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Chapter 2. - The enforcement of consumer law in the United States by

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In the United States the great bulk of enforcement activity under consumer protection laws is initiated by public agencies rather than private individuals or groups. Later in this paper I will examine the evidence for this conclusion and offer some explanations for the phenomenon. First, however, I will briefly describe the range of public enforcement agencies, discuss some of the factors that differentiate enforcement activities between federal and state levels of government, and then indicate some of the other considerations that bear on the strategies of public enforcement agencies.

Section 1. The range of enforcement agencies

At the federal level the Federal Trade Commission has the most general jurisdiction. Its most basic power comes from Section 5 of the Federal Trade Commission Act prohibiting "unfair or deceptive trade practices and unfair methods of competition" (1). The Commission has enforcement authority under many other, more specific statutes as well. The Truth in Lending (2) Act and the Magnuson-Moss Warranty (3) Act are two good examples. There are many other federal agencies with enforcement powers and responsibilities under reasonably specific legislation. The Consumer Product Safety Commission, which enforces product design quality legislation, is a good example. The

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(1) 15 U.S.C. § 45 (1976).

(2) 15 U.S.C. §§ 1601 -1665 (1976). The most important provisions of this Act require creditors to disclose a great deal of information about the financial aspects of a consumer credit transaction. The disclosure must be made before the contract is signed.

(3) 15 U.S.C. §§ 2301-2312 (1976). The most important provisions of the Act require disclosures respecting the product warranty in consumer sale of goods transactions.

Food and Drug Administration is another important enforcement agency, and there are many others.

Most states have adopted general deceptive practices legislation containing language similar to Section 5 of the Federal Trade Commission Act. In most instances the Attorney General of the state is given the enforcement authority, and as a consequence most states have established consumer protection divisions in their Attorney General offices(1). The size of these divisions varies greatly between states; a division with five lawyers and three or four investigators would be approximately average. In addition to these divisions, there are commonly a myriad of other agencies with enforcement responsibility under more specific legislation. In the State of Wisconsin, for example, there is an Insurance Commissioner with responsibilities under various laws designed to protect purchasers of insurance; a Motor Vehicle Department which enforces, inter alia, laws and regulations protecting the car buyer; and a Banking Commissioner with authority to enforce various laws in the consumer credit field. Various licensing agencies, of which there are many at the state level, typically have authority to police consumer abuse by its licensees.

Local units of government have been involved with enforcement of consumer protection legislation only sporadically. Prosecuting attorneys often have authority to initiate criminal proceedings where criminal sanctions are provided for violation of consumer protection laws. Criminal actions are rarely initiated, however, prosecutors choosing instead to allocate their scarce resources to other activities. Some localities assume responsibility for regulating the accuracy of weights and measures. Municipal licensing of many business activities is common, and in a few jurisdictions there are procedures in place for suspending or revoking licenses for consumer abuse. In only a very few localities, however, are there general consumer protection

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(1) *LOVETT, State Deceptive Trade Practice Legislation, 46 Tulane L. Rev. 724 (1972); JEFFRIES, Protection for Consumers Against Unfair and Deceptive Business, 57 Marq. L. Rev. 559 (1974.*

activities or agencies focusing on a wide range of consumer problems (1).

Section 2. The allocation of enforcement responsibility between different levels of government

In general each level of government enforces the laws it has enacted. Because of overlapping substantive law, particularly in the area of deceptive practices, there is a need for coordination of enforcement efforts between levels of government to prevent unnecessary duplication. The paper by Dave and Louise Trubek describes some of the institutions that facilitate this coordination. My purpose here is to describe the general conclusions reached respecting the division of enforcement authority and the reasons for them.

The factors that account for the division of enforcement responsibility between state and federal agencies where there are overlapping statutes resemble closely the factors that account for the division of law-making authority between levels of government in the consumer protection area. I have grouped the factors that seem most important to me into four main categories. First, and most important to the concept of federalism in America, there are the needs of trade. Preventing undue barriers to interstate trade will sometimes require uniformity or near uniformity in consumer protection legislation,and the easiest way to achieve uniformity is to adopt legislation at the federal level. A very good example of the influence of this factor is in the area of product quality legislation, such as the legislation authorizing regulation of the manufacture of food, drugs, and some other consumer products to enhance safety. Manufactured products are often marketed nationally in the United States, and economies of scale can commonly be achieved if they can be produced according to a single or very few designs and specifications. As a consequence, most product quality legislation is federal.

At the enforcement policy level, a good example of concern for the needs of

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(1) P. SCHRAG, Counsel for the Deceived (1972), for a description of one famous local agency with general deceptive practices jurisdication (New York City).

trade.is with respect to the regulation of advertising. Both state and federal deceptive practices legislation is written sufficiently broadly to authorize regulation of virtually any advertising that is deceptive. Nonetheless, it is the almost uniform practice in the states not to attempt regulation of either print or broadcast media advertising that is distributed nationally. Rather, it is expected that the Federal Trade Commission (hereinafter sometimes referred to as the FTC) will be the exclusive agency for such regulation. On the other hand, misleading advertising appearing only on local broadcasting stations or in local newspapers is commonly subject to enforcement actions initiated at the state level. This division of enforcement responsibility is not reflected in any formal document but rather seems to be a product of a general shared understanding. The understanding reflects the economic reality of producing and distributing advertising. Statutes authorizing regulation of advertising are invariably phrased in the most general terms , making enforcement policy very important in particularizing their application to individual advertisements. The costs of advertising distributed nationally would increase considerably if it were necessary to prepare and distribute a separate advertisement for special jurisdictions because of a lack of uniformity in enforcement policy. Leaving all regulation of national advertising to the Federal Trade Commission forecloses this possibility.

A second factor possibly accounting for the division of both law-making and enforcement responsibility between state and federal levels of government is the philosophy, also derived from the concept of federalism, that one role of the federal government ought to be to insure a minimal level of the protection of human dignity throughout the country. Much of the constitutional Bill of Rights can be rationalized on this basis, for example. An example of federal consumer protection legislation that can be readily justified on this ground is the legislation establishing minimum federal exemptions in wage garnishment proceedings (1). When enacted, the federal exemptions were already less than existed in many states but the legislation explicitly pre-

(1) 15 U.S.C. §§ 1671-1677 (1976).

served the right of states to set or maintain higher exemptions, or even to prohibit wage garnishment altogether (1). This legislation, therefore, was not an effort to set uniform standards in order to satisfy the needs of trade.

It is difficult to document the application of this philosophy at the enforcement policy level. Many federal agencies will articulate this philosophy as justifying an enforcement action against a practice ordinarily left to state authorities on the ground that state enforcement activities are inadequate. It is not clear to me, however, that many federal enforcement activities are actually initiated on this basis. A good example of the ambiguity concerns the ten regional offices of the Federal Trade Commission. These offices are concerned in part with enforcement actions respecting practices more limited in geographical extent than would ordinarily justify attention by the national FTC staff based in Washington. Paradoxically, when the Reagan Administration recently proposed to close all the regional offices, the philosophy of insuring minimally acceptable enforcement programs in the states was not advanced as a rationale for their retention. Rather the Commission pled for continuation of its regional offices on the ground that they facilitated communication with consumers and businessmen by locating Commission staff closer to them. Furthermore, it is my impression that the FTC regional offices that have been most active and productive in the past have been those that have been located in areas with active and well known state agencies. It is a reasonable hypothesis that it has been competition for prestige and reputation with nearby state agencies, rather than a lack of activity by those state agencies, that has stimulated innovative enforcement activity by FTC regional offices.

A third factor accounting for the division of law-making and enforcement responsibility between state and federal agencies might be best described as political advantage. If a group believes that the circumstances permit the enactment of a federal law, or the securing of an enforcement decision at the

(1) *SCHUMAN & JANTSCHER, Effects of the Federal Minimum Exemption from Wage Garnishment on Nonbusiness Bankruptcy Rates, 77 Comm. L. J. 360 (1972).*

federal level that it favors, it is very tempting to act because of the ability of the federal government to foreclose inconsistent legislation or action at the state level through its powers of preemption. Where such action occurs, initiative at the federal level is likely to be rationalized on one of the two bases for federal action described above, in order to justify use of the federal preemption power. Yet in these circumstances a plausible argument for a need of uniformity is often lacking, and it is also further difficult to justify the federal action as establishing barely minimal standards for protecting individual dignity.

A possible example of securing federal rulemaking for political advantage is the 1975 adoption by the Federal Trade Commission of a rule outlawing the holder in due course doctrine in consumer transactions (1). At the time the doctrine, which was based in state law, was much maligned and commentators of nearly all political persuasions were agreed that the doctrine ought not to be applied in consumer transactions. Many states had already passed such legislation, and hence there was a lack of uniformity in the law at the time the FTC acted. The FTC, however, made only a passing reference to the need for uniformity as justifying federal action, instead basing its action principally on the straight forward ground that abolition of the holder in due course doctrine in consumer transactions was good policy (2). Moreover, it would have been difficult to defend the FTC rule on the basis of need for uniformity. Consumer credit is a business in which the creditor does not usually market nationally, instead marketing through local offices which can adapt their practices to meet local conditions (3). Consistent with this

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(1) FTC Trade Regulation Rule, Preservation of Consumers' Claims and Defenses, 16 C.F.R. § 433 (1979).

(2) Statement of Basis and Purpose, FTC Trade Regulation Rule on Preservation of Consumer Defenses, 40 Fed. Reg. 53524 (Nov. 18, 1975).

(3) A possible exception to this generalization concerns credit dispensed through use of a credit card. Many cards are marketed nationally, and possibly a lack of legal uniformity would cause some serious inconveniences. Perhaps this accounts for the reasonably early enactment of federal legislation regulating many aspects of the credit card transaction. 15 U.S.C. §§ 1643-1666i (1976). Even then, however, regulation of interest rates was left to the states until very recently.

economic reality, states have long had a wide variety of inconsistent regulations governing this business, and no convincing case has ever been assembled that the lack of legal uniformity seriously impedes interstate business (1). Given the unanimous opinion among disinterested commentators that abolition of the holder in due course doctrine was good policy, the FTC might plausibly have attempted to defend action on the federal level by appealing to the notion of minimal protection of human dignity. The FTC made no explicit appeal to this notion, however, and if it had, it would have been necessary to account for the fact that until the 1960's every state had applied the holder in due course doctrine in consumer transactions. It is possible for a practice so recently widely accepted to violate contemporary standards respecting minimal protection of human dignity, but it is not very likely. The most evident explanation for adoption of the rule at the federal level, therefore, is simply that its promoters seized an opportunity to "do good" as they saw it. Adoption at the federal level is difficult to defend in terms of traditional policies of federalism.

A fourth factor accounting for the division of law-making and enforcement responsibility between state and federal agencies is the amount of resources available to each, as well as considerations of efficiency in the dispensation of those resources. Federal law-making and enforcement agencies typically have more resources available to them than do their state level counterparts, in large part because of the federal government's greater taxing capacity. The enactment of a reasonably comprehensive consumer protection law can be quite draining on the resources of a state legislature, given the research and consultation with diverse interest groups that is required. For largely this reason much comprehensive consumer protection legislation adopted at the state level is drafted elsewhere -- perhaps by an organization like the National Conference of Commissioners for Uniform State Laws, perhaps copied from a state that did put the required resources into drafting a comprehensive law.

(1) The National Conference of Commissioners on Uniform State Laws proposed the Uniform Consumer Credit Code in the late 1960's, citing a need to eliminate the great diversity in state consumer credit regulation. That the Code has been adopted in only a few states -- and often only after amendments undercutting the uniformity rationale -- is testimony to how unconvincing is the case for legal uniformity in this area.

Similar considerations can affect enforcement policy. The maintenance of an enforcement action that is likely to be contested by the business affected and that raises arguable issues of fact or law can require a huge proportion of the enforcement resources available to a state agency, many of whom have only three to five lawyers. The Federal Trade Commission, on the other hand, customarily maintains many such actions simultaneously. The case for federal action is especially strong where the challenged activity is occurring in several jurisdictions and raises similar issues in each. For a single federal action can dispose of the matter finally, where state enforcement may require many essentially duplicative enforcement actions.

The enforcement activities in the early 1970's directed at pyramid sales schemes, and especially the many enterprises of Glenn Turner, provide an interesting example of the application of the last two factors in the formulation of enforcement policy. Although pyramid sales schemes have long existed in America, they became especially prevalent in the late 1960's and early 1970's. In a pyramid sales scheme, persons are asked to invest sizeable amounts in order to become a distributor of some good or service. A distributor can then sell the product, usually directly to consumers on a door-to-door basis. Much more importantly a distributor can recruit new distributors and keep a sizeable part of the investment made by each of his or her recruits. Of course, the promoter of the pyramid sales scheme receives a sizeable percentage of each initial investment by a new distributor as well.

It is possible for a distributor to make a great deal of money in a pyramid sales scheme by recruiting new distributors into the organization. Most persons lose most of their initial investment, however, making few if any door-to-door sales and failing to recruit new distributors. The fact that there were a large number of persons losing a sizeable portion of their savings caused political pressure to be brought upon many consumer protection enforcement agencies to do something in the late 1960's. The schemes, on the other hand, were so structured that there was only an arguable case as to their illegality, and it was a certainty that the promoters of the various enterprises were prepared to invest heavily in legal resources to resist any enforcement action. A few states initiated some action anyway, causing a considerable drain on the enforcement resources available to deal with other problems (1). After some successes at the state level and considerable publicity, various of the pyramid sales schemes fell into financial difficulty (2). Furthermore, political pressure for decisive action increased. At that time two federal agencies, the Securities and Exchange Commission and the FTC, initiated enforcement activities against the more prominent schemes (3).

Federal action could be justified by the greater efficiency of federal enforcement, since the particular pyramid schemes challenged were operating in most states. The federal enforcement initiatives also probably reflected political responses to the pressure to do something on behalf of the many investors who had lost sizeable sums. From the perspective of the policies underlying federalism, however, little could be said in favor of federal action. A uniform enforcement policy was not needed, as the nature of the business is such that it would be practical for a pyramid sales scheme to do business in some states while refraining in others. And given that the schemes were only of questionable illegality, that part of federalism which encourages experimentation and diversity would favor allowing the enforcement decisions to be taken at the state level. This is particularly true because of the range of enforcement responses possible. Some agencies sought to prohibit pyramid sales schemes entirely as inherently deceptive, or as essentially illegal gambling schemes, whereas others insisted only that there be more extensive disclosure to prospective new distributors of the risks of loss. Some agencies sought refunds on behalf of distributors who had suffer-

(1) *e.g. Kugler v. Koscot Interplanetary, Inc., 120 N.J. Super. 216, 293 A. 2d 682 (1972). For a case upholding the legality of a pyramid sales scheme, see Holiday Magic v. James, 209 So. 2d 47 (La. Cir. Ct. App. 1968).*

(2) *Comment, Pyramid Sales Participants: Victims or Perpetrators?, 47 Temple L.Q. 697 (1974).*

(3) *Glenn W. Turner Enterprises v. S.E.C., 474 F. 2d 476 (9th Cir. 1973); FTC Proposed Complaint Against Koscot Interplanetary, Inc., CCH Trade Reg. § 19, 576, April 12, 1971 (1970-73 Trans. Bind.).*

ed losses, whereas others sought only prospective (injunctive-type) relief.

Section 3. Setting priorities within an enforcement agency

Because of limited resources, enforcement agencies can never take action in response to all possible violations of statutes within their jurisdiction, and hence they need some system for deciding in which circumstances to act. Furthermore, when an agency decides to initiate enforcement activity, it usually has a range of potential sanctions it can seek to impose on an alleged violator and must choose from among them.

There are two fundamentally different approaches agencies take to the decision about how to allocate their enforcement resources. Some agencies, mostly at the state and local level, view their mission as primarily the settlement of disputes. These agencies encourage consumers to complain to the agency when they believe they have been victimized by a merchant within the agency's jurisdiction. The agency then adopts a mediational posture and attempts to settle the dispute. Typically this process begins by contacting the merchant and asking for its response to the consumer's complaint. If this initiative fails to prompt a settlement, some agencies drop the matter, advising the consumer to seek redress through private remedies (1). Other agencies invest more resources into the mediation effort, in some cases even going so far as to invite the merchant and consumer to a personal conference with a representative of the agency. Agencies which make such extensive efforts to mediate complaints may also threaten a merchant with initiation of a formal enforcement proceeding -- seeking, perhaps a financial penalty -- if the merchant refuses to make what the agency regards as a reasonable offer in settlement negotiations (2).

(1) *WHITFORD & KIMBALL, Why Process Consumer Complaints? A Case Study of the Office of the Commissioner of Insurance of Wisconsin, 1974, Wis. L. Rev. 639.*

(2) *STEELE, Fraud, Disputes, and the Consumer: Responding to Consumer Complaints, 123 U. Pa. L. Rev. 1107 (1975).*

It is probably more common for enforcement agencies to emphasize the prevention of future statutory violations by merchants rather than the mediation of disputes. The usual strategy for achieving this preventative objective is to initiative enforcement actions against merchants found to be engaging in a practice alleged to violate a statute within the agency's jurisdiction. There are two basic ways agencies use for learning about merchant practices possibly violative of a consumer protection statute. Many agencies, though oriented toward policing practices, solicit consumer complaints. The complaints are then used as data about problems in the marketplace, and if a number of complaints are received about particular conduct by the same merchant, an investigation may ensue. Many of these agencies attempt to combine a dispute settlement and practice policing approach, by both attempting to mediate the complaints and using them as data of problems with respect to which formal enforcement action might be taken. Where that happens, the agency is faced with a troubling decision about how much resources to devote to each activity (1).

Using consumer complaints as the sole basis for allocating enforcement resources has been criticized from time to time, usually on the ground that there are many kinds of practices with respect to which an agency should be taking enforcement activity that are not likely to be the subject of consumer complaint (2). Such might be the case, for example, with respect to practices which cause each individual consumer only a very small amount of injury. Perhaps partly for this reason, a number of agencies will directly monitor merchant practices, looking for possible statutory violations. The FTC, for example, regularly monitors national broadcast advertising. And agencies with licensing authority often hire examiners whose job it is to inspect a licensee's books and records on a more or less regular basis. Finally, interest groups, including consumer organizations, occasionally bring enforcement problems to an agency's attention.

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(1) *BERNSTINE, Prosecutorial Discretion in Consumer Protection Divisions of Selected State Attorney General Offices, 20 Howard L. J. 247 (1977).*

(2) *A blistering criticism of a former FTC practice of allowing enforcement priorities to be determined by the "mailbag" can be found in ELMAN, Administrative Reform of the Federal Trade Commission, 59 Geo. L.J. 777, (1971).*

Whatever the method for learning about merchant practices, an agency is very likely to find more potentially violative practices than it has resources to prosecute. There are several grounds on which agencies tend to make choices. Probably every agency attempts some type of cost-benefit analysis -- that is, whether the benefits to consumers of maintaining the action exceed the costs of bringing it. At the FTC for a period during the middle of the 1970's, a procedure was established by which the estimated benefits of bringing an action were quantified. An effort was then made to initiate only those cases that yielded the greatest benefit relative to alternative possible uses for those resources. It is a fair conclusion, however, that most agencies do not believe the potential benefits of an enforcement action can be quantified in sufficiently precise terms to permit such rigor in cost-benefit analysis.

A number of other factors also influence an agency in the exercise of its prosecutorial discretion. Political pressure often brought to bear on any agency through legislators can influence an agency to take or not to take a case. Many agencies tend to be biased in favor of cases which raise questions of novel statutory interpretation or in other ways may set a precedent. Such cases have the potential for greater impact than most cases if the practice brought under question is engaged in by a number of merchants. Hence they tend to fare well in any cost-benefit analysis. Precedent-making cases may also be favored because the agency lawyers who make the enforcement decisions regard such cases as more intellectually challenging, and as helping the agency gain greater prestige. Agencies which tend to favor precedent-making cases also tend, of course, to give less enforcement priority to cases where the facts suggest a rather clear violation of some statute. These agencies may believe that consumers injured by a clear law violation can adequately protect themselves through use of private remedies, a topic I will discuss shortly. Alternatively, these agencies may regard the clear violation case as presenting a mere "law enforcement" problem and hence as more appropriately resting with another agency, probably an agency with less prestige. Often, however, these other agencies also eschew clear violations of consumer protection statutes, perhaps because they too have their priorities.

Prosecuting attorneys, for example, rarely devote much resources to consumer protection cases.

Enforcement agencies must decide not only what cases to bring but also what remedies to seek when a case is brought. The sanctions formally available to enforcement agencies can mostly be grouped into three categories. Many remedies are injunctive in nature, prohibiting the respondent in an enforcement action from engaging in the future in activity described in the order, on pain of financial penalty. A second category of remedy imposes a financial penalty for initial violation of the statute, not just for violation of an injunction entered after the initial statutory violation. A third category of remedy provides for compensation to be paid to injured consumers in a suit initiated by a public enforcement agency (1). Where an agency is given authority to seek such a remedy, commonly the statute provides that the remedy should provide compensatory relief to all consumers harmed by the statutory violation. Nonetheless, agencies will often agree to settle enforcement actions if the respondent agrees to compensate all consumers who have actively sought the agency's assistance (usually by filing a complaint with the agency), while leaving other consumers to their private remedies, if any.

There is a great temptation for an agency to avoid imposition of direct financial sanction against a respondent in an enforcement proceeding. Injunctive remedies may require the respondent to cease an activity which has proved profitable but they do not require an immediate financial payment by the respondent. As a result respondents are more likely to settle a case if only injunctive remedies are sought, and settlements are likely to be very tempting to the agency because of the enforcement resources they save(2). Stated otherwise, if an agency can encourage a large number of settlements, by seeking principally injunctive remedies, the agency can initiate many more en-

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(1) SEBERT, Obtaining Monetary Redress for Consumers Through Action by the Federal Trade Commission, 57 Minn. L. Rev. 225 (1972).

(2) An additional reason to avoid seeking mass restitution remedies is that simply implementing that remedy in a particular case is likely to require a considerable proportion of the agency's litigation resources.

forcement actions with a given amount of resources.

The difficulties presented by an agency's emphasis on injunctive remedies are twofold. First, injunctive remedies do nothing in themselves to compensate those consumers already injured by the offending practice. Agencies concerned principally with policing practices are likely to regard compensation of consumers as a secondary objective, however. Secondly, and more importantly, a failure to impose financial penalties may underdeter statutory violation by merchants. Exclusive reliance on injunctive remedies by an enforcement agency facilitates decisions by unscrupulous merchants to violate a consumer protection statute until caught and required to stop by an injunction.

Section 4. The role of private remedies in enforcement

Private remedies, as the term is used here, are initiated by individual consumers, generally seeking monetary damages compensating for injuries resulting from a merchant's violation of a consumer protection statute. These remedies have the potential for easing considerably agencies' decisions about how to allocate their scarce enforcement resources. Thus, an agency might more justifiably concentrate on precedent-setting cases if it could be confident that clear statutory violations would be subject to many private actions for damages, thereby bringing financial pressure on the offending merchant to cease the practice. Similarly, nearly exclusive reliance on injunctive remedies could be more easily justified if private remedies were commonly invoked.

Most, though not all, consumer protection statutes do provide a private cause of action for compensatory damages to consumers injured by violation of the statute. There is overwhelming evidence that these remedies are rarely invoked. Consumer ignorance of their rights is one reason private remedies are rarely invoked. Moreover, it is often the case in the United States that it is not in the economic self-interest of an injured consumer to invoke private remedies. Compensatory damages are often relatively small and difficult to measure, and a litigant must ordinarily bear his or her own attorney's fee. Because of the economics of litigating for small amounts, attorneys often discourage consumers from seeking private remedies for violation of a consumer protection statute (1). Small claims courts were established in the United States in part to facilitate the litigation pro se of matters of small value, but it is well established today that consumers rarely use these courts as plaintiffs. Rather, the primary users of small claims courts are merchants, who find them a convenient and low cost way to collect debts owed by consumers (2).

Statutes fixing product quality standards are one potential major exception to this general conclusion that private compensatory remedies are little used, and hence probably have little effect on levels of compliance with consumer protection legislation. Although there is little evidence of use of private remedies directly granted by product quality legislation, the relationship of product quality legislation with the common law of products liability may provide merchants with a significant incentive to comply with the legislation. The relationship stems from the fact that any product violating a statutory quality standard is likely to be considered defective, subjecting a manufacturer choosing non-compliance as a course of action with claims for substantial damages if the non-complying product feature causes serious personal injury. Products liability suits are initiated frequently, of course.

Two qualifications must be made to the suggestion that the availability of products liability litigation significantly induces compliance with legislation establishing product quality standards. First, although there is a good deal of products liability litigation, products liability claimants are not distributed randomly throughout the population. More particularly, a disproportionate number of product liability claims arise from injuries at workplace, the plaintiff first contacting an attorney in order to present a work-

(1) MACAULAY, Lawyers and Consumer Protection Laws, 14 Law & Soc. Rev.115, (1979).

(2) YNGVESON & HENNESSEY, Small Claims, Complex Disputes: A Review of the Small Claim Literature, 9 Law & Soc. Rev. 219 (1975).

men's compensation claim and the situation only later being defined as raising a products liability claim. Consumers injured in the home are much less likely to present a products liability claim. As a consequence, products liability law may provide a lesser incentive to compliance with product quality legislation affecting products not used in the workplace than might first be assumed. Secondly, though much is made in the theoretical literature about the kinds of impacts products liability has on product design and manufacturing quality control procedures, there is a dearth of empirical evidence specifically validating such a link. Given the amount of products liability litigation and the size of judgements, it would be highly surprising if there were no impact at all, particularly with respect to products that present a substantial risk of costly injury. It is possible, however, that the impact is less than would be predicted from an assumption that the manufacturers seek only to maximize profits. In the first place, the decision-making apparatus of many manufacturers is simply not well organized. Secondly, many corporations are likely to be systematically biased in favor of short run gain, such as avoidance of extra manufacturing costs, over long term loss, such as extra liability or higher insurance premiums in the future. One reason for this is that it serves the career interests of the important decision-makers within the organization, whose promotion possibilities are heavily influenced by short term profitability.

Outside the product quality area there is general recognition in the United States that private compensatory remedies, without more, do not provide significant incentives for compliance with consumer protection laws. A common legislative response has been to couple a right to a private compensatory remedy with rights to some additional compensation as well. Most commonly this has been accomplished by providing for the recovery by victorious consumer litigants of a modest amount of punitive damage, typically between 100 and 1,000 dollars, and of reasonable attorney fees. Sometimes the statute explicitly states that the reasonableness of the consumer's attorney fees should be ascertained with reference to the difficulty of the matters at issue and the time devoted to them, and not solely with reference to the amount of damages claimed.

The effect of these extra recoveries is to make a lawsuit a more attractive proposition financially to an injured consumer. Nonetheless, the best evidence is that the availability of these extra recoveries have not stimulated sufficient extra claims for private remedies to have a significant impact in encouraging compliance with consumer protection legislation. A common explanation for this lack of effect is that the extra recoveries do nothing to inform consumers of their rights and consequently they still fail to take the steps necessary to initiate a claim such as contacting an attorney. And it is reported there is a widespread belief among attorneys that it is not possible to make money representing consumers, in part because it is believed that courts will not really award attorney fees commensurate with the time and effort involved where the amount in controversy is small. As a consequence attorneys themselves have not made extensive efforts to inform consumers of their rights in an effort to stimulate legal business (1).

These conclusions about the usual ineffectiveness of allowance of modest punitive damages (often called exemplary damages) and attorney fees must be qualified somewhat when discussing experience under the Truth in Lending Act (2). Some commentators have concluded that a right of action for individual damages, which under the Truth in Lending Act includes a right both to exemplary damages and attorney fees, has not been a significant factor in inducing compliance with the Act (3). Other commentators have noted the reasonably substantial incidence of litigation under Truth in Lending, however, as well as the recovery of substantial fees by victorious consumer attorneys. These commentators have pointed out that it often is relatively effortless for an attorney to establish a defense to an existing debt under Truth in Lending because a cause of action does not require development of difficult

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(1) MACAULAY, Lawyers and Consumer Protection Laws, 14 Law & Soc. Rev. 115 (1979).

(2) 15 U.S.C. §§ 1601-1665 (1976).

(3) Note, Private Enforcement Under the Fair Debt Collection Practices Act, 28 Case West. Res. L. Rev. 710, 720 (1978); Note, Recent Developments in Truth-in-Lending Class Actions and Proposed Alternatives, 27 Stan.L. Rev. 101, 104 (1974).

factual issues; the disclosure form and the written contract are often the only evidence needed. These commentators do not discount the possibility that the desire to avoid a Truth in Lending based defense to a debt has induced some creditors to make greater efforts to comply than they might otherwise have (1).

The ambiguous assessment about the effects on compliance under the Truth in Lending Act raises a question whether a strategy of inducing individual claims for damages through financial incentive is inherently ineffective. At a theoretical level, the strategy of offering fees to attorneys that are commensurate with their efforts seems potentially effective in stimulating claims. There is a respectable body of scholarship suggesting that the primary determinant of what types of claims are brought to attorneys is the receptivity of the Bar to entering claims of that nature (2). And if enough claims are stimulated, at least some effect on compliance with consumer protection legislation might be expected. Perhaps, the ever-increasing supply of lawyers will ultimately generate enough economic pressure within the legal profession to induce members of the Bar to master the substance of much consumer protection legislation and attempt to generate reasonable fees by taking consumer claims.

This discussion suggests that to date individual lawsuits for compensatory damages have had little effect in enforcing consumer protection legislation. Individuals in the American system are sometimes authorized to seek remedies designed to accomplish some public purpose other than mere compensation of private injury, such as deterrence or prevention of undesirable conduct. Hybrid remedies will be the term I will use for these other remedies, since they are initiated by individuals but seek remedies of a type ordinarily sought by agencies in public enforcement actions. Examples of hybrid remedies include punitive damages in substantial amounts, injunctions, and class actions.

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(1) LANDERS, Some Reflections on Truth in Lending, 1977 U. Ill. L. For. 669, 676-86.

(2) MAYHEW & REISS, The Social Organization of Legal Contacts, 34 Am. Soc. Rev. 309 (1969).

Class actions are the hybrid remedy of greatest pertinence in the consumer context. Class action procedure is designed to permit efficient adjudication of a larger number of small claims raising a number of identical issues, by providing for a single determination of those common issues. Since merchants typically establish routine ways for dealing with consumers, class actions are often thought to be ideally suited for consumer transactions; if the rights of one consumer are violated, it is likely the rights of others are violated in the same ways. In fact, however, class actions have proven not to be so useful in most consumer situations. In most situations there are some issues for which it is not possible to make a common determination of the rights of all consumers affected by the merchant practice. Damages typically present an issue of this nature, since they so often depend on the actual injury incurred by the consumer. It is technically permissible in most jurisdictions to maintain a class action even though not all issues can be determined in a common way, but the necessity of making individual determinations on even some issues typically robs the class action procedure of the efficiency in legal costs that is its main attraction. A second major difficulty in maintaining consumer class actions in most jurisdictions is a procedural rule requiring the person initiating the action -- called the representative plaintiff -- to finance the mailing of a notice of the class action suit to all locatable members of the consumer class (1). If the class action succeeds, the cost of this notice can be assessed to the defendant, but frequently the cost of the mailing is so great that no representative plaintiff can or will undertake the expense pending the outcome of the litigation.

The Truth in Lending Act has presented a situation in which class actions have greater potential viability than they do in most consumer transactions. The great advantage of the Truth in Lending Act for class actions is that all consumer rights are defined formally -- that is, in a way unrelated to the actual understanding of or the actual injuries to participants in the transaction. Thus, under Truth in Lending violations are defined in terms of failure to include certain information on a form -- it matters not whether

(1) *Eisen v. Carlisle & Jacquelin, 417 U.S. 156 (1974).*

This failure misled any consumer. Furthermore, under Truth-in-Lending, any consumer with a cause of action is entitled to damages of at least 100 dollars, without proof of any actual injury (1). This damages provision, originally intended to encourage individual litigation as a way of stimulating compliance, has made class actions practically available by providing a method for assessing damages that is not dependent on the individual circumstances of each consumer's transaction. Finally, the cost of providing notice to the class can often be minimized in a Truth in Lending class action because the merchant defendants, being in the credit business, are likely to be sending monthly statements to most members of the class. Courts have sometimes been willing to order defendants to include the required notice in a monthly statement mailing, thereby greatly reducing the initial investment required of a representative plaintiff in order to maintain a class action (2).

Largely because of the many litigational advantages, a great number of class actions have been filed under the Truth in Lending Act. A surprisingly small proportion of these class actions have actually been certified as proper class actions (3). A major difficulty has been the injustice courts have perceived in entering a class judgement against a merchant defendant for an enormous amount when the unlawful conduct consists of an unintentional, technical omission on a disclosure form that causes few if any consumers actual injury. Faced with this sense of injustice, courts have been ingenious in finding technical obstacles to the maintenance of class actions (4). Nonetheless, it is the consensus of most observers that the threat of a class action has remained sufficiently plausible to play an important role in encouraging merchants to comply with the Act.

In sum, except in the case of Truth in Lending, remedies initiated by private

(1) 15 U.S.C. § 1640 (1976). The statute now limits a merchant's total liability in a class action to 500,000 dollars or to one percent of its net worth, whichever is less.

(2) Katz v. Carte Blanche Corp., 53 F.R.D. 539 (W.D. Pa. 1971).

(3) Note, Class Actions Under the Truth in Lending Act, 83 Yale L.J. 1410 (1974).

(4) e.g. Ratner v. Chemical Bank of New York Trust Co., 54 F.R.D. 412 (S.D. N.Y. 1972).

individuals have not played an important role in the enforcement of consumer protection legislation. Today, whatever inducements to compliance exist are provided mostly by the public enforcement agencies. The experiences with Truth in Lending offer encouragement, however, that private remedies might become a significant enforcement factor in the future. Attorneys might learn that they can make money representing consumers in individual actions for damages. And perhaps legislation other than Truth in Lending can be redrafted to define both rights and remedies in a formal way, thereby making the threat of class actions more viable. If these developments occur, private remedies could become a more important factor in inducing merchants to avoid statutory violation. And this development in turn would have implications for the enforcement strategies of public agencies.