier shall commit an unfair or deceptive act or practice in connection with a consumer transaction. Such an unfair or deceptive act or practice by a supplier violates this section whether it occurs before, during or after the transaction."¹⁶⁰ A list of specific acts or practices which are statutorily-designated as "unfair or deceptive" is included in the statute, but this does not limit in any way the judicial declaration of non-specified acts as unfair or

¹⁵⁴TEX. CIVIL PRACTICE & REMEDIES CODE ANN. § 15.035(a) (Vernon Supp. 1986).

¹⁵⁵Fidelity Union Life Ins. Co. v. Evans, 477 S.W.2d 535, 537 (Tex. 1972).

¹⁵⁶OHIO R. CIV. P. 3.

¹⁵⁷OHIO REV. CODE ANN. §§ 1345.01-1345.13 (Page 1979 & Page Supp. 1985).

¹⁵⁸Celebrezze v. United Research, Inc., 19 Ohio App. 3d 49, 482 N.E.2d 1260 (1984).

¹⁵⁹7A U.L.A. §§ 1-19 (West 1985).

¹⁶⁰OHIO REV. CODE ANN. § 1345.02(A) (Page 1979).

deceptive.¹⁶¹ The CSPA similarly prohibits “unconscionable” acts or practices committed by suppliers in connection with consumer transactions.¹⁶² The state attorney general has enforcement power,¹⁶³ as well as the authority to promulgate rules which further define “with reasonable specificity” acts or practices which are unfair, deceptive or unconscionable.¹⁶⁴ Moreover, consumers have a private cause of action under the CSPA and may obtain injunctive relief, have the transaction rescinded, recover actual damages, and in some situations, recover treble damages, attorneys’ fees and costs.¹⁶⁵

All of Ohio’s statutory law regarding venue is contained in Rule 3 of the Ohio Rules of Civil Procedure, no matter which type of trial court is involved. For the purposes of this discussion, there are four important subsections to the venue rule. Civil Rule 3(B) states in pertinent part:

Proper venue lies in any one or more of the following counties:

- (1) The county in which the *defendant resides* . . .
- (3) A county in which the *defendant conducted activity which gave rise to the claim for relief* . . .
- (6) The county in which *all or part of the claim for relief arose* . . .
- (10) If there is no available forum in subsection (1) through (9) of this subdivision, in the county in which *plaintiff resides*, has his principal place of business or regularly and systematically conducts business activity¹⁶⁶

The Staff Notes which accompanied the rule when it was enacted make it clear that subsection 10 may only be invoked where none of the first nine forums is available.¹⁶⁷ However, even without that provision the venue rule is clearly broad enough to sustain the propriety of a distant forum suit brought in an Ohio court against an Ohio consumer. If payments are sent to the county where the creditor or debt collector has its home office it might be construed that any breach by the consumer’s non-payment occurs at the place where those payments are to be sent. Furthermore, if the county in which the creditor or collector has its home office has been designated by a contractual clause as the “place of performance” of the contract, the consumer-debtor may be held to have “conducted activity” there, or “part of the claim for relief” may have arisen there. Ohio has no restrictions on contractually-designated “place of performance” clauses as do several other states, so the business entities may include these terms in standard form contracts.

¹⁶¹OHIO REV. CODE ANN. § 1345.02(B) (Page 1979).

¹⁶²OHIO REV. CODE ANN. § 1345.03 (Page 1979).

¹⁶³OHIO REV. CODE ANN. § 1345.07 (Page Supp. 1985).

¹⁶⁴OHIO REV. CODE ANN. § 1345.05(B) (Page Supp. 1985).

¹⁶⁵OHIO REV. CODE ANN. § 1345.09 (Page 1979).

¹⁶⁶OHIO R. CIV. P. 3(B) (emphasis added).

Moreover, the alternative locations of proper venue which precede subsection 10 are not ranked in any order of preference, and it has been held that where more than one of the "proper" forums is available, the plaintiff may bring suit in whichever county she chooses.¹⁶⁸ The case which declared this, *General Motors Acceptance Corp. v. Jacks*, is especially relevant in that it embodied many elements of distant forum abuse. *Jacks* involved a motion for change of venue by a consumer-defendant who was being sued for a deficiency judgment in a distant county. The consumer had purchased an automobile from the plaintiff's assignor, which operated its business in the county of the consumer-defendant's residence. The retail installment contract which was entered into was assigned to the plaintiff, which maintained its office in a different county. When the consumer allegedly defaulted, the vehicle was repossessed and the lawsuit was filed in the county where the plaintiff maintained its main office. Though the consumer-defendant's only connection with the forum was that he sent payments there, the court, in denying the motion for change of venue, ruled that the defendant had "conducted activity" in the forum county and that the cause of action arose in the forum county.¹⁶⁹

However, in *Ross Orthopedic Supply v. Jewish Hospital*,¹⁷⁰ another municipal court ruled differently in a case with facts similar to *Jacks*. There, a contract for the purchase of hospital supplies was sued upon by the supplier when the purchasing hospital refused to pay because of a dispute in the amount billed. The supplier was located in a distant county and had solicited the hospital's business at the county where the hospital was situated. The hospital's only connection with the supplier's county, where the suit was filed, was a phone call to that county placing a purchase order, a letter sent to that county to confirm the order and an agreement that payment was to be made in that county (payment was never made). The court ruled in favor of the hospital's motion for change of venue on the ground that the hospital's "activities" in the forum county were not substantial or close, as contemplated by Civil Rule 3 and the accompanying Staff Note.¹⁷¹ Thus, it was inappropriate to invoke Civil Rule 3(B)(3) and 3(B)(6) under these circumstances.

Neither *Jacks* nor *Ross Orthopedic* are controlling decisions for the Ohio courts, yet they illustrate how loosely or strictly Civil Rule 3 may be read. Additionally, *Jacks* may foreshadow the validity of future distant forum suits, at least with respect to Ohio venue laws. Also of concern is the fact that Ohio courts have yet to rule on the validity of contractual provisions which fix venue in a particular forum or designate a legal "place of performance." It is clear, however, that venue is waivable once a suit has been filed.¹⁷² Currently in

¹⁶⁸*General Motors Acceptance Corp. v. Jacks*, 27 Ohio Misc. 115, 268 N.E.2d 833 (Dayton Mun. Ct. 1971).

¹⁶⁹*Id.* at 119-20, 268 N.E.2d at 836.

¹⁷⁰59 Ohio Misc. 5, 391 N.E.2d 752 (Bellefontaine Mun. Ct. 1977).

¹⁷¹*Id.* at 9, 391 N.E.2d at 754.

¹⁷²*Burnett v. New York Central R.R. Co.*, 380 U.S. 424, 429 (1965) (recognizing that under Ohio law, venue objections may be waived); *Reece v. West Hamilton Hydraulic Co.*, 12 Ohio Cir. Dec. 728, 730 (1901).

Ohio there are no statutory restrictions on these contractual clauses of dubious fairness.

Those seeking to eliminate distant forum abuse in Ohio may fare better by looking to the CSPA for remedial provisions. This was the position of the Ohio Attorney General, who brought suit against distant forum abusers in a recent case, *Celebrezze v. United Research, Inc.*¹⁷³ In *United Research*, a state appellate court held that both a retailer and its affiliate debt "servicing" company were suppliers under the CSPA, and that their practice of suing consumers, who had been solicited at their homes, in distant forums on allegedly defaulted accounts was an unfair act or practice under the CSPA.¹⁷⁴ These holdings, if followed by other Ohio courts, represent an important breakthrough in Ohio consumer law, and may provide the basis for many more suits striking down this abusive practice.

There were two defendants in the attorney general's suit. The defendant United Research, Inc. (hereinafter "United"), was a company which regularly sold "educational materials" such as encyclopedias, cookbooks and children's books throughout the state of Ohio, as well as in many other states.¹⁷⁵ United's co-defendant was its affiliate credit bureau and collection agency, Universal Acceptance Corp. (hereinafter "Universal"). Although the sales agreements used by United did not contain contractual venue waiver or "place of performance" clauses, other aspects of the sales relationship between United and its customers were manipulated such that connections were established with Akron, Ohio, the location of United's central office. Once sales agreements were signed by consumers, they were sent to United's central office in Akron, where the company reviewed them and performed credit checks. According to the defendants, a United representative would then call the consumers to verify interest in the purchase and then "execute" the contract in Akron.¹⁷⁶

United handled its litigation on overdue debts in two different manners. On some accounts, United would maintain the collection itself, and, after other collection attempts had been completed, United would sue the consumers in the Akron Municipal Court. However, other accounts were assigned to Universal soon after the contracts were executed and prior to the date of the first installment payment.¹⁷⁷ The servicing of and collection on these accounts was Universal's sole function; it did not engage in sales or solicitation of sales to consumers. Universal would also sue consumers in Akron Municipal Court when necessary to collect on its accounts.

¹⁷³*United Research*, 19 Ohio App. 3d 49, 482 N.E.2d 1260.

¹⁷⁴*Id.*

¹⁷⁵*Id.* at 49, 482 N.E.2d at 1261. It was United's practice to hire independent contractors to solicit sales, often through home solicitations.

¹⁷⁶Brief for Defendant-Appellants at 5, *United Research*, 19 Ohio App. 3rd 49, 482 N.E.2d 1260.

¹⁷⁷United and Universal were under common ownership and controlled by the same individual.

The attorney general sued the defendants to enjoin them from filing distant forum suits against Ohio consumers (as well as out-of-state residents) and to recover damages under the CSPA.¹⁷⁸ Both parties filed motions for summary judgment on liability and damages. The attorney general was granted summary judgment on liability and the common pleas court permanently enjoined the defendants from suing consumers in distant forums,¹⁷⁹ but the claim for damages was denied. The attorney general's summary judgment motion was granted on the basis of affidavits and the defendants' answers to interrogatories, admissions of fact and production of documents. These indicated that fifty-eight consumers had been sued by the defendants in Akron Municipal Court of which forty-seven (81 percent) had default judgments entered against them. These consumers lived as far away as South Carolina, and within Ohio, as far as Cincinnati.¹⁸⁰

The primary issues on appeal were whether distant forum suits are unfair or deceptive practices under the CSPA and whether Universal was a "supplier," as defined in the CSPA, and thus liable under the Act's provisions.¹⁸¹ The appeals court ruled both that the suits were an unfair practice under the CSPA and that Universal was a supplier under the Act. In doing so, it relied upon the fact that the FTC and at least one federal court have declared "a supplier's act or practice of filing collection suits in a judicial district other than the district in which the consumer resides or signed the contract" unfair and deceptive in violation of the FTCA.¹⁸² These determinations are given "great weight" in construing the CSPA.¹⁸³ The court also looked to the common pleas court in *Santiago v. S.S. Kresge Co.*,¹⁸⁴ which had declared distant forum suits as a regular practice to be unconscionable, and, by similar reasoning, declared the practice unfair as well.¹⁸⁵

The CSPA, as enacted in Ohio, is illustrative of some of the general problems involving statutory construction of state consumer protection acts with regard to the question of whether distant forum abusers are subject to coverage. It is for this reason that a detailed analysis of the operative terms of the CSPA, as well as their relation to analogous statutes, is necessary. *United Research* is the first major case to be decided in Ohio courts on the CSPA's ap-

¹⁷⁸Related allegations under the following statutes were also charged: Home Solicitation Sales Act, OHIO REV. CODE ANN. §§ 1345.21-1345.28 (Page 1979 & Page Supp. 1985); Retail Installment Sales Act, OHIO REV. CODE ANN. §§ 1317.01-1317.16, 1317.99 (Page 1979 & Page Supp. 1985); Fair Debt Collection Practices Act, 15 U.S.C. §§ 1692-1692o (1982 & Supp. II 1984); Truth-in-Lending Act, 15 U.S.C. §§ 1601-1667e (1982 & Supp. II 1984).

¹⁷⁹*United Research*, 19 Ohio App. 3rd at 49-50, 482 N.E.2d at 1261. The defendants prevailed on the issue of damages, and the attorney general did not file a cross-appeal on that issue.

¹⁸⁰Brief for Plaintiff-Appellant at 4, *United Research*, 19 Ohio App. 3rd 49, 482 N.E.2d 1260.

¹⁸¹*United Research*, 19 Ohio App. 3rd at 50, 482 N.E.2d at 1261.

¹⁸²*Id.* at 50, 482 N.E.2d at 1262.

¹⁸³OHIO REV. CODE ANN. § 1345.02(C) (Page 1979).

¹⁸⁴2 Ohio Op. 3d 54 (1976).

¹⁸⁵*United Research*, 19 Ohio App. 3rd at 50-51, 482 N.E.2d at 1262.

plicability to distant forum abuse. Its effect on the future of this practice in Ohio remains to be seen, yet it has already clarified some of the issues regarding the Act.

"Suppliers" and "Consumer Transactions"

Two important issues under the CSPA are (1) whether the business entity against which the Act is to be invoked is a "supplier" within the meaning of the Act, and (2) whether the supplier was acting in connection with a "consumer transaction." If the business entity is not a "supplier" or if it is a supplier and it has not engaged in a consumer transaction, then no cause of action may be maintained under the CSPA. As defined by the CSPA, a supplier is "a seller, lessor, assignor, franchisor, or other person engaged in the business of *effecting* or soliciting consumer transactions, whether or not he deals directly with the consumer."¹⁸⁶ "Consumer Transaction" means a sale, lease, assignment, award by chance, or other transfer of an item of goods, a service, franchise, or an intangible, except those transactions between persons, defined by sections 4905.03 and 5725.01 of the Revised Code, and their customers, between attorneys, physicians or dentists and their clients or patients that pertain to medical treatment but not ancillary services, to an individual for purposes that are primarily personal, family, or household, or solicitation to supply any of these things.¹⁸⁷

The first major loophole with respect to distant forum abuse coverage is the specific exemption from the definition of "consumer transaction" which provides that persons defined in section 5725.01 of the Revised Code and their customers do not engage in consumer transactions. Section 5725.01 of the Ohio Revised Code defines the terms "financial institution" and "dealer in intangibles."¹⁸⁸ Thus, banks and savings and loan institutions are clearly exempt from the CSPA's coverage. As holders of notes and other assigned evidences of indebtedness, these institutions would be potential distant forum plaintiffs. However, there is no empirical evidence indicating that they are the primary offenders in this field. Of even greater concern is whether certain finance companies would be exempt as "dealers in intangibles." This term includes:

every person who keeps an office or other place of business in this state and engages at such office or other place in the business of lending money, or discounting, buying, or selling bills of exchange, drafts, acceptances, notes, mortgages, or other evidences of indebtedness, or of buying or selling bonds, stocks or other investment securities¹⁸⁹

¹⁸⁶OHIO REV. CODE ANN. § 1345.01(C) (Page Supp. 1985) (emphasis added).

¹⁸⁷OHIO REV. CODE ANN. § 1345.01(A) (Page Supp. 1985).

¹⁸⁸OHIO REV. CODE ANN. § 5725.01 (Page 1980). It also defines "Insurance company," "Domestic Insurance company" and "foreign insurance company." Section 4905.03 defines different classes of public utilities, and, through the CSPA provision, transactions between public utilities and their customers are exempted.

¹⁸⁹OHIO REV. CODE ANN. § 5725.01(B) (Page 1980).

The question may have to be determined on a case-by-case basis by studying the activities of the particular company involved. However, any attempt by a finance company to exempt itself from the CSPA would have to include proof that it engaged in the activities listed in section 5725.01. Certainly, at least with respect to consumer loan transactions, it seems that distant forum abuse is not an action which could be reached by the CSPA.

However, a wide scope of business entities such as retail merchants, collection agencies, and companies which "service" debts, are still likely to be restricted by the CSPA from filing distant forum suits provided they meet the definition of "supplier." Clearly, retail merchandisers are "effecting or soliciting consumer transactions" on a regular basis, and there is no real dispute over that issue. Debt collection agencies and variations on finance companies are closer to the borderline; nevertheless, they should all logically fall within the statutory definition of "supplier."

Debt collection agencies were held to be suppliers in one of the few reported cases on this issue under Ohio law, *Liggins v. The May Co.*¹⁹⁰ The case was a private class action suit by consumers who had been the victims of various debt collection abuses. The defendants were a major retail merchandiser and the collection agency to which the retailer assigned its debts. The defendant-collection agency filed a motion to dismiss the complaint on the basis that it was not involved in "effecting" a consumer transaction and that debt collection itself does not constitute a "consumer transaction." A common pleas court rejected these claims and overruled the defendant's motion. In doing so, the court interpreted the legislative intent behind the CSPA to be "to prohibit certain types of consumer practices to apply from the initial contact between the supplier and the consumer until the relationship terminates . . . that relationship continues from the initial inception between consumer and supplier until, as in this case, the debt is fully paid."¹⁹¹ The court went on to say that the assignment of debts by the retailer to the collection agency was a part of the consumer transaction and that "any conduct in violation of the practices prohibited in the provisions of the Code is not permissible either by the supplier or its designated assignee, agent or agency with relation to the collection of the debt"¹⁹² It concluded that independent debt collectors were effecting consumer transactions, and thus fell into the "supplier" definition of the CSPA.

The language of *Liggins* offers strong support for actions against debt collection agencies, but it does not really clarify precisely what the term "effecting" envisions. Likewise, the court in *United Research* was not helpful in elaborating on this point. In its second holding, the court declared that Universal, the retailer's affiliate credit bureau, was a supplier under the CSPA. The

¹⁹⁰44 Ohio Misc. 81, 337 N.E.2d 816 (1975).

¹⁹¹*Id.* at 83, 337 N.E.2d at 818 (1975).

court read broadly the CSPA's definition of supplier, invoking its belief that the Act's protections were effective until the debt is paid.¹⁹³ Paralleling the reasoning in *Liggins*, the court emphasized that allowing the original seller to avoid the responsibility to conduct business fairly simply by assigning its accounts to an affiliated agent or assignee engaged in unfair practices would be to defeat the purpose of the CSPA. Without further discussion, it declared that Universal was "engaged in the business of effecting consumer transactions (i.e., payment) and, as such, is a supplier pursuant to R.C. 1345.01(C)."¹⁹⁴ This lends great credibility to the argument that the "effecting" language should be read quite broadly to include all types of debt collecting entities.

It is the opinion of at least one member of the Consumer Protection Division staff in the Ohio Attorney General's Office, that the Ohio legislature really intended to include the word "affecting" in the supplier definition. If this were true, it would imply that the legislature intended an even larger scope of business entities to be covered by the CSPA than are covered now. But even the term "effecting" lends itself to an interpretation that goes beyond that of simply completing the sales transaction. "Effect" has been defined as "1. to cause to come into being . . . 2a: to bring about . . . ACCOMPLISH, EXECUTE . . ."¹⁹⁵ Thus, the term can be read broadly enough to entail all types of consumer purchase financing, debt servicing or debt collection, since all of these activities may be necessary to actually "accomplish" or "bring about" the completed sale, lease or other transaction.

There is a possibility that the Ohio legislature had a more restrictive meaning of "supplier" in mind when it enacted the CSPA. This is evidenced by the fact that while most of the terms from the Uniform Consumer Sales Practices Act were adopted verbatim by the Ohio lawmakers, the term "supplier" was one term which was revised. As defined in the Uniform CSPA, the term "supplier" meant "a seller, lessor, assignor, or other person who regularly solicits, engages in, or enforces consumer transactions, whether or not he deals directly with the consumer."¹⁹⁶ The plain meaning of "enforces" as used in the context of a consumer transaction must refer to the collection of payments from the consumer.¹⁹⁷ While the terms, "solicit" and "engage" were carried over, in slightly different form, into the Ohio CPSA, the word "enforce" was deleted. Although this could be a manifestation of legislative intent to exclude

¹⁹³ *United Research*, 19 Ohio App. 3rd at 51, 482 N.E.2d at 1262.

¹⁹⁴ *Id.*

¹⁹⁵ WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY OF THE ENGLISH LANGUAGE (1976).

¹⁹⁶ Uniform Consumer Sales Practices Act, 7A U.L.A. § 2(5) (West 1985). The Commissioner's Comment to this section elaborates on the definition as follows: "In addition to manufacturers, wholesalers, and dealers, debt collection agencies and advertising agencies fall within this definition."

¹⁹⁷ It should be noted that the Supreme Court of Kansas recently held that independent debt collection agencies are "suppliers" under the Kansas Consumer Protection Act, which closely follows the Uniform Consumer Sales Practices Act definition of "supplier." See *State ex rel. Miller v. Midwest Serv. Bureau*, 229 Kan.

debt collectors and others who participate in collection activity from the reaches of the Ohio act, it also could have been a meaningless rearrangement of terms. The Ohio legislature may have been looking for a more concise way to express the meaning of supplier, and felt that "effecting a consumer transaction" included within its scope the enforcement of consumer payments. Furthermore, the legislature clearly exempted other distinct entities from the scope of the Act, and had it intended to exclude debt collection agencies it could have done so with equal clarity.

The problem regarding what business entities are covered under state consumer protection statutes has often come up in the context of attempts to take action against debt collection agencies and others engaged in the collection of debts.¹⁹⁸ Yet, it is important that these parties be restricted by the provisions of state consumer laws since the federal Fair Debt Collection Practices Act is so limited in terms of the business it regulates. The problem with the precision with which the term "debt collector" was defined by the FDCPA,¹⁹⁹ is that it is easy to escape the FDCPA's terms by setting up debt collection entities which are exempted from the FDCPA. For example, rather than accept accounts which are already in default, a finance company can "service" accounts by having them assigned by the retailer before the accounts are overdue. In this way the finance company becomes the "creditor" and collects in its own name, thus taking it out of the category of businesses regulated by the FDCPA.²⁰⁰ This is precisely how Universal operated in the *United Research* case. For these reasons, it is important that courts take into serious consideration any sections of state consumer protection statutes which instruct the courts to liberally construe their provisions in order to fulfill the remedial purpose of such legislation.²⁰¹

Acts Permitted By Law

Because of the open-ended nature of the Ohio venue rule, the possibility of distant forum suits exists under Ohio law. This may arguably present another problem in trying to reach persons bringing distant forum collection suits with the CSPA. Section 1345.12 of the CSPA provides certain exemptions to the application of the Act, including an exemption for: "An act or practice required or specifically permitted by or under federal law, or by or under other sections of the Revised Code, except as provided in division (B) of section 1345.11 of the Revised Code;"²⁰² section 1345.11(B) limits the

¹⁹⁸ See, e.g., *State ex rel. Edmisten v. J.C. Penney Co.*, 292 N.C. 311, 233 S.E.2d 895 (1977). This decision was recently superseded by an amendment to North Carolina's consumer protection statute which put debt collectors within the scope of the act, as well as barred distant forum suits. See N.C. GEN. STAT §§ 75-1.1, 75.55(4) (1985).

¹⁹⁹ 15 U.S.C. § 1692a(6) (1982).

²⁰⁰ *Kizer v. Finance America Credit Corp.*, 454 F. Supp. 937 (N.D. Miss. 1978).

²⁰¹ See, e.g., TEX. BUS. & COM. CODE ANN. § 17.44 (Vernon Supp. 1986).

²⁰² OHIO REV. CODE ANN. § 1345.12(A) (Page 1979) (emphasis added).

remedial provisions of the CSPA where a supplier shows that the act or practice complained of has been specifically permitted by FTC orders, rules or guides or federal court interpretations of Section 5(a)(1) of the FTCA, and that it has not otherwise been declared unfair, deceptive or unconscionable by an Ohio substantive rule.²⁰³

Distant forum abuse is certainly not "required" by any federal or state law, but suppliers may argue that it is "specifically permitted" by Ohio's venue rule which permits suits where all or part of the cause of action arose, or where the defendant (consumer) conducted activity which gave rise to the action.²⁰⁴ However, this argument should not be received positively by the Ohio courts. The language of section 1345.12(A) seems to contemplate more of a direct statutory approval or endorsement of the specific act or practice before the exemption arises. It is clearly a different thing to say that an act is not in violation of any specific state statutory provision than to say it is "specifically permitted" by law.²⁰⁵ Another aspect of reading this CSPA exemption is how narrowly or broadly the act that is "permitted" is defined. While it may be "specifically permitted" to drive an automobile at fifty-five miles per hour on the freeway, that permission would be somewhat tainted if the driver were escaping from the scene of a crime she had just committed. In the same sense, it might be "specifically permitted" by the Ohio venue rules to file suit in a county where part of the claim for relief arose, but the authors of that rule did not contemplate that they would be specifically allowing distant forum suits whereby consumers were being effectively deprived of their fundamental right to appear and defend and where the plaintiffs were engaging in a high-volume default judgment collection process.

If courts were to follow the supplier argument and uphold distant forum suits as acts permitted by law, perhaps a legislative amendment to more properly define the exemption would be necessary. Alternatively, the exemption could be deleted altogether. Although no Ohio cases, including *United Research*, have dealt with this issue, the Massachusetts Supreme Court ruled that acts permitted by law are not exempt from being declared unfair and deceptive in the *Schubach* case, even though the Massachusetts Consumer Protection Act did not, and still does not, have a provision analogous to section 1345.12(A) of the Ohio Revised Code.

In Connection With A Consumer Transaction

Another concern which needs to be addressed is whether collection suits are acts or practices committed in connection with a consumer transaction as

²⁰³OHIO REV. CODE ANN. § 1345.11(B) (Page 1979).

²⁰⁴OHIO R. CIV. P. 3.

²⁰⁵*Cf. West v. Costen*, 558 F. Supp. 564, 581-82 (W.D. Va. 1983) (interpreting similar exemption contained in 15 U.S.C. § 1692(n)).

required by sections 1345.02 and 1345.03 of the Revised Code. While the retail seller who extends its own credit can hardly argue that enforcing installment payments is not part of the consumer transaction, other parties less closely connected with the actual sales transaction might attempt to remove themselves from the CSPA's coverage by virtue of the fact that they have no connection with the "consumer transaction" since their role is merely ancillary to the actual sale, lease or other act. This argument, too, deserves little recognition by the courts. Ohio legislators made it clear that any unfair, deceptive or unconscionable act committed by a supplier is in violation of the CSPA "whether it occurs before, during, or after the transaction."²⁰⁶ The *United Research* court seized upon this phrase in holding that the CSPA was applicable to the activities of an assignee debt collector.²⁰⁷ It is very important that consumer protection statutes reach a wide range of activities and persons so that suppliers cannot avoid the law through various tactics of distancing themselves from the original sale or other underlying transaction. As the court in *Liggins* recognized:

[A] supplier engaged in the business of enforcing or attempting to enforce the payment of a claim or debt owed by a consumer to the supplier cannot relieve itself of the prohibition provided for in the Code by merely assigning or transferring said claim to an assignee or agent or agency, and have that assignee, agent or agency conduct practices prohibited by the act. To permit said supplier to contend that the transfer of the collection of said debt relieves it from the obligations prohibited, and for the other person to whom it is transferred to say that it is not covered under the prohibitions of the act, would defeat the very purpose for which the Consumer Protection Act was enacted.²⁰⁸

Unfairness

Assuming other statutory hurdles have been overcome, a party using the CSPA to sue a distant forum abuser still must show by some measure that the act or practice involved is unfair, deceptive or unconscionable. One lower court in Ohio has declared the "regular" practice of suing in distant forums to be unconscionable,²⁰⁹ and although this term is separate from the term "unfair" under the CSPA, the semantic distinctions are less important than the legal proscriptions. As discussed above, it was held in *United Research* that the practice of suing consumers in distant forums was unfair under the CSPA.²¹⁰

There is also an abundance of precedent from other jurisdictions to sug-

²⁰⁶ OHIO REV. CODE ANN. §§ 1345.02(A), 1345.03(A) (Page 1979).

²⁰⁷ *United Research*, 190 Ohio App. 3rd at 51, 482 N.E.2d at 1262.

²⁰⁸ *Liggins*, 44 Ohio Misc. at 83-87, 337 N.E.2d at 818.

²⁰⁹ *Santiago v. S.S. Kresge Co.*, 2 Ohio Op. 3d 54 (1976).

²¹⁰ *United Research*, 190 Ohio App. 3rd at 51, 482 N.E.2d at 1262.

gest the general unfairness of distant forum suits for the collection of consumer debts. Ohio's CSPA provides that in construing what is unfair or deceptive under section 1345.02(A), courts "shall give due consideration and great weight to federal trade commission orders, trade regulation rules and guides, and the federal courts' interpretations of subsection 45(a)(1) of the 'Federal Trade Commission Act,'"²¹¹ Thus, Ohio courts can look to the *Spiegel* decision of the Seventh Circuit which suggested that at least in some circumstances intrastate distant forum suits on consumer debts could fall within the proscriptions of the FTCA's "unfair or deceptive acts" section.²¹² Furthermore, the FTC Distant Forum Orders issued in the 1970s must be given "great weight" by the Ohio courts. At least one of those orders specifically enjoined intrastate distant forum suits that had been regularly filed by the respondents.²¹³

Other sources, although not specifically referred to by the CSPA, also contribute to the view that distant forum suits are unfair. The federal Fair Debt Collection Practices Act declares that any violation of its provisions, including the one which limits collection suits to non-distant forums, is an unfair or deceptive act.²¹⁴ The state of Texas, by statute, has declared distant forum suits to be "false, misleading or deceptive,"²¹⁵ terms which, read in conjunction with each other, present a strong suggestion of unfairness. Furthermore, the decisions in *Barquis* and *Schubach*, while not going so far as to say distant forum abuse is unfair, condemn the regular use of such suits for the collection of consumer debts.²¹⁶

While there might be a slight problem of overbreadth in a per se declaration of unfairness with respect to distant forum suits, it should be of little concern to the courts. Despite the fact that the restriction of suits to the place of the consumer's residence or where the consumer signed the actual contract would mean that suits in adjacent or otherwise nearby counties or judicial districts would be considered "unfair" as a matter of law, it is better to prohibit suits outside of these designated appropriate counties altogether than to require courts to engage in line-drawing. And though it is understandable for creditors and other debt collectors to desire centralization of their legal actions in pursuit of allegedly overdue debts, their interests are significantly outweighed by the legitimate social objective of fairness in consumer litigation. It would be relatively inexpensive for larger retailers or creditors to hire local

²¹¹OHIO REV. CODE ANN. § 1345.02(C) (Page 1979).

²¹²*Spiegel, Inc. v. FTC*, 540 F.2d 287, 296 n.12 (7th Cir. 1976).

²¹³*In re Montgomery Ward & Co.*, 84 F.T.C. 1337 (1974) (enjoining distant forum suits within Alaska).

²¹⁴15 U.S.C. § 1692 (1982). The suggestion is also contained in the Senate Report which accompanied the FDCPA's enactment. The report expressly states that forum abuse is an unfair practice. S. Rep. No. 95-382, 95th Cong., 1st Sess. 5, reprinted in 1977 U.S. CODE CONG. & AD. NEWS 1695, 1699.

²¹⁵TEX. BUS. & COM. CODE ANN. § 17.46(b)(22) (Vernon Supp. 1986).

²¹⁶*Barquis v. Merchants Collection Ass'n*, 7 Cal. 3d 94, 496 P.2d 817, 101 Cal. Rptr. 745 (1972).

counsel where the consumers are located in order to handle simple debt collection matters. As for the smaller businesses, which may include a great deal of the home solicitation suppliers, there should be a presumption that if they are willing to participate in business transactions which involve dealings with consumers residing in distant counties (and which often arise from the suppliers' solicitation of sales in those counties), that they are willing to file collection suits, if necessary, in those counties.

Consumer suits by both the Attorney General of Ohio and private consumers should be instituted wherever distant forum abuse is detected so that a clear case law development will occur. Courts would be well advised to follow the recent appellate decision in *United Research*, as well as the lower court rulings on distant forum abuse in Ohio, in condemning this unfair and oppressive debt collection tactic. While this will still leave uncovered the financial institutions and dealers in intangibles exempted from the CSPA, it will serve the purpose of prohibiting distant forum suits by a large percentage of debt collection plaintiffs.

Should the litigation route prove unfavorable to consumer advocates, it would be left to the Ohio legislature to enact some sort of amendment to the existing statutory scheme to deal with distant forum abuse. Rather than attempting to limit the venue rules, it would probably be more practical to either amend the CSPA to include distant forum suits as one of the enumerated "unfair or deceptive" acts or to revise the Ohio Retail Installment Sales Act²¹⁷ to include a special limitation on venue for suits on retail installment sales contracts and accounts (similar to California's Unruh Act). However, in enacting such amendments, the potential for circumvention by contractual clauses in pre-printed form contracts must also be addressed, such that consumers' rights to be sued in the forum of their residence or where they signed their contracts cannot be waived or altered in any way.²¹⁸ It is time that Ohio consumers were protected from the patently unfair debt collection practice of distant forum suits. Moreover, other states should follow the lead of states such as Texas, California and Massachusetts, in engaging the aid of the courts and the legislature to eradicate this pervasive attempt to deprive consumers of their opportunity to be heard and to assert their defenses.

²¹⁷OHIO REV. CODE ANN. § 1317.01-1317.16, 1317.99. (Page 1979 & Page Supp. 1985).

²¹⁸The Retail Installment Sales Act already has a provision declaring void contractual provisions purporting to waive the buyer's defenses. OHIO REV. CODE ANN. § 1317.14 (Page Supp. 1985).