CONSUMER REMEDIES—STATUTES—A NEW APPROACH—*Mass. Gen. Laws Ann.* ch. 93A (Supp. 1969); *N.C. Gen. Stat.* § 75-16 (1969).

> It is a commonplace observation that effective consumer remedies have not kept pace with the increasing recognition of consumer rights. . . . Neither administrative regulations nor individual private law suits adequately protect consumer rights.[1]

The validity of the above stated premise can be tested by examining some recurring situations which ensnare consumers.

Mrs. M resides in Massachusetts. She and several other persons contracted for home improvement services from a door to door salesman representing himself as a building inspector. The salesman, working for CDE Co., deceived the home-owners into signing home improvement contracts by telling them that their homes were in danger of collapse. Mrs. M paid $300 for unnecessary repairs.

Last year in Maine, a local dealer advertised "Used 69 sewing machines for $50." Hundreds of prospective customers responded to the home demonstration offer. When the salesman arrived at Mrs. T's home, he informed her that "69" designated the model number and not the year of manufacture. The machines shown were ten to fifteen years old. They were even less appealing when compared to the brand new $199 to $249 machines which were then shown. Responding to the "bait and switch" technique, Mrs. T signed a contract and made a down payment on a new machine.

Meanwhile, in New Jersey, Mr. L was having trouble with the family car. He remembered ABC's advertisement for a transmission overhaul: "$55 for the complete job, with a life of the car guarantee." He arranged for the work to be done and when he returned to pick up his car, Mr. L was told that $159 in additional work was necessary. He refused to authorize the additional repairs but was required to pay $55 to have his transmission reassembled. The guarantee on another car read: "90 days or 4,000 miles," and was unsigned.[2]

Ralph Nader has pointed out that "the aggregate reward of minor cheats, deceptions and the like can now be planned with slide rule efficiency,"[3] because individual consumer losses are not worth the expense of redress. While this may be true as a general proposition, attempts have been made to alleviate this problem.

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[1] Tydings, *1980—Class Action Jurisdiction Act*, 4 N. ENG. L. REV. 83 (1969).

[2] Cases cited note 8 *infra*.

[3] *Testimony Before the Subcomm. on Improvement in Judicial Machinery*, 91st Cong., 1st Sess., July 28, 1969.

Existing statutory means of redress for consumers are of two types. The first group, Unfair Trade Practices Act(s),[4] declares unlawful, conduct which has been proscribed by Federal Trade Commission regulations. Enforcement is delegated to the Attorney General who has authority to impose penalties[5] and to seek an injunction prohibiting the unlawful conduct.[6] In the hypothetical situation in New Jersey, where such a statute[7] is in effect, Mr. L would file a complaint with the Office of Consumer Protection. After investigation, a conference bewteen Mr. L and ABC would be arranged by the consumer agency. Since ABC's practices violate the statute, either a fine or an injunction could be ordered.[8] Although this procedure imposes no costs upon the consumer, it does not compensate him for his loss.[9] Furthermore, its impact as a deterrent on fraudulent practices in the marketplace will be minimal because all that the injunction can do is to prevent one offender from continuing a particular practice. Consequently, there is no price on the practice sufficient to deter its widespread use. The inadequate scope of this remedy is further underscored by the fact that its operation is controlled by the public budget, a factor which will limit the services[10] available to cope with an increasing case load. Political changes also affect consumer agency operations.

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4 Consumer Fraud Act, ILL. ANN. STAT. ch. 121½ § 262 (Smith-Hurd, Supp. 1970); Frauds, etc. in Sales or Advertisement of Merchandise, N.J., STAT. ANN. 56:8-1 to 8-11 (1964), *as amended* (Supp. 1969); Unfair Trade Practices, N.M. STAT. ANN. 49-15-1 to 49-15-14 (Supp. 1969); Unfair Trade Practices and Consumer Protection Law, Act No. 387 (5 PURDON'S PA. LEGIS. SERV. 1042, 1969); Deceptive Trade Practices, R. I. GEN. LAWS ANN. §§ 6-13.1-1 to 6-13.1-11 (Spec. Supp. 1968); Unfair Business Practices—Consumer Protection, WASH. REV. CODE §§ 19.86.010-19.86.920 (Supp. 1967).

5 *See, e.g.*, N.J. STAT. ANN. 56:8-3.1 (Supp. 1969).

6 N.J. STAT. ANN. 56:8-8 (1964).

7 N.J. STAT. ANN. 56:8-1 *et seq.* (1964), *as amended*, (Supp. 1969).

8 *See* Montgomery Ward & Co. v. F.T.C., 379 F.2d 666 (7th Cir. 1967). (Variation between advertised guarantee and guarantee certificate is a deceptive trade practice); F.T.C. v. Balme, 23 F.2d 615 (2d Cir. 1928). (When there is a tendency to deceive it is a deceptive trade practice).

9 Restitution depends on specific statutory authorization. *See* State v. Johnson, No. 68-3817 (Super. Ct. R.I. Ch. Div. Dec. 9, 1968) (Court enjoined scare methods of sales but was unable, in the same action, to award damages to victimized consumers, R.I. GEN. LAWS ANN. § 6-13.1-1 (Spec. Supp. 1968)). *But cf.* State v. Magnum, No. 3277-68 (N.J. Super. Ct. Ch. Div. Sept. 17, 1969) (Court enjoined deceptive advertising and practices and also ordered restitution pursuant to statutory authority, N.J. STAT. ANN. 56:8-8 (1964)).

10 In New Jersey, Gov. Richard Hughes noted that in Jan. 1969, the Office of Consumer Fraud had a backlog of over 6,000 cases. (Your Daily Bread, Mar.-Apr. 1969-publication of the N.J. Office of Consumer Fraud). Currently, the office has a staff of 2 deputy attorneys-general and 15 investigators. From July 1, 1969 to Jan. 1, 1970, the office received 5,577 written complaints, 7,665 telephone inquiries, conducted 195 conferences

The second type of consumer statute is the Uniform Deceptive Trade Practices Act[11] which permits[12] private persons to enjoin proscribed practices. Originally enacted as a remedy for merchant-competitors, the measure has been urged[13] for consumer use. However, the inadequacies of such use are evident when viewed from the situation of Mrs. T and the XYZ Sewing Machine Co. Although Mrs. T has the statutory grounds[14] to seek an injunction, the question of standing arises. Since the Act confers standing on "persons likely to be damaged,"[15] the question of whether Mrs. T, already harmed, has the requisite standing has not yet been determined. However, even if her standing is recognized, the expense and burden of undertaking legal action which cannot result in recovery of damages[16] make the remedy unsuitable for effective consumer use. Thus, the net effect of this measure is that, unless Mrs. T is altruistic enough to undertake action merely to prevent harm to others or sophisticated enough to champion a cause, the offending merchant is not vulnerable to consumer attack.

A new approach to consumer protection has been taken in Massachusetts[17] and North Carolina.[18] In these states, statutes now enable consumers to enforce their rights by direct action[19] for multiple or fixed minimum damage recovery.[20] These statutes attack the problem of consumer abuse by the same means used to deter anti-trust violations under the Clayton Act.[21] The thrust behind both is private enforcement to implement the statutory purpose and multiple damage recovery to deter offending conduct.[22] As a result of this consumer legislation,

between complaining consumers and merchants and has undertaken 103 litigations. The backlog of cases remains.

11 *See, e.g.*, ME. REV. STAT. ANN. ch. 10 §§ 1211-1216 (Supp. 1970).

12 ME. REV. STAT. ANN. ch. 10 § 1213 (Supp. 1970).

13 Dole, *Merchant and Consumer Protection*, 76 YALE L.J. 485 (1967); Dole, *Consumer Class Actions Under the Uniform Deceptive Trade Practices Act*, 1968 DUKE L.J. 1101 (Author of the Model Act discusses its application).

14 ME. REV. STAT. ANN. ch. 10 §§ 1212-1-G, L (Supp. 1970) (prohibits: G, practice of representing goods to be of a certain standard when they are not; L—conduct which creates likelihood of misunderstanding).

15 ME. REV. STAT. ANN. ch. 10 § 1213 (Supp. 1970).

16 Dole, *supra* note 13.

17 Regulation of Business Practices for Consumer Protection, MASS. GEN. LAWS ANN. ch. 93A, § 1-10 (Supp. 1969).

18 Monopolies, Trusts and Consumer Protection, N.C. GEN. STAT. § 75-1.1, 16 (1969).

19 MASS. GEN. LAWS ANN. ch. 93A § 9(1) (supp. 1969); N.C. GEN. STAT. § 75-16 (1969).

20 MASS. GEN. LAWS ANN. ch. 93A § 9(3) (Supp. 1969), N.C. GEN. STAT. 75-16 (1969).

21 38 Stat. 731 (1914), 15 U.S.C. § 15 (1964).

22 *See* Sandidge v. Rogers, 167 F. Supp. 553 (S.D. Ind. 1958). "The primary purpose of the Anti-Trust laws is to prevent restraints of interstate commerce in the public interest, and to afford protection of the public. . . ." *Id.* at 559; Mach-Tronics, Inc. v. Zirpoli, 316 F.2d 820 (9th Cir. 1963). "The provision for the recovery of treble-damages by an injured

Mrs. M now has a viable means of redress. CDE's conduct is unlawful under the statute.[23] In addition to direct action and a multiple or fixed minimum damage recovery, Mrs. M may bring a class action[24] on behalf of others similarly harmed by CDE's acts. The joint provision for multiple damages and class actions means that the cost of consumer abuse may now be of sufficient consequence to jar the slide rule's profit calculations. Mrs. M need no longer suffer her losses because they are too small to warrant litigation. She has a potential claim of $900, compounded by the trebled claims of her class. CDE must now anticipate actual liability for its offending conduct. There is now a price on the abusive practice.

If the Massachusetts-type statute were enacted in the states of the other hypothetical consumers, each could take advantage of its provisions. For example, if Mrs. T, victimized by a "bait and switch" tactic prohibited by Federal Trade Commission regulations,[25] could show the requisite harm[26] to avail herself of the statute's protection, she could recover even minimal damages.[27] Harm could be shown by proof that the price paid was excessive. If, however, she were unable to show any loss, she could still rescind the contract by reason of a Federal Trade Commission ruling allowing a three day cancellation period.[28]

Mr. L might await Attorney General investigation of ABC's practices. Following the pattern of anti-trust procedure, the Massachusetts statute[29] provides means for coordinating public and private actions.

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party was an important and significant feature of the entire anti-trust program. . . . The treble-damage action was intended not merely to redress injury to an individual through the prohibited practices, but to aid in achieving the broad social object of the statute." *Id.* at 828.

23 MASS. GEN. LAWS ANN. ch. 93A § 2 (Supp. 1969).

Unfair practices; legislative intent; rules and regulations

> (a) Unfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce are hereby declared unlawful.
>
> (b) It is the intent of the legislature that in construing paragraph (a) of this section the courts will be guided by the interpretations given by the Federal Trade Commission and the Federal Courts to section 5(a)(1) of the Federal Trade Commission Act (15 U.S.C. 45(a)(1)) as from time to time amended.

Holland Furnace v. F.T.C., 295 F.2d 302 (7th Cir. 1961) (Scare tactics to make sales are unlawful).

24 MASS. GEN. LAWS ANN. ch. 93A § 9(2) (Supp. 1969).

25 F.T.C. order D8761, Aug. 28, 1969.

26 MASS. GEN. LAWS ANN. ch. 93A § 9(1) (Supp. 1969).

27 MASS. GEN. LAWS ANN. ch. 93A § 9(3) (Supp. 1969).

28 F.T.C. order D8761, Aug. 28, 1969. What is required is an order that will dissipate the effects of deceptive invasions of the privacy of the home where high-pressure tactics may result in the ill-advised purchase of expensive merchandise which would not be bought upon careful reflection.

29 MASS. GEN. LAWS ANN. ch. 93A § 10 (Supp. 1969).

When a permanent injunction is procured by the Attorney General, it is prima facie evidence of violation of the statute in a subsequent private suit. However, institution of the private action is not dependent on successful state action.[30]

These statutes are aimed at restoring consumer leverage in dealing with businesses outside the sphere of the Better Business Bureau. Practices which fall within their prohibitions are unlawful, whether or not the conduct is intentional.[31] This presents a problem of potential harassment of legitimate business. However, where business is legitimate, it will respond to legitimate demands. Consequently, the Massachusetts law requires that plaintiff make written demand for relief, and limits recovery to reasonable offers of settlement.[32]

That legitimate business has a stake in a free competitive marketplace was recently noted by President Nixon:

> Fortunately, most businessmen in recent years have recognized that the confidence of the public over a long period of time is an important ingredient for their own success and have themselves made important voluntary progress in consumer protection. At the same time, buyers are making their voices heard more often, as individuals and through consumer organizations. These trends are to be encouraged and our governmental programs must emphasize their value. Government consumer programs, in fact, are a complement to these voluntary efforts. They are designed to help honest and conscientious businessmen by discouraging their dishonest or careless competitors.[33]

It appears that the original premise is more than a commonplace observation. It is an operational fact of existing law. Whether the newly enacted state statutes will adequately protect consumers' rights is largely dependent on the range of wrongs they can combat.

> [I]n the field of consumer protection the agency [Federal Trade Commission] has been preoccupied with technical labeling and advertising of the most inconsequential sort. . . . At the same time the F.T.C. has exercised little leadership in the prevention of retail

30 Administration-proposed federal consumer class action legislation makes successful government prosecution a condition precedent to institution of a private action. S. 3201, 91st Cong., 1st Sess. (1969), H.R. 14931, 91st Cong., 1st Sess. (1969). An alternative proposal eliminates that requirement. S. 3092, 91st Cong., 1st Sess. (1969), H.R. 14585, 91st Cong., 1st Sess. (1969). *See Hertzberg, Consumer Class Action Legislation* (Jan. 1970), position paper issued by Nat'l. Consumer Law Center, Boston Coll. Law. School, Brighton, Mass.

31 MASS. GEN. LAWS ANN. ch. 93A § 9(3) (Supp. 1969).

32 MASS. GEN. LAWS ANN. ch. 93A § 9(3) (Supp. 1969).

33 *See Protection of Interests of Consumer*, Special Message submitted to Congress by President Richard M. Nixon, Oct. 30, 1969; 115 Cong. Rec. H. 10307 (H. Doc. No. 91-188).

> marketing frauds. . . . We recommend a new and vigorous approach to consumer fraud. The F.T.C. should establish task forces in major cities to concentrate exclusively on this problem. . . . We see in this project a source, not only of improved enforcement, but of substantially expanded knowledge as to the nature and significance of consumer fraud.[34]

Since the standards of these statutes are those of the Federal Trade Commission, their ultimate success in novel situations may depend upon broad judicial interpretation. With that approach these statutes may provide the vehicle for exploring new and uncharted areas of consumer fraud.

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[34] Report of the American Bar Association Commission on the Federal Trade Commission, N.Y. Times, Sept. 16, 1969 at 29, col. 2, 3.