
IN THE MATTER OF

SPIEGEL, INC.

OPINIONS, ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF
THE FEDERAL TRADE COMMISSION ACT

Docket No. 8990. Complaint, Aug. 7, 1974—Decision, Aug. 18, 1975

Order requiring a Chicago, Ill., catalog retailer, among other things to bring collection law suits only in a court in the county where the defendant resides or the debt was incurred.

Appearances

For the Commission: *Randall H. Brook* and *Barry E. Barnes*.

For the respondent: *Stein, Mitchell & Mezines*, Wash., D.C.

COMPLAINT

The Federal Trade Commission, having reason to believe that respondent Spiegel, Inc. has violated Section 5 of the Federal Trade Commission Act, and that a proceeding in respect thereof would be in the public interest, issues this complaint:

PARAGRAPH 1. Spiegel, Inc. is a Delaware corporation, with its office and principal place of business located at 2511 W. 23rd St., Chicago, Ill.

PAR. 2. Respondent is a catalog retailer, engaged in the advertising, offering for sale, sale and distribution of clothing, household goods, appliances, tools, tires and various other articles of merchandise. Allegations below of respondent's present acts or practices include past acts or practices.

PAR. 3. In the course of its mail-order catalog business, respondent receives orders from purchasers in various States at its place of business in Illinois and causes its products when sold to be shipped from Illinois to purchasers located in various States of the United States. Thus, respondent maintains a substantial course of business in commerce, as "commerce" is defined in the Federal Trade Commission Act.

PAR. 4. In the course of its business, respondent regularly extends credit (hereinafter referred to as retail credit accounts) for the purpose of facilitating consumers' purchase of respondent's products.

PAR. 5. In the course of its collection of retail credit accounts, respondent regularly sues allegedly defaulting retail mail-order purchasers who reside in States other than Illinois (hereinafter referred to as out-of-State defendants) in the Circuit Court of Cook County, Illinois. Courts located in the State and county where out-of-State defendants reside or where they signed the contracts sued upon could be used for these suits. Almost all out-of-State defendants have received respondent's catalogs or other advertising material, and executed purchase orders or contracts, in their home States. Almost all out-of-State defendants have had no pertinent contact with the State of Illinois other than their dealings with respondent.

PAR. 6. The distance, cost and inconvenience of defending such suits in Illinois place a virtually insurmountable burden on out-of-State defendants. Respondent thus effectively deprives these defendants of a reasonable opportunity to appear, answer and defend. Therefore, such use of distant or inconvenient forum is unfair.

PAR. 7. The aforesaid acts and practices of respondent are all to the prejudice and injury of the public and constitute unfair acts or practices in commerce in violation of Section 5 of the Federal Trade Commission Act.

INITIAL DECISION BY HARRY R. HINKES, ADMINISTRATIVE
LAW JUDGE

JANUARY 31, 1975

PRELIMINARY STATEMENT

In a complaint issued by the Federal Trade Commission on Aug. 7, 1974, respondent, Spiegel, Inc., was charged with unfair acts or practices in commerce in violation of Section 5 of the Federal Trade Commission Act in suing defaulting retail mail-order purchasers who reside in States other than Illinois in the Circuit Court of Cook County, Illinois. By answer duly filed respondent admitted all of the material factual allegations of the complaint but denied any violation of law. The record was thereupon closed and the parties have submitted proposed findings and briefs. Pursuant to the admitted factual allegations of the complaint, I make the following:

FINDINGS OF FACT

1. Spiegel, Inc., is a Delaware corporation, with its office and principal place of business located at 2511 W. 23rd St., Chicago, Ill.

2. Respondent is a catalog retailer, engaged in the advertising, offering for sale, sale and distribution of clothing, household goods, appliances, tools, tires and various other articles of merchandise. Allegations below of respondent's present acts or practices include past acts or practices.

3. In the course of its mail-order catalog business, respondent receives orders from purchasers in various States at its place of business in Illinois and causes its products when sold to be shipped from Illinois to purchasers located in various States of the United States. Thus, respondent maintains a substantial course of business in commerce, as "commerce" is defined in the Federal Trade Commission Act.

4. In the course of its business, respondent regularly extends credit (hereinafter referred to as retail credit accounts) for the purpose of facilitating consumers' purchase of respondent's products.

5. In the course of its collection of retail credit accounts, respondent regularly sues allegedly defaulting retail mail-order purchasers who reside in States other than Illinois (hereinafter referred to as out-of-State defendants) in the Circuit Court of Cook County, Illinois. Courts located in the State and county where out-of-State defendants reside or where they signed the contracts sued upon could be used for these suits. Almost all out-of-State defendants have received respondent's catalogs or other advertising material, and executed purchase orders or

contracts, in their home States. Almost all out-of-State defendants have had no pertinent contact with the State of Illinois other than their dealings with respondent.

6. The distance, cost and inconvenience of defending such suits in Illinois place a virtually insurmountable burden on out-of-State defendants.

COMMENT

The respondent states:

The material factual allegation charged in the complaint is that suits filed by Spiegel in Cook County, Illinois, are inconvenient to defaulting debtors who reside in another state.

This is an oversimplification of this case. In fact, the complaint alleges that respondent Spiegel, Inc., in the course of its *mail-order catalog retailer business*, regularly sues in the courts of Illinois allegedly defaulting *retail mail-order purchasers* who reside in States other than Illinois (hereinafter referred to as out-of-State defendants) and that such acts and practices are to the prejudice and injury to the public and constitute unfair acts and practices in commerce in violation of the Federal Trade Commission Act. This distinction is important as will be explained below.

In recent years the limits of permissible *in personam* jurisdiction over out-of-State defendants have undergone great modification and expansion. Originally physical presence within the forum State was required, *Pennoyer v. Neff*, 95 U.S. 714 (1877), regardless of how temporary the presence may have been. This concept of jurisdiction changed in *Hess v. Pawloski*, 274 U.S. 352 (1927), where a Massachusetts nonresident motorist statute was upheld and in *Doherty & Co. v. Goodman*, 294 U.S. 623 (1935), where jurisdiction over nonresidents was recognized for claims resulting from doing business within the State. In *International Shoe Co. v. Washington*, 326 U.S. 310 (1945), the Supreme Court laid down the constitutional requirements for the assertion of jurisdiction:

Due process requires only that in order to subject a defendant to a judgment *in personam*, if he be not present within the territory of the forum, he have certain minimum contacts with it such that the maintenance of the suit does not offend "traditional notions of fair play and substantial justice."

The court considered relevant both an estimate of the inconveniences to each party and an estimate of the quality and nature of the activity being conducted by the nonresident defendant within the forum.

The "minimum contacts" theory of *International Shoe* was further defined in later Supreme Court decisions. In *McGee v. International Life Insurance Co.*, 355 U.S. 220 (1957), a foreign insurance company was sued in California for payment under a life insurance policy. The company had never solicited nor done any insurance business in

California apart from this one policy which was transacted by mail. *In personam* jurisdiction of the foreign insurance company was upheld, the Court noting that the insurance contract was delivered in California, the premiums were mailed from there, the insured was a resident of the State and died there and that there was a substantial State interest in protecting residents from insurers who refused to pay. In *Hanson v. Denckla*, 357 U.S. 235 (1958), the Court held that a Florida court had no personal jurisdiction over a Delaware trustee corporation when the only connection between the trustees and Florida was some correspondence between the settlor and the trustees, holding that the act done or the transaction consummated in the forum must be one "by which the defendant purposefully avails itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws."

Respondent points to a number of statutes which have been enacted in a number of States conferring jurisdiction upon the courts of that State over persons transacting any business within the State whether or not such persons are resident or present in the State. Not only is such a jurisdictional statute in effect in the State of Illinois, (Smith-Hurd, Ill. Stat., Supp. 1967, c.110 Sec. 17) but more than one-half of the States have enacted such so-called long-arm statutes in one form or another (4 Wright & Miller *Fed. Practice and Procedure*, Sec. 1068). Similarly, the Commissioners on Uniform State Laws have promulgated and the American Bar Association has approved the Uniform Interstate and International Procedure Act containing a long-arm provision and Congress has enacted a long-arm statute for the District of Columbia (13 D.C. Code Sec. 423, 1973 ed.). Respondent argues, therefore, that the validity of long-arm jurisdiction is beyond question.

But that is not the issue before us. The validity of the Illinois statute is not involved. Its application to the persons specified in this proceeding is involved and a determination must be made whether such out-of-State defendants have contacts with the forum sufficient to comport with fair play. To this end respondent cites the fact that the out-of-State defendants purposefully and intentionally mailed to Illinois a purchase order for merchandise, instructing Spiegel to ship merchandise from Chicago. Respondent argues that, thus, the out-of-State defendants transacted business within Illinois and submitted themselves to the jurisdiction of the courts of Illinois as to causes of action arising from such business transactions. But respondent concedes, as it must, that such *in personam* jurisdiction over out-of-State defendants in Illinois courts is proper only if the nonresidents have contacts with the forum, Illinois, sufficient to comport with due process and where the nonresidents have committed any of the acts

specifically enumerated in the long-arm statute. Stated differently, the question is whether Spiegel, a mail-order house in the State of Illinois, can sue an out-of-State retail mail-order purchaser of its merchandise in the courts of Illinois.

This practice has been decried by many commentators and assumed to be violative of due process by many courts, but, to the best of my knowledge, has never been specifically adjudicated in a litigated action. The language of some court decisions is instructive on this point.

In *In-Flight Devices Corporation v. Van Dusen Air Incorporated*, 466 F.2d 220, 233 (1972), it was stated:

In our economy the seller often initiates the deal, tends to set many, if not all of the terms on which it will sell, and, of course, bears the burden of producing the goods or services, in the course of which production injuries and other incidents giving rise to litigation frequently arise. The buyer, on the other hand is frequently a relatively passive party, simply placing an order, accepting the seller's price and terms as stated in his product advertisement and agreeing only to pay a sum upon receipt of the goods or services.

The court went on to note that if the buyer vigorously negotiates terms, inspects production, travels to the forum, conducts substantial interstate business and the like, then his contacts with the forum are increased and the expectation and likelihood that he may be successfully sued in a distant forum are also correspondingly increased. See, e.g., *Ziegler v. Houghton-Mifflin Co.*, 224 N.E. 2d 12 (1967). It cannot be denied that here Spiegel initiated the contacts with the buyer through its mail-order catalog and advertisements and dictated the price and terms of the contract. Generally, the purchase is the only contact the buyer has had with Spiegel or Illinois.

The language of an Illinois court in *Geneva Industries Inc. v. Copeland Construction Co.*, 312 F.Supp. at 188 (1970), is even more specific:

The notion that any customer of an Illinois based mail-order house such as *Sears Roebuck or Montgomery Ward* [or Spiegel?] would be subject to the jurisdiction of Illinois is obviously violative of the most minimal standard of minimum contacts and the fundamental structure of the Federal system. (Emphasis added.)

The court noted differences in an earlier Illinois case, *Gorden v. ITT*, 273 F.Supp. 164 (1967), where the out-of-State defendant was subjected to the jurisdiction of the Illinois court because it "regularly sent its salesmen into Illinois to solicit orders * * *" and engaged in a heavy mail-order solicitation in Illinois. See also *Koplin v. Thomas, Haab & Botts*, 219 N.E. 2d 646, 652 (1966), where the court upheld *in personam* jurisdiction over a nonresident defendant which "affirmatively and voluntarily sought the benefit of our [Illinois] laws by initiating and soliciting the sales here." (Emphasis added.)

In *McQuay, Inc. v. Schlosberg, Inc.*, 321 F.Supp. 902 (1971), the court said:

The general philosophy of long-arm statutes is to protect citizens of a state where a nonresident comes into the state directly or indirectly to sell something or solicit sales, or where, even though out-of-state, a nonresident sells a product which is brought into or comes to rest in the state. The nonresident thus receives the benefit and protection of the state laws and profits or hopes to from its adventure therein. The nonresident is the aggressor or initiator. It is appropriate that such a nonresident seller should respond to service of process in that state.

The court added that where a nonresident corporation enjoys no particular privilege or protection in purchasing products from the seller in the forum State, it would be wrong to subject the nonresident buyer to the jurisdiction of the forum State:

The rationale behind this long time statutory precedent is that a defendant ought to be entitled to defend himself among people and in a community where he resides and is known, his witnesses generally will reside in or near the place of his residence, his counsel will be from his community, the goods he has purchased * * * likely will be situated in his home community. Such concepts have roots deep in common law traditions. It would seem that this is what the United States Supreme Court meant by "traditional notions of fair play and substantial justice" in *International Shoe, supra*.

Courts have also distinguished between out-of-State buyers and out-of-State sellers noting that generally it would be more equitable to impose *in personam* jurisdiction over out-of-State sellers than out-of-State buyers. See, for example, *Nordberg Div. of Rex Chainbelt Inc. v. Hudson Engineering Corp.*, 361 F.Supp. 903 (1973), where the court noted that "sellers in general have more resources to defend themselves in out-of-state litigation than do buyers." The same case also noted that individuals and small companies may be hard put to defend themselves in a foreign forum saying:

A customer of a mail-order house, be it an individual or a small company engaged in a one-state operation, is also more likely to be unprepared to defend itself in a foreign forum than is a company * * * which transacts a substantial amount of interstate business. When almost all of its business is conducted in its home state, a customer of a mail-order house does not expect to be forced to travel to a distant forum. It thus lacks experience in out-of-state litigation. When its expectations are disappointed, it is caught unprepared psychologically and, perhaps, financially. (Emphasis added.)

In *Conn v. Whitmore*, 342 P.2d 871 (1959), an Illinois horse fancier wrote to the defendant in Utah, offering to sell him several horses. The defendant had a friend inspect the horses in Illinois, accepted the offer by mail from Utah and sent a servant to Illinois to pick up his purchases. The Court refused to enforce an Illinois judgment against the buyer. "It was not the defendant Utah resident who took the initiative by going into Illinois to transact business, nor did he engage in any activity resulting in injury or damage there. Quite the contrary, it was the plaintiff resident of Illinois who proselyted for business in Utah." Much the same can be said of Spiegel's relationship with its out-of-State mail-order purchasers.

Thus, Spiegel's suits in Illinois courts against out-of-State retail mail-order purchasers would be deemed beyond the pale of the Illinois long-

arm statute whether one considers the extent of such purchasers' activities within Illinois or whether one considers the extent of the interstate business of such purchasers or whether one considers the participation of such purchasers in the terms and conditions of the contract. In short, under the doctrine of *International Shoe, supra*, considering the inconveniences to each party and the quality and nature of the activity being conducted within the forum, the maintenance of a suit by Spiegel in Illinois against out-of-State retail mail-order purchasers could not but offend traditional notions of fair play and substantial justice. See Currie, *The Growth of the Long Arm*, 1963 U. Ill. L.F. 533, 577. Such practice is oppressive since the distance, cost and inconvenience of defending such suits in Illinois effectively deprives out-of-State defendants of a reasonable opportunity to appear, answer and defend.

Nor can it be denied that the practice causes substantial injury to such defendants since a default judgment may be entered in Illinois without defendants effectively being able to contest it, ultimately operating to their substantial economic detriment in the impairment of their credit standing if nothing else. As the court noted in *Barquis v. Merchants Collection Association of Oakland, Inc.*, 496 P.2d 817 (1972):

Knowingly filing actions in distant counties in order to gain an unconscionable advantage is not a unique or isolated practice, but instead has been continuously identified * * * as a widespread and common abuse in the debt collection field.

Respondent argues, nevertheless, that if, indeed, this practice of Spiegel is violative of due process, it cannot be acted upon without a second suit in the State of the defendant purchaser where the latter may raise the issue of due process and, if successful, prevent collection. It is unlikely, however, that such purchaser in the second suit would have an opportunity to raise any valid defenses on the merits or make counter-claims or correct the damage done to his credit rating. Moreover, such circuitous and last-ditch defense tarnishes the machinery of justice. Supreme Court Chief Justice Burger noted that there was a need to improve the machinery of justice so that the sense of confidence in the courts will not be destroyed by a belief among people "who have long been exploited" that "the courts cannot vindicate their legal rights from fraud and overreaching in the smaller daily transactions of life." 69 U.S. News & World Report 68 (No. 8, Aug. 13, 1970). It is even more incumbent upon the Federal Trade Commission which is specifically charged with protecting the public from unfair trade practices to act under these circumstances. See *Barquis, supra*, p. 828.

The injury to such mail-order purchasers subjected to suits in distant forums was pointed out not only by the courts but by others as well.

The National Commission on Consumer Finance, for example, stated in its report of December 1972:

Many states permit a suit of money judgment to be brought in a county where either the plaintiff or defendant resides. This type of venue provision can easily be abused by plaintiffs in collection matters. For example, if the plaintiff-creditor has multiple locations or a central place of business fairly distant from the county or location where most of its customers reside, it can initiate suit in a venue (location) which, though "legally" proper, is extremely distant from or inconvenient to the debtor-defendant. The 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.

Similar observations are contained in the final draft of the Uniform Consumer Credit Code by the National Conference of Commissioners on Uniform State Laws (1974) and in the first final draft of the National Consumer Act (National Consumer Law Center, Boston College Law School, Brighton, Mass. (1970).

Even if the debtor's defense was totally lacking in merit, he should not have been denied his opportunity to assert it. Even the most deadbeat debtor can perceive the perversion of justice in a procedure that allows a default judgment to be entered against him in a court at the other end of Texas, (Sampson, *Distant Forum Abuse in Consumer Transactions*, 51 Tex. L.R. 269 (1973)).

The Commission's guidelines in ascertaining fairness or unfairness were noted by the Supreme Court in *Sperry & Hutchinson v. Federal Trade Commission*, 405 U.S. 233, 244-45 n. 5 (1972). Where, as here, the practice has been found to offend public policy as it has been established by statutes, common law or otherwise and where it is oppressive and causes substantial injury to consumers, such practice may be found unfair and prohibited. I have found that Spiegel's practices involved in this proceeding lack due process and do not conform to the objectives of long-arm statutes. But even if they had been valid under such statutes, it would not change the outcome of this proceeding. What may have been lawful heretofore may, nevertheless, be found to have become an unfair trade practice under current community standards of fair dealing. See, e.g. *Federal Trade Commission v. Standard Education Society*, 86 F.2d 692, 696 (1936). I have found that Spiegel's use of the Illinois long-arm statute against out-of-State retail mail-order purchasers would not comport with fair play and would be deemed unfair. Under such circumstances, the Commission is authorized to act even in the absence of proof of actual injury to anyone. See *Spiegel, Inc. v. Federal Trade Commission*, 494 F.2d 59, 62 (1974).

THE REMEDY

The Commission's authority and obligation to enter an order of sufficient breadth to ensure that a respondent will not engage in future violations of the law is well established; the Commission has widest

discretion to fashion suitable order provisions, not limited to the exact nature of the specific violations, to protect the public interest. *Federal Trade Commission v. Colgate-Palmolive Co.*, 380 U.S. 374, 392, 394-5 (1965); *Federal Trade Commission v. National Lead Co.*, 352 U.S. 419, 428-30 (1957); *Federal Trade Commission v. Ruberoid Co.* 343 U.S. 470, 473 (1952); *Jacob Siegel Co. v. Federal Trade Commission*, 327 U.S. 608, 611-13 (1946). The only limitations set by the courts are that the order provisions must be reasonably related to the unlawful practices and must be sufficiently clear and precise in defining understandable parameters of compliance and enforcement. *Colgate*, 380 U.S. at 392, 394-95; *National Lead*, 352 U.S. at 428-30; *Ruberoid*, 343 U.S. at 473; *Federal Trade Commission v. Cement Institute*, 333 U.S. 683, 726 (1948).

Thus, Paragraph One of the order herein prohibits the institution of suits against a defendant other than where defendant resides or where the contract sued upon was signed. This will not preempt any rule of law which further limits choice of forum and is similar to the consent orders issued by the Commission in *Montgomery Ward & Co.*, C-2602 (Nov. 1974) [84 F.T.C. 1337] and *West Coast Credit Corp.*, C-2600 (Nov. 1974) [84 F.T.C. p. 1328].

Paragraph Two of the order herein is also akin to the consent orders in *Montgomery Ward* and *West Coast Credit*, *supra*. It requires Spiegel to terminate any suit instituted contrary to the provisions of Paragraph One above and vacate any default judgment entered thereunder, although a change of forum is permitted instead. Respondent opposes this paragraph as harsh and unfair. But this termination requirement is triggered only after Spiegel learns that such a suit had been instituted. Complaint counsel interprets this paragraph of the order to be prospective in effect and not disturbing existing judgments. Consequently, the burden on Spiegel should not be undue, and would insure that Spiegel did not retain the fruits of a suit and judgment improperly, but in good faith, obtained. Moreover, this paragraph permits Spiegel to seek a change of forum where permitted by State law. At the same time, defendants are to be given a reasonable opportunity to defend the new proceeding by Spiegel.

Paragraph Three of the order herein requires Spiegel to notify credit bureaus and consumer reporting agencies, as well as any others upon request of the defendant, of the termination of suits improperly filed and the vacation of default judgments obtained thereunder. This is necessary to overcome the harm done to the defendant's credit reputation by the filing of an improper suit even though the suit may have been terminated later.

Paragraph Four of the order herein concerns recordkeeping. It

requires Spiegel to prepare and maintain a summary of consumer law suits filed for two years following the commencement of this order. This will enable the Commission to monitor compliance and should not constitute an undue burden to Spiegel which can comply with relatively slight clerical operations at the scene of such activity. It would be much more burdensome for the Commission to undertake such monitoring considering Spiegel's far-flung operations. This paragraph also requires Spiegel to prepare such a summary for the year preceding the issuance of the complaint herein, Aug. 7, 1974. This will enable the Commission to gauge the effectiveness of the order and is consistent with the Commission's powers. See, *e.g.*, *National Dynamics Corp. v. Federal Trade Commission*, 492 F.2d 1333 (1974); *Tashof v. Federal Trade Commission* 437 F.2d 707, 715 (1970); *Arthur Murray Studio of Washington, Inc.*, 78 F.T.C. 401, 436 (1971).

Paragraphs Five, Six and Seven of the order herein are standard provisions.

ORDER

It is ordered, That respondent Spiegel, Inc., a corporation, and its successors, assigns, officers, agents, representatives and employees, directly or through any corporation, subsidiary, division, or other device, including any collection agency, in connection with the collection of retail credit accounts in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

Instituting suits except in the county where defendant resides at the commencement of the action, or in the county where the defendant signed the contract sued upon. This provision shall not preempt any rule of law which further limits choice of forum or which requires, in actions involving real property or fixtures attached to real property, that suit be instituted in a particular county.

It is further ordered, That, where respondent learns subsequent to institution of a suit that the preceding paragraph has not been complied with, it shall forthwith terminate the suit and vacate any default judgment entered thereunder. In lieu of such termination, respondent may effect a change of forum to a county permitted by the preceding paragraph, provided that respondent gives defendant notice of such action and opportunity to defend equivalent to that which defendant would receive if a new suit were being instituted. In all cases respondent shall provide defendants with a clear explanation of the action taken and of defendants' rights to appear, answer and defend in the new forum.

It is further ordered, That where respondent terminates a suit or vacates a judgment pursuant to the preceding paragraph, it shall give

notice of such termination or vacation to each "consumer reporting agency," as such term is defined in the Fair Credit Reporting Act (15 U.S.C. §603), which it has been informed or has reason to know has recorded the suit or judgment in its files. Additionally, respondent shall furnish such notice to any other person or organization upon request of the defendant.

It is further ordered, That respondent prepare and maintain a summary of suits instituted, pending, terminated, or acted upon subsequent to judgment. This summary shall contain each defendant's name, address, and county of residence; county where the contract was signed by the defendant, if the suit was not instituted in the residence county; county where served; date served; date filed; docket number; name and location of court in which filed; name of plaintiff (if a collection agency suing in its own name); amount claimed; and disposition (including garnishment or execution, if any). Where a suit has been instituted in a county other than where defendant resides or signed the contract, the reason for this choice of forum shall be explained. This summary shall cover three years, including Aug. 1, 1973 to Aug. 1, 1974, and two years immediately following effective date of this order. A copy of this summary shall be submitted to the Federal Trade Commission on a quarterly basis except that the summary of activity for the first year shall be submitted within sixty days after the effective date of this order.

It is further ordered, That respondent shall forthwith deliver a copy of this order to each of its subsidiaries and operating divisions, to each collection agency currently collecting any of respondent's retail credit accounts, and to any other collection agency prior to referral to it of any of respondent's retail credit accounts. Respondent shall obtain and preserve signed and dated statements from each collection agency, acknowledging receipt of the order and willingness to comply with it.

It is further ordered, That respondent notify the Commission at least thirty days prior to any proposed change in the corporate respondent such as dissolution, assignment or sale resulting in the emergence of a successor corporation, the creation or dissolution of subsidiaries or any other change in the corporation which may affect compliance obligations arising out of the order.

It is further ordered, That respondent shall, within sixty days and at the end of six months after the effective date of the order served upon them, file with the Commission a report, in writing, signed by respondent setting forth in detail the manner and form of its compliance with the order to cease and desist.

OPINION OF THE COMMISSION

BY DIXON, *Commissioner*:

Complaint in this matter was issued on Aug. 7, 1974, charging that respondent's use of an inconvenient forum in which to sue certain of its customers constituted an unfair act or practice, in violation of Section 5 of the Federal Trade Commission Act, 15 U.S.C. §45. Proceedings before the administrative law judge were brief. Respondent admitted all the factual allegations of the complaint but argued they did not warrant a finding of illegality, or, at least, the imposition of an order. The administrative law judge disagreed, sustained the complaint, and entered an order. Respondent has appealed.

The facts are readily summarized. Respondent is a catalog retailer, engaged in the advertising, offering for sale, sale and distribution of clothing, household goods, appliances, tools, tires and various other articles of merchandise (I.D. 2).¹ Respondent's principal place of business is in Chicago, Ill. (I.D. 1). In the course of its mail-order catalog business it receives orders in Illinois from purchasers domiciled throughout the country, and ships products to them in their home States (I.D. 3). Respondent regularly extends credit to consumers to facilitate their purchase of its products (I.D. 4), and in the course of collecting overdue accounts, it regularly sues purchasers who reside in States outside of Illinois (hereinafter "out-of-State" defendants) in the Circuit Court of Cook County, Ill. Almost all out-of-State defendants have received respondent's catalogs or other advertising material, and executed purchase orders or contracts in their home States. Almost all of these defendants have had no pertinent contact with the State of Illinois other than their dealings with respondent (I.D. 5). The distance, cost, and inconvenience of defending such suits in Illinois place a virtually insurmountable burden on out-of-State defendants who might wish to defend the charges against them (I.D. 6).

I.

It is perhaps to respondent's credit that on appeal it has made less effort to defend the justness of its own prior conduct than to challenge the propriety of Commission action to change it. We agree with the administrative law judge that respondent's activities do fall squarely within Section 5's proscription of unfair acts and practices, and that

¹ The following abbreviations are used herein:

I.D. - Initial Decision (Finding No.)

I.D. p. - Initial Decision (Page No.)

RB - Respondent's Appeal Brief to the Commission (Page No.)

RPF - Respondent's Proposed Findings of Fact and Law

CB - Complaint Counsel's Reply Brief to the Commission (Page No.)

remedial action is warranted. The Commission has previously described factors it will consider in determining whether a practice is "unfair" within the statutory meaning:

(1) Whether the practice, without necessarily having been previously considered unlawful, offends public policy as it has been established by statutes, the common law, or otherwise—whether, in other words, it is within at least the penumbra of some common law, statutory, or other established concept of unfairness;

(2) whether it is immoral, unethical, oppressive, or unscrupulous;

(3) whether it causes substantial injury to consumers.***²

In seeking the source of public policy with respect to questions of jurisdiction and the proper use of judicial fora for debt collection, we must begin with the guarantees of due process as they have been articulated by courts. We think there can be little question that Spiegel's use of an Illinois situs to sue its out-of-State debtors offends traditional notions of due process and denies consumers the meaningful opportunity to answer and defend charges against them which it is the purpose of the law to provide.

Spiegel contends that it has merely made proper use of the Illinois "Long Arm Statute,"³ which confers jurisdiction over parties who are, *inter alia*, "doing business" in Illinois, to the extent a suit concerns such business. The statute has been construed to confer jurisdiction as broad as that permitted by the Constitution *Nelson v. Miller*, 11 Ill. 2d 378, 143 N.E. 2d 673, 679 (1957). Complaint counsel reply (and the administrative law judge so found) that suit against out-of-State debtors in the circumstances defined by the complaint denies due process, and, thus, could not come within the grant conferred by the Illinois statute (I.D. p. 8 [pp. 431, 432, herein]).⁴

The Supreme Court has set forth the general standard for permissible *in personam* jurisdiction:

[D]ue process requires only that in order to subject a defendant to a judgment *in personam*, if he be not present within the territory of the forum, he have certain minimum contacts with it such that the maintenance of the suit does not offend "traditional notions of fair play and substantial justice." *International Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945).

Subsequent decisions have made clear that a defendant need not have entered a State or have had extensive contacts with it in order to satisfy the constitutional test *Travelers Health Association v. Virginia*, 339 U.S. 643 (1950); *McGee v. International Life Insurance Co.*, 355 U.S. 220 (1957).

² "Statement of Basis and Purpose of Trade Regulation Rule 408, Unfair or Deceptive Advertising and Labeling of Cigarettes in Relation to the Health Hazards of Smoking," 29 Fed. Reg. 8355 (1964), cited in *FTC v. Sperry & Hutchinson Co.*, 405 U.S. 233, 244-45 n. 5 (1972).

³ Ill. Rev. Stat., Supp. Ch. 110 §176, 1967.

⁴ Respondent's argument that the Commission in this proceeding is challenging the validity of the Illinois statute itself is patently incorrect. To the extent the Illinois statute is relevant, the question is whether its narrow and particular *use* by Spiegel is consistent with federal law. Respondent has pointed out no opinion by an Illinois court or any other holding that Spiegel's particular use of the long arm statute is a proper one.

While extending the reach of *in personam* jurisdiction, courts have continued to recognize the impropriety and fundamental unfairness of assuming jurisdiction over defendants whose connection with the forum State is tenuous at best, who have made no attempt to avail themselves of the benefits and protections of the laws of the forum State (e.g., *Hanson v. Denckla*, 357 U.S. 235, 253 (1958)), and who have no means or expectation of defending suit in a distant locale. Compare *McQuay, Inc. v. Samuel Schlosberg, Inc.*, 321 F. Supp. 902 (D. Minn. 1971) in which the court said:

The general philosophy of long arm statutes is to protect citizens of a state where a nonresident comes into the State directly or indirectly to sell something or solicit sales, or where, even though out of state, a nonresident sells a product which is brought into or comes to rest in the State. The nonresident thus receives the benefit and protection of the state's laws and profits or hopes to from its adventure therein. The nonresident is the aggressor or initiator. It is appropriate that such a nonresident seller should respond to service of process in that state. (At 906.)

With *Nordberg Div. of Rex Chainbelt Inc. v. Hudson Engineering Corp.*, 361 F. Supp. 903 (E.D. Wisc. 1973) in which the court reviewed underlying policy considerations militating against assertion of jurisdiction over a nonresident mail order purchaser:

A customer of a mail-order house, be it an individual or a small company engaged in a one-state operation, is also more likely to be unprepared to defend itself in a foreign forum than is a company which transacts a substantial amount of interstate business. When almost all of its business is conducted in its home state, a customer of a mail order house does not expect to be forced to travel to a distant forum * * *. When its expectations are disappointed, it is caught unprepared psychologically and, perhaps, financially. (At 907.)

It is perhaps an oversimplification to say that the courts have drawn a firm jurisdictional line between buyers and sellers, but those categories are clearly of relevance to the extent they are used "as a short-hand means of expressing the differences between passive and active involvement in a transaction." *In Flight Devices Corporation v. Van-Dusen Air, Inc.*, 466 F.2d 220, 233 (6th Cir. 1972). Jurisdiction over an out-of-State purchaser may be appropriate, but only where the buyer has taken an active role in negotiation or performance of the contract, or has had other significant contacts with the forum State. Thus, in finding that a large corporate purchaser could be sued in the vendor's home State, the First Circuit distinguished its role from that of the usual long distance customer:

On this background the extent of United's participation in the economic life of Massachusetts seems clearly to rise above that of a purchaser who simply places an order and sits by until the goods are delivered * * *. *Whittaker Corporation v. United Aircraft Corporation*, 482 F.2d 1079, 1084 (1973).

It is clear, however, that Spiegel's retail credit customers are the quintessential passive buyers, who do sit by until the goods are delivered. They have purchased in response to respondent's advertising

or mailing of its catalog. They have had no contact with the State of Illinois other than to mail in a standardized contract signed in their home State. They have not sought the benefit and protection of Illinois laws, and they most certainly have no expectation of being required to travel to Illinois to engage in litigation should a dispute develop concerning the merchandise. Nor, undoubtedly, do most have the means to launch a cross-country defense on procedural or substantive grounds.

While neither side has cited a holding precisely on point, there appear to be numerous instances in which courts, in the course of resolving related problems, have considered situations virtually the same as that involved here, and concluded that jurisdiction over an out-of-State mail order customer would contravene due process. Indeed, one reason that this narrow point has never been the subject of a litigated holding may be that sellers' counsel have considered it too obvious to withstand scrutiny and have backed off if faced with a contest.⁵ As the Illinois District Court commented in *Geneva Industries, Inc. v. Copeland Construction Co.*:

The notion that any customer of an Illinois based mail order house such as Sears Roebuck or Montgomery Ward would be subject to the jurisdiction of Illinois courts is obviously violative of the most minimal standard of minimum contacts and the fundamental structure of the federal system. 312 F. Supp. 186, 188 (1970).

In *McQuay, Inc. v. Samuel Schlosberg, Inc.*, *supra*, a New York-based contractor was solicited by a Minnesota corporation's New York agent. It placed an order and failed to pay. In denying jurisdiction under Minnesota's long-arm statute, substantially identical to that of Illinois, the court reasoned that:

If plaintiff's position is sound, then it or any other Minnesota manufacturer can sue all of its customers wherever they may be located in the United States who for good or bad reasons have failed to pay their bills or the purchase price of goods.* * * This concept almost completely obliterates state lines.* * * (At 906.)

In *Conn v. Witmore*, 9 Utah 2d 250, 342 P. 2d 871 (1959), the court denied enforcement of a default judgment rendered in Illinois against a Utah purchaser who had sent his servant to Illinois to inspect and pick up the merchandise, and remitted payment by mail to the Illinois vendor. The court reasoned that:

Brief reflection will bring to mind difficulties to be encountered if the ordering of merchandise in a foreign state by mail and taking delivery through a designated carrier * * * is to be deemed "doing business" in a foreign state which will draw one into the orbit of the jurisdiction of its courts.* * * Mail order houses, for example, accept and fill orders from all over the country. If they could sue on their own accounts in their own state where it would be highly inconvenient for out-of-state customers to defend, and forward the judgments to the jurisdictions where the customers live, demanding full faith and credit for them, this would effectively prevent the customers from presenting a meritorious defense where one existed. The ultimate result would be to dissuade

⁵ See RPF, Appendix A, p. 2.

customers from doing business across state lines by mail. Thus what may seem a temporary advantage to such businesses, in all likelihood would be detrimental to them and to business generally in the long run. (At 342 p. 2d 874-75.)

More recently, an Illinois District Court denied jurisdiction in a suit brought by an Illinois corporation against a Michigan corporation which had leased railroad cars from plaintiff, having been solicited by the vendor's agents in Michigan. The court concluded that:

The interpretation by state and federal courts that the Illinois Long-Arm Statute does not extend Illinois jurisdiction to such cases as the instant action rests on logic and hard fact. To grant jurisdiction in such cases would have an adverse effect on commerce because such a decision would subject any customer of an Illinois business, manufacturer, or mail order house to Illinois jurisdiction in the event of suit arising solely out of the acceptance by mail of an Illinois resident's offer. The ultimate result would be to dissuade customers in foreign states from doing business by mail or even telephone with Illinois businessmen. *United States Railway Equipment Co. v. Port Huron and Detroit Railroad Co.*, 58 FRD 588 (N.D. Ill. 1973).

To the same effect are numerous other reported cases, e.g., *In-Flight Devices Corp. v. Van Dusen Air, Inc.*, 466 F.2d 220, 232-33 (6th Cir. 1972); *Nordberg Div. of Rex Chainbelt Inc. v. Hudson Engineering Corp.*, 361 F. Supp. 903, 906-07 (E.D. Wisc. 1973); *Fourth Northwestern Nat. Bank v. Hilson Industries, Inc.*, 264 Minn. 110, 117 N.W. 2d 732 (1962); *"Automatic" Sprinkler Corp. v. Seneca Foods Corp.*, 280 N.E. 2d 423, 425 (Mass. 1972); *Marshall Egg Transport Co. v. Bender-Goodman Co., Inc.*, 275 Minn. 534, 148 N.W. 2d 161 (1967); *Tiffany Records Inc. v. M.B. Krupp Distributors, Inc.*, 81 Cal. Rptr. 320, 327, 276 Cal. App. 2d 610 (1969); *Belmont Industries, Inc. v. Superior Ct. of Stanislaus County*, 107 Cal. Rptr. 237, 31 Cal. App. 3d 281 (1973).⁶

From the foregoing we conclude that Spiegel's practice of suing its out-of-State mail order customers in Illinois courts is patently offensive to clearly articulated public policy, intended to guarantee all citizens a meaningful opportunity to defend themselves in court.

We also find that Spiegel's practices are oppressive, and injurious to consumers. The burdens imposed on a consumer-debtor by the creditor's use of an inconvenient forum have been highlighted in a *Staff Report on Debt Collection Hearings* compiled by the Commission's New York Regional Office, and cited by complaint counsel:

The plaintiff, having selected a forum convenient to himself, may have at the same

⁶ Respondent has made no effort to distinguish the extensive case law cited by complaint counsel in support of their position. We have carefully reviewed the decisions cited by respondent at pages 32-36 of its Appeal Brief, involving construction of the Illinois long-arm statute, e.g., *Ziegler v. Houghton-Mifflin Co.*, 80 Ill. App. 210, 224 N.E. 2d 12 (App. Ct. 2d Dist. (1967)); *Koplin v. Thomas, Haab, and Boffs*, 73 Ill. App. 2d 242, 219 N.E. 2d 646 (App. Ct. 1st Dist. 1966); *O'Hare International Bank v. Hampton*, 437 F.2d 1173 (7th Cir. 1971). None of these matters involved, nor did the courts therein discuss, the type of situation at issue here, and of concern to courts in cases cited by complaint counsel, i.e., a passive consumer mail order buyer and a large vendor who initiates and sets the terms of the transaction. Respondent's reliance on *McGee v. International Life Insurance*, *supra*, is similarly misplaced, in light of the wide difference of involvement in the transaction between the defendant vendor in that case and the defendant consumers in this, and in view of the Court's heavy reliance in that case on the state's interest in providing its citizens with an effective means of suing insurers who refuse to pay their claims 355 U.S. 223-24.

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 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 motions 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 (at pages 123-24; April 1973).⁷

It is not surprising that all of the cases cited by counsel in their briefs have involved well-heeled defendants and substantial sums of money, which made it economically worthwhile for the defendants to retain counsel to contest the issue of jurisdiction. If lawyers worked for free, and there were no limit to their numbers, Spiegel's practices would cause us less concern. In fact, however, it is probable that for many of Spiegel's defaulting customers, like most consumers who are sued for small debts, the only meaningful and economically viable opportunity they have to defend a suit against them is to appear in court *pro se* and argue their case. This opportunity is totally foreclosed by respondent's use of the Cook County forum, which forces the consumer who wishes to defend to appear in a courtroom hundreds or thousands of miles from home, at a cost in travel alone which may exceed the amount in controversy. The option of hiring a lawyer who would be able to file a motion contesting jurisdiction is likely to be equally unviable. Nor do we think it lessens the damage done to argue that judgments unfairly obtained by Spiegel would be rejected if it attempted to collect on them. Affirmative efforts to defend a collection suit can also impose costly and unaccustomed burdens on the consumer, and in any event there are many injurious uses which can be made of improper judgments short of execution, such as sully credit records cf. *Riverside & Dan River Mills v. Menefee*, 237 U.S. 189, 195-97 (1915).

Spiegel has suggested that it confined its Illinois collection suits to those involving "undisputed balances" in which the debtor "could not be persuaded to pay."⁸ It is clearly not for Spiegel, however, to decide which of its debtors have defenses so unmeritorious that they do not deserve a reasonable opportunity to defend themselves in judicial

⁷ This passage discusses the effect of use of inconvenient venue within the debtor's home State. Spiegel's suits in an inconvenient venue outside the debtor's State can hardly be less oppressive. See also, *Consumer Credit in the United States, Report of the National Commission on Consumer Finance*, pages 41-42 (Dec. 1972).

⁸ RPF, Appendix A, page 2.

proceedings brought against them. In a society which prizes the right of everyone to a day in court, there can be little doubt that substantial injury is done whenever the meaningful opportunity to defend is foreclosed, no matter what the outcome would have been absent the foreclosure. As the Supreme Court noted more than a half century ago in *Coe v. Armour Fertilizer Works*:

To one who protests against the taking of his property without due process of law, it is no answer to say that in his particular case due process of law would have led to the same result because he had no adequate defense on the merits. 237 U.S. 413, 424 (1915).

Because Spiegel's practice of suing its out-of-State mail order customers in Illinois is contrary to clearly established public policy favoring a meaningful opportunity for all citizens to defend suits brought against them, and because this conduct is oppressive and injurious to consumers in denying them valuable rights which our society holds dear, we conclude that Spiegel has engaged in an unfair practice within the meaning of Section 5 of the Federal Trade Commission Act.

II

Counsel for respondent has raised a number of objections to the entry of an order, which we believe are without merit. Counsel suggests that the Commission should proceed by rulemaking rather than "singling it out" for imposition of sanctions. While rulemaking would not necessarily be inappropriate in this circumstance, it is well settled that the Commission may proceed by adjudication against an offender without simultaneously pursuing all others. *Moog Industries, Inc. v. Federal Trade Commission*, 355 U.S. 411 (1958), *cert. denied* 356 U.S. 905 (1958); *Ger-Ro-Mar, Inc., et al. v. Federal Trade Commission*, No. 74-2343 (2d Cir., June 16, 1975). In addition, at the same time that suit was brought against Spiegel, three other firms, including Montgomery Ward, were cited for practices involving suit in inconvenient fora, and those three all consented to orders imposing the same limitations on choice of forum as are contained in the order of the administrative law judge.⁹ In light of its holding in this matter the Commission will certainly view with care the allegedly identical practices of others which may come to its attention (though respondent has not suggested whom it has in mind), but we do not believe that imposition of an order on respondent amounts, by any standard, to an abuse of discretion *Federal Trade Commission v. Universal-Rundle Corp.*, 387 U.S. 244 (1967).

A related contention on Spiegel's part is that the Commission should

⁹ *Montgomery Ward & Co.*, C-2602 (Nov. 1974); *West Coast Credit Corp.*, C-2600 (Nov. 1974); *Commercial Service Co., Inc.*, File No. 732-3434 (consent order accepted and placed on public record for comment).

stay its hand because of the "novelty" of the legal position asserted in the complaint. Spiegel proposes that if the Commission will not proceed by rulemaking it should issue a declaratory judgment in this proceeding, stating that the practice is unlawful but omitting a binding order. We cannot agree with Spiegel's suggestion that somehow its practice has been lawful until now. We think it is more accurate to say that Spiegel has in the past gotten away with something that its counsel ought to have recognized, in light of the numerous decisions cited hereinbefore (some of which were a matter of public record before Spiegel contends it began its practice), was at best a highly dubious activity.¹⁰ There may be instances in which it would be inequitable to impose a harsh order on a respondent based upon a novel interpretation of the law. This is nowhere near such a case. The order imposed is not harsh, and not particularly difficult of compliance. And the Commission's "novel interpretation" of law has been foreshadowed, indeed dictated, by substantial prior precedent. We do not believe that whenever the Commission resolves a point of law for the first time in an adjudication it must omit an order against the violator. Acceptance of Spiegel's argument would require no less.

Spiegel also contends that the Commission may not "pre-empt" the laws of Illinois by limiting the reach of the Illinois long-arm statute. Relatedly, Spiegel argues that a sufficient remedy is afforded injured debtors by the courts of Illinois, which can determine on a case-by-case basis whether or not jurisdiction lies therein.

With respect to the pre-emption argument, the Commission does not believe that its decision in this matter is in any way inconsistent with the law of Illinois, which has necessarily been construed by the courts of that State to afford all defendants due process *Nelson v. Miller*, *supra*. As noted earlier, Spiegel has cited no precedent from Illinois or elsewhere to suggest that an Illinois court could find its use of the long-arm statute to be proper. To the contrary, more than one Illinois federal district court judge, upon considering the precise issue before us, has expressed the view that Illinois law would not favor Spiegel's behavior, *e.g.*, *United States Railway Equipment Co. v. Port Huron and Detroit Railroad Co.*, *supra*; *Geneva Industries v. Copeland Construction Co.*, *supra*.

It may be argued that the baseline courts in Cook County have tacitly sanctioned Spiegel's construction of the long-arm statute by

¹⁰ In this regard it may not be irrelevant to note that in Appendix A of respondent's "Proposed Findings of Fact and Conclusions of Law" before the administrative law judge, respondent's vice-president/secretary states that Spiegel instituted its experimental program of suing out-of-State debtors in Cook County "to determine what the collection results would be without recourse to execution or garnishment on the judgments obtained against delinquent debtors." In the same affidavit it is stated that in those rare instances when a consumer objected to the Illinois venue, the suit was dropped. We wonder why, with an "undisputed balance" at stake, Spiegel should desist from proceeding in a forum it assertedly believed to be entirely proper.

entering default judgments in its favor. It is questionable, however, whether these courts have ever really had occasion to consider the legal issues involved here. While there is authority to suggest that a court should consider on its own initiative whether it has subject matter jurisdiction before entering a judgment, there is little authority to suggest that a court, when faced with valid proof of service of process, a petition by plaintiff, and no answer by defendant, is obliged before entering a default judgment to look behind the pleadings to determine *sua sponte* whether it possesses *in personam* jurisdiction.¹¹ Particularly since Spiegel, by its own admission, has withdrawn its suit in the rare case when a defendant had the legal resources or legal acumen to challenge jurisdiction, the failure of the Cook County Circuit Court to put a spontaneous stop to respondent's practice appears to us to be of slight precedential value as a guide to the proper construction of the Illinois long-arm statute.

Moreover, assuming *arguendo*, and contrary to what appears to be the fact, that Illinois law could somehow be read to condone Spiegel's conduct, such conduct must nevertheless fall in the final analysis before clear Federal policy which condemns it. Respondent does not challenge the proposition that where State and Federal laws conflict, Federal policy governs *Free v. Bland*, 369 U.S. 663 (1962). While courts will endeavor to avoid reading a pre-emptive intention into Federal law, they will not hesitate to find pre-emption where a clear conflict exists *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 142-43 (1963). Moreover, any conflict which exists here is minimal. This is not a situation in which State and Federal law compel two different and inconsistent courses of conduct. Rather, at most, Spiegel can argue that State law permits that which Federal policy forbids. Under these circumstances there can be no reason why clear Federal standards should be bent or ignored.¹²

With respect to the alleged remedy already available to individuals sued in Cook County courts, we think it is evident that such a remedy has proven illusory in the majority of cases. We strongly suspect that the tribunals of Illinois would not have hesitated to throw Spiegel out of court were there ever a case in which a defendant chose to mount a defense on the jurisdictional question, while Spiegel stayed with its

¹¹ Neglect of uncontroverted jurisdictional issues occurs in administrative proceedings as well. As complaint counsel have pointed out in their brief (CB 22-23), the administrative law judge did not enter a conclusion of law in his initial decision stating that the Commission has jurisdiction in this case. Spiegel has not challenged the Commission's jurisdiction, and we hereby do conclude that the Federal Trade Commission has jurisdiction over the respondent and over the subject matter of this proceeding.

¹² We similarly do not believe that the Tenth Amendment forbids Commission action (RB 40-42). Even if the Commission's action is viewed as imposing a limitation on State authority to authorize suits, rather than as imposing a limitation on Spiegel's ability to abuse the judicial process, it is nonetheless well-established that the Tenth Amendment does not mean that State-authorized activity may stand in the face of duly authorized Federal requirements *Maryland v. Wirtz*, 392 U.S. 183 (1968); *United States v. Darby*, 312 U.S. 100, 123-24 (1941).

suit. In fact, however, few defendants are likely to know how to challenge Spiegel's abuse of the long-arm statute by themselves, and few are likely to pay for a lawyer to mount a cross-country contest when the cost of so doing may well exceed the amount at issue. Faced with the typical default situation, the courts of Illinois have not in the past provided an adequate remedy on a case-by-case basis, and that is precisely the reason that action by the Commission is needed to protect consumers, and is in the public interest cf. *Barquis v. Merchants Collection Association of Oakland, Inc.*, 7 C. 3rd 94, 101 Cal. Rptr. 745, 496 P. 2d 817 (1972).

In the concluding paragraph of its brief (RB 42) respondent suggests that it has abandoned the challenged practices, and for that reason an order is not required. It is well established, of course, that discontinuance of an offending practice, particularly after initiation of governmental investigation, and in circumstances where resumption is possible, does not obviate the need for, or propriety of, an order *Libby-Owens-Ford Glass Co. v. Federal Trade Commission*, 352 F.2d 415 (6th Cir. 1965); *Cotherman v. Federal Trade Commission*, 417 F.2d 587 (5th Cir. 1969); *Coro, Inc. v. Federal Trade Commission*, 338 F.2d 149 (1st Cir. 1964), *cert. denied*, 380 U.S. 954 (1965). Moreover, we have reviewed the "Assurance of Voluntary Compliance" appended by respondent to its proposed findings of fact before the administrative law judge, and we do not believe that the promises contained therein, if adhered to, would be sufficient to eliminate the offending conduct. For example, the assurance would not prevent Spiegel from assigning its cases to collection agencies who could sue on Spiegel's behalf in objectionable fora, and the assurance would not prevent Spiegel from suing a consumer in counties other than those of residence or signing of the contract, a remedial standard we think is necessary to eliminate the unfairness which has occurred here.

III

Respondent has objected to portions of the order proposed by the administrative law judge, which is essentially the same as the notice order. Respondent does not quarrel with the first substantive paragraph of the order¹³ which establishes a "fair venue" standard for suits by respondent, requiring that it sue its consumer debtors in the county of their residence or the county in which they signed the contract sued upon.

The second substantive paragraph (III) requires that if respondent violates the preceding paragraph by suing in a distant locale, it must

¹³ Paragraph II of the Commission's revised order. References hereinafter are to the revised order entered by the Commission, which generally tracks the notice order.

take steps to terminate the suit, vacate any default judgment entered as a result, or, in the alternative, transfer the proceeding to a suitable forum and provide the defendant with an opportunity to defend. The following paragraph (IV) requires that if respondent brings a suit in an unfair forum it must take steps to notify credit bureaus of the fact that the suit has been terminated or a default judgment vacated. We believe that these two paragraphs are necessary to satisfy the objective of this proceeding, which is to protect consumers from the unfair practice in which respondent has engaged. Even should Spiegel proceed, as we trust it will, with the greatest diligence and attention to the obligations imposed by Paragraph II, there is always the possibility that through an inadvertence of one sort or another the prohibited practice will be repeated. Paragraphs III and IV are intended to ensure that should such a situation occur, and the consumer be again sued in distant forum, an adequate mechanism exists to remedy the harm done thereby. If no violations of Paragraph II occur, Paragraphs III and IV will prove to be mere surplussage; if a violation of Paragraph II does occur, we are at a loss to see how respondent could quarrel with the objectives of Paragraphs III and IV.

Respondent worries that the obligations imposed by Paragraphs II-IV are retroactive, and protests. There is no need for us to rule here with regard to the Commission's authority to require respondent to vacate existing judgments obtained prior to the order, in violation of Section 5. We think that Paragraphs II-IV on their face quite clearly apply only to suits brought after the effective date of the order, and respondent's concerns on that score are unwarranted.

Respondent takes most strenuous exception to those portions of the order which require recordkeeping. The order proposed by the administrative law judge would require that respondent provide the Commission with a summary of collection suits it has brought for a two-year period following the effective date of the order, and for a one-year period prior to the effective date of the order. The summary of suits shall contain each defendant's name, address, county of residence, county in which the defendant signed the contract (if the suit is not instituted in the residence county), county where service was made, date of service, date of filing, docket number of case, name and location of the court in which the action was filed, name of plaintiff (if a collection agency suing in its own name), amount sued for, and disposition of the case. Where a suit has been instituted in a county other than where defendant resides or has signed the contract, the reason for the choice of forum shall be explained.

Respondent objects that the reporting requirement is unduly "burdensome." With respect to the case summaries for the period

following the effective date of the order, the information required is the minimum necessary to permit the Commission to monitor compliance and, therefore, the order is warranted, even though it may impose some burden *National Dynamics Corporation v. Federal Trade Commission*, 492 F.2d 1333 (2d Cir. 1974), *cert. denied*, 43 U.S.L.W. 3280 (Nov. 12, 1974); *Tashof v. Federal Trade Commission*, 437 F.2d 707, 715 (D.C. Cir. 1970). In addition, we do not believe the order imposes a significant burden, and beyond its barebones assertion respondent has given no indication of the extent of the burden or how the order could be modified (as opposed to omitted) to alleviate the alleged difficulties.

The necessity for the required information as a means of checking compliance during an initial post-order period is clear. Respondent suggests that the Commission can evaluate compliance any time it wishes simply by scanning the docket of the Cook County courts to determine whether Spiegel has sued any customers from out-of-State. Even assuming that it were feasible for Commission investigators to check each entry on the Cook County docket to make sure that it was not Spiegel suing in a prohibited forum, respondent ignores the fact that under this procedure it could sue anywhere else, regardless of the distance of such a forum from a consumer's residence or location of contract signing, without detection. Obviously the Commission cannot feasibly search every docket in the country to determine that respondent, or its collection agencies, is not suing in a locale prohibited by the order.¹⁴ Only respondent itself can readily provide the information needed to determine whether or not it is in compliance. Moreover, the particular details required seem to us to be the fewest necessary to determine whether suit has been filed in a forum forbidden by the order.

With respect to the issue of burdensomeness, in the absence of any detailed substantiation by respondent we can only observe that it would astonish us to find that respondent does not have readily available all the information required to be reported by the order. The only possible "burden" of which we can conceive is that of transcribing or copying this information for submission in a compliance report. The fact that respondent has made no effort to estimate the cost of such transcription makes it difficult for us to take seriously its claim that it would prove costly.¹⁵

The Commission has determined that the requirement that respondent provide a litigation summary for cases brought during the year

¹⁴ Indeed, a mere docket check in most counties would be insufficient to reveal instances in which a collection agency had sued on a Spiegel account in the agency's name.

¹⁵ This is particularly so in view of the fact that three other respondents, sued at the same time as Spiegel, were willing to consent to reporting requirements identical to those involved here see n. 9, *supra*.

prior to the effective date of an order is unnecessary to determine compliance with the order subsequent to its effective date, and this provision will, therefore, be deleted. Respondent argues it is unnecessary, and complaint counsel have presented no convincing reason for its retention.

We have also modified the order slightly, to reflect the Commission's authority to enjoin practices "affecting" commerce, and to make clear (Par. I) what was implicit in the order proposed by the administrative law judge, that all provisions of the order apply to practices which Spiegel may undertake through the auspices of a collection agency or other third party.

An appropriate order is appended.

CONCURRING STATEMENT OF COMMISSIONER NYE

The Commission bases its determination that respondent has violated Section 5 of the Federal Trade Commission Act in part upon a conclusion that respondent has obtained judgments against out-of-State mail-order consumers under circumstances which fall short of the due process guarantees of the Fourteenth Amendment to the Constitution. I believe this conclusion is unnecessary and reliance upon it unwise.

It is an important principle of our jurisprudence that constitutional questions should be avoided in a case which can be resolved on statutory or common law grounds.¹ That principle should apply with special force to an administrative agency, which has no particular competence to address issues of constitutional dimension.

There appears to me no occasion to address constitutional issues in this case. While the Fourteenth Amendment imposes on the States certain minimal standards of justice and decency, Section 5 of the Federal Trade Commission Act requires the Commission "to discover and make explicit those unexpressed standards of fair dealing which the conscience of the community may progressively develop"² and to enforce adherence to those standards in consumer transactions. The semantic kinship between the "fundamental fairness" standard adopted in the due process cases³ and the "unfairness" yardstick mandated by Section 5 is not at all indicative of a legal equivalence. Although in particular cases the two standards may often coalesce, it would not be remarkable if a constitutional limitation on the activities of States were to diverge from a statutory limitation on the conduct of businessmen.

¹ See, e.g., Frankfurter, *Law and Politics* 25 (1939).

² *FTC v. Standard Education Society*, 86 F.2d 692, 696 (2d. Cir. 1936) (per L. Hand, J.), *rev'd on other grounds*, 302 U.S. 112 (1937).

³ See, e.g., *International Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945) ("traditional notions of fair play").

The Commission, quite appropriately, refers to a number of judicial decisions which express doubt about the constitutionality of a State's assertion of *in personam* jurisdiction over out-of-State mail order consumers.⁴ These decisions, together with others which do not involve the due process clause,⁵ sufficiently establish that public policy disfavors the institution of collection lawsuits against consumers in courts unreasonably remote from the consumers' place of residence. That established public policy judgment, coupled with the substantial consumer injury disclosed by the record in this case, is enough to persuade me that the litigation practices of Spiegel which were challenged in this case amount to an unfair practice within the meaning of Section 5 of the Federal Trade Commission Act.

This reasoning also disposes of respondent's argument to the effect that the Commission cannot interfere with respondent's use of the Illinois long-arm statute unless the resulting judgments against out-of-State consumers were entered unconstitutionally. Again, while the Commission's opinion seems to answer this contention by concluding that the judgments *were* entered unconstitutionally, it is not necessary to decide that question. Leaving aside the fact that no Illinois court has ever held use of the long-arm statute in the manner adopted by respondent to be proper, I am perfectly content to assume *arguendo* that respondent's long-arm litigation does not involve the Cook County courts in a violation of due process, and that the judgments respondent obtains are entitled to full faith and credit in other States. The Federal Trade Commission Act, however, is not infrequently interpreted to prohibit unfair or deceptive acts or practices regardless of whether those acts or practices are authorized by the law of the State in which they are committed. *See, e.g., FTC v. Sperry & Hutchinson Co.*, 405 U.S. 233, 239 n. 4 (1972); *Chamber of Commerce of Minneapolis v. FTC*, 13 F.2d 673, 684 (8th Cir. 1926); *Peerless Products, Inc. v. FTC*, 384 F.2d 825, 827 (7th Cir. 1960), *cert. denied* 365 U.S. 844 (1961).

This case appears to illustrate the wisdom of the rule that constitutional issues should not be decided unless necessary to the result. When the Commission issued its proposed complaint in this matter on Mar. 4, 1974, it announced simultaneously its intention to institute three similar cases: *Montgomery Ward & Co., Inc.*, File No. 742 3102 [Dkt. C-2602, 84 F.T.C. 1337]; *West Coast Credit Corp.*, File

⁴ No court, however, has expressly held such an application of a long-arm statute unconstitutional.

⁵ *See, e.g., Barquis v. Merchants Collection Association of Oakland, Inc.*, 7 C.3d 94, 101 Cal. Rptr. 745, 496 P.2d 817 (1972); *All-State Credit Corporation v. Defendants Listed in 669 Default Judgments*, 61 Misc. 2d 677, 306 N.Y.S. 2d 596 (Sup. Ct. App. Term 1970).

No. 732 3110 [84 F.T.C. 1328] and *Commercial Service Co., Inc.*, File No. 732 3404 [p. 467, herein].⁶ In those three proposed complaints, the Commission stated it had reason to believe that the practice of suing a consumer in a remote location within the consumer's own State was unfair. At issue were alleged disregard of State venue provisions (*Commercial Service*), contractual waiver of State venue provisions (*West Coast Credit*), and, apparently, reliance on State venue provisions which the Commission had reason to believe did not in the particular circumstances come up to the standards of fairness embodied in Section 5 (*Montgomery Ward*). Of all the cases, only *Spiegel* raised putative constitutional issues. Taken together, the four cases signaled the Commission's intention to decide whether it is fair to force consumers to defend collection suits in distant courts, regardless of whether those courts are outside the State of the consumer's residence and, further, regardless of whether State venue rules are followed. *Spiegel* is the only one of these cases to be reviewed by the Commission after full administrative proceedings. The forum involved happens to be out-of-State, but that was certainly not deemed critical when the case was filed.⁷ To the extent the Commission's opinion suggests otherwise, I believe it confuses the relevant assessment of public policy.

FINAL ORDER

This matter having been heard by the Commission upon the appeal of respondent from the initial decision, and upon briefs and oral argument in support thereof and opposition thereto, and the Commission for the reasons stated in the accompanying opinion, having denied the appeal in principal part:

It is ordered, That the initial decision of the administrative law judge be, and it hereby is, adopted as the findings of fact and conclusions of law of the Commission, to the extent not inconsistent with the accompanying opinion.

Other findings of fact and conclusions of law of the Commission are contained in the accompanying opinion.

It is further ordered, That the following order to cease and desist be, and it hereby is, entered:

⁶ Respondents in all three cases have since agreed to the entry of consent orders.

⁷ Nor can it be critical to the relief ordered herein. Although the specific practice held unfair in this case was suing out-of-State mail-order consumers in Cook County, Ill., it is significant that the Commission's cease and desist order prohibits Spiegel from suing a consumer anywhere other than in his county of residence or the county where he signed the contract sued upon.

Final Order

86 F.T.C.

ORDER

I

For purposes of this order, the term "respondent" means "Spiegel, Inc., a corporation, and its successors, assigns, officers, agents, representatives and employees, acting directly or through any corporation, subsidiary, division, or other device, including any collection agency."

II

It is ordered, That respondent, in connection with the collection of retail credit accounts in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from instituting suits except in the county where the defendant resides at the commencement of the action, or in the county where the defendant signed the contract sued upon. This provision shall not preempt any rule of law which further limits choice of forum or which requires, in actions involving real property or fixtures attached to real property, that suit be instituted in a particular county.

III

It is further ordered, That, where respondent learns subsequent to institution of a suit that the preceding Paragraph (II) has not been complied with, it shall forthwith terminate the suit and vacate any default judgment entered thereunder. In lieu of such termination, respondent may effect a change of forum to a county permitted by the preceding paragraph, *Provided,* That respondent gives defendant notice of such action and opportunity to defend equivalent to that which defendant would receive if a new suit were being instituted. In all cases respondent shall provide defendants with a clear explanation of the action taken and of the defendants' right to appear, answer and defend in the new forum.

IV

It is further ordered, That where respondent terminates a suit or vacates a judgment pursuant to the preceding Paragraph (III) it shall give notice of such termination or vacation to each "consumer reporting agency," as such term is defined in the Fair Credit Reporting Act (15 U.S.C. §603), which it has been informed or has reason to know has recorded the suit or judgment in its files. Additionally, respondent shall furnish such notice to any other person or organization upon request of the defendant.

V

It is further ordered, That respondent prepare and maintain a summary of suits instituted, pending, terminated, or acted upon subsequent to judgment, involving the collection of retail credit accounts by respondent. This summary shall contain each defendant's name, address, and county of residence; county where the contract was signed by the defendant, if the suit was not instituted in the residence county; county where served; date served; date filed; docket number; name and location of court in which filed; name of plaintiff (if a collection agency suing in its own name); amount claimed; and disposition (including garnishment or execution, if any). Where a suit has been instituted in a county other than where defendant resides or signed the contract sued upon, the reason for this choice of forum shall be explained. This summary shall cover the two years immediately following effective date of this order. A copy of this summary shall be submitted to the Federal Trade Commission on a quarterly basis.

VI

It is further ordered, That Spiegel, Inc., shall forthwith deliver a copy of this order to each of its subsidiaries and operating divisions, to each collection agency currently collecting any of Spiegel's retail credit accounts, and to any other collection agency prior to referral to it of any of Spiegel's retail credit accounts. Spiegel, Inc., shall obtain and preserve signed and dated statements from each collection agency, acknowledging receipt of the order and willingness to comply with it.

It is further ordered, That respondent shall notify the Commission at least thirty days prior to any proposed change in the corporate respondent such as dissolution, assignment or sale resulting in the emergence of a successor corporation, the creation or dissolution of subsidiaries, or any other change in the corporation which may affect compliance obligations arising out of the order.

It is further ordered, That respondent shall, within sixty days and at the end of six months after the effective date of the order served upon it, file with the Commission a report, in writing, signed by respondent, setting forth in detail the manner and form of its compliance with the order to cease and desist.

Complaint

86 F.T.C.

IN THE MATTER OF

BORG-WARNER CORPORATION

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF
THE FEDERAL TRADE COMMISSION ACT AND SEC. 7 OF THE
CLAYTON ACT*Docket C-2716. Complaint, Aug. 20, 1975—Decision, Aug. 20, 1975*

Consent order requiring a Chicago, Ill., automotive parts manufacturer, among other things to divest itself, within 18 months, of all assets acquired as a result of its acquisition with Unit Parts Company, reestablishing Unit Parts as a competitor. Further, respondent is required to obtain Commission approval before acquisition of any automotive parts rebuilder for a period of 10 years.

Appearances

For the Commission: *K. Keith Thurman, Roger J. McClure and Anne R. Schenof.*

For the respondent: *Charles W. Houchins, Chicago, Ill.*

COMPLAINT

The Federal Trade Commission having reason to believe that Borg-Warner Corporation, (hereinafter "B-W"), a corporation subject to the jurisdiction of the Commission, has acquired Unit Parts Company, (hereinafter "U-P"), a corporation, in violation of Section 7 of the Clayton Act, as amended (15 U.S.C. §18), and Section 5 of the Federal Trade Commission Act, as amended (15 U.S.C. §45), and that a proceeding in respect thereof would be in the public interest hereby issues this complaint, pursuant to Section 11 of the Clayton Act (15 U.S.C. §21) and Section 5 of the Federal Trade Commission Act (15 U.S.C. §45) stating its charges in that respect as follows:

I. Definitions

1. For the purpose of this complaint, the following definitions shall apply:

(a) "Automotive" refers to parts used on all self-propelled land vehicles, including automobiles, trucks, buses, tractors, self-propelled agricultural equipment and construction equipment, but excluding motorcycles.

(b) "Clutches" are clutch discs, clutch cover plates, and complete clutch assemblies.

(c) "Carburetor parts" are individual parts and kits containing such parts used to repair carburetors.