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CONSUMER PROTECTION IN PRACTICE: ENFORCEMENT PROVISIONS

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Quebec's Draft Civil Code and the proposed *Consumer Protection Act* both have as one purpose the protection of the consumer from exploitation. Thus, the preeminence of the human personality in the first article of the draft code: "Every human being possesses juridical personality."

Both the code and the act provide the consumer with an opportunity to cancel a contract under certain circumstances to avoid that exploitation, e.g., articles 37 and 38 and articles 47 through 49 of Book Five of the code and section 220 of the act.

Although both the code and the act have ostensibly the same goal and at some times may even employ the same means to that goal, a special law such as the proposed *Consumer Protection Act* is necessary, in the short run, for the best protection of the consumer and to avoid his exploitation.¹

Consumerism has always been in the code under the pseudonym of redhibition, lesion, fraud, etc., but it has never gone by that name; and it has never done the job for consumers. This is not to belittle the code but to admit that it was not designed in the fashion that a consumer law would be. The civil code is a more permanent law with general principles that govern all aspects of the relationship between people. The *Consumer Act* on the other hand is a special law which only concerns itself with one dimension of the person, i.e., his status as a consumer; and it is therefore easier to amend without questioning basic principles and is easier to adapt to the quick changes in the marketplace.

The American experience in Louisiana is analogous to the choice in Quebec between the civil code and the *Consumer Act*.

¹ It should be noted that, although the author teaches a course in consumer litigation at Loyola University School of Law, he is primarily a legal practitioner and bases his conclusions on his own practical experience rather than on any theoretical grounds. In five years of practice the author has handled approximately two hundred consumer cases.

Louisiana has a dual system of laws like every other state in the union, the state's own laws and federal laws. In reference to credit transactions, state laws still governs the terms and conditions that may be included in a contract. The federal law is merely a disclosure law that, in essence, requires the terms and conditions of the contract, whatever they may be, be disclosed in advance of the consumation of the transaction. Thus, a contract may be usurious or unconscionable under state law, but as long as the usurious or unconscionable terms are disclosed in advance, there is no violation of federal law. Congress mandated that the consumer be given information such that his consent can be free and enlightened as proposed by article 27 (Book Five) of the draft code. Once "enlightened" the consumer is on his own.

Although there are substantive difference between the state and federal laws, the primary difference lies in the ability to enforce them. A more detailed examination of the two systems of laws emphasizes this difference. The more general the law (such as Louisiana law or the draft code) the more difficult it is to enforce it. The more definite the law (such as federal law or the proposed consumer act) the easier it is to enforce it.

In addition to those articles in the Louisiana Civil Code that may protect the consumer, the State of Louisiana adopted in 1972 two act specifically for the protection of the consumer: the *Louisiana Consumer Credit Law*² and the *Unfair Trade Practices and Consumer Protection Law*.³

Although the credit law did amend the law to protect the consumer in many respects and even went so far as to provide courts with very broad authority not to enforce unconscionable agreements⁴, it developed an enforcement mechanism so cumbersome that there has only been one private action brought against a creditor since the effective date of the law and the consumer lost that suit.⁵

The pertinent part of the *Unfair Trade Practices and Consumer Protection Law* is succinct:

Unfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce are hereby declared unlawful.⁶

Since the effective date of that act only eight cases have been filed pursuant to the act but this is in no way attributable to a dearth of unfair and deceptive acts or practices in the Louisiana marketplace. On the contrary, it is attributable to the statute itself which is so broad that the judges interpret it narrowly and are very demanding in their requirements for proof of damages. Of the eight suits, four⁷ have been filed by the Attorney General of Louisiana on behalf of consumers and

² Act No. 454 of 1972, R.S. 9: 3510 et seq.

³ Act No. 759 of 1972, R.S. 51: 1401 et seq.

⁴ R.S. 9: 3551.

⁵ *Bohm v. CIT Financial Services, Inc.*, 348 So. 2d 132 (La. App. 177).

⁶ R.S. 51: 1405(A).

⁷ *Guste v. City Council*, 309 So. 2d 290 (La. 1975); *Guste v. Demars*, 330 So. 2d 123 (La. App. 1976); *Guste v. Crossroads Gallery*, 357 So. 2d 1381 (La. App. 1978); *Guste v. General Motors Corp.*, 354 So. 2d 770 writ granted 356 So. 2d 1005.

the other four⁸ by private parties. However, no private party has ever been successful under this act and the Attorney General has met success but once.⁹

Laws such as *Louisiana Consumer Credit Act* and the *Unfair Trade Practices Act* remain unenforced because they demand traditional notions of the sanctity of contract be replaced with a new social notion of protection for the consumer. Until the courts assimilate these new notions and values, enforcement requires the law be spelled out in definite detail for the court and lawyers. Federal jurisprudence confirms this fact.

Enforcement of federal consumer laws has been so effective that creditors and merchants now demand that Congress amend the laws to make them less stringent and compliance easier. In 1976 there were 146 Truth in Lending suits filed in the federal court in New Orleans alone, twelve of which were filed as class actions.¹⁰

Quebec's proposed *Consumer Protection Act* parallels many of these federal laws. For example, Section 94 and the various schedules attached to the act are similar to the *Truth In Lending Act*¹¹; Sections 95 and 125 are similar to the *Fair Credit Billing Act*¹²; Sections 43 through 46 of the 1971 *Consumer Protection Act* are similar to the *Fair Credit Reporting Act*¹³; and Section 180 is similar to a part of the *Motor Vehicle Information and Cost Savings Act*.¹⁴

All of the federal statutes have certain characteristics in common: a) they have been cast as remedial legislation and are therefore to be liberally construed in favor of the consumer¹⁵; b) they establish a private cause of action in favor of the consumer; c) they grant federal court jurisdiction; d) they encourage class actions; e) they mandate regulations to be promulgated by federal agencies to complete the details of the law¹⁶; and g) to the successful plaintiff, they award attorney's fees (i.e., on honorarium) and either a penalty, punitive damages or minimum damages.

Although these federal laws are substantively similar to the proposed act they differ in one essential detail — enforcement provisions. As explained above the

⁸ *Gerasta v. Hibernia National Bank*, 411 F. Supp. 176 (E.D. La. 1975); *Faris v. Model's Guild*, 297 So. 2d 536 (La. App. 1974); *General Investment, Inc. v. Gaudet*, 303 So. 2d 624 (La. App. 1974); *Bohm v. CIT Financial Services, Inc.*, 348 So. 2d 132 (La. App. 1977).

⁹ *Guste v. Crossroads Gallery*, *supra* n. 7.

¹⁰ These statistics were compiled from court records by a student in the author's Consumer Litigation course.

¹¹ *Truth in Lending Act*, 15 U.S.C.A. 1601 et seq.

¹² *Fair Credit Billing Act*, 15 U.S.C.A. 1666.

¹³ *Fair Credit Reporting Act*, 15 U.S.C.A. 1681.

¹⁴ *Motor Vehicle Information and Cost Savings Act*, 15 U.S.C.A. 1981 et seq.

¹⁵ *Mourning v. Family Publications Service, Inc.*, 411 U.S. 356, 93 S. Ct. 1652, 36 L. Ed. 2d 318 (1973).

¹⁶ These regulations are often very technical and require precise language and, at times, even specific type size in a contract. If a court finds a violation of an act, no matter how technical or de minimis the violation, it has no discretion with respect to the imposition of liability and must award statutory penalties. *Grant v. Imperial Motors Co.*, 539 F. 2d 506, 510 (5th Cir. 1976).

federal laws provide for statutory damages. For example, if a creditor violates any provision of the *Truth In Lending Act*, the consumer is entitled to two times the amount of the finance charge but with a minimum damage of one hundred dollars and a maximum damage of one thousand dollars.¹⁷ If the consumer had to prove actual damages or if the successful consumer was not awarded attorney's fees very few consumer cases would be filed; and without this private enforcement there would be little respect for the law by creditors and merchants.

It is for this reason that the third paragraph of Section 220 of the proposed *Consumer Protection Act*, which requires a consumer to suffer actual damages to recover, be deleted and in its stead a provision for minimal damages be included. Such a change will give consumers the incentive to privately enforce the act and the decrease their dependency on governmental enforcement that must always fall short of meaningful enforcement because of the volume of complaints.

Consumer protection laws without private enforcement is a right without a remedy. The federal courts fully appreciate this fact and have held that the federal consumer laws establish a system of "private attorney generals" to participate prominently in enforcement¹⁸; that individual suits on a private cause of action have public dimensions since successful efforts directed toward vindicating private rights will aid in bringing about compliance with the regulatory scheme¹⁹; and that the statutory damages punish those who violate the consumer laws and reward those consumers who detect the violations and bring them to the attention of the federal courts.²⁰

Cancellation of a contract alone is not a deterrent to a creditor since he is not out-of-pocket in such a situation but merely forfeits whatever profit he would have made in the transaction. Furthermore, if the consumer in Quebec must prove actual damages to recover on his demand, a very difficult burden in many cases, the public dimension of any lawsuit is eliminated. There is no punishment to the merchant for violating the law; there is no reward to the consumer for prosecuting the case; there is no enforcement of the statute.

CONCLUSION

Deceit and fraud perpetrated upon consumers are often subtle practices such that if the traditional notions of freedom of contract are applied to the facts, the scales tip in favor of the merchant. Therefore specific laws that reach particular practices are necessary to protect the consumer; and this law must be flexible and ever changing to keep pace with the machinations which unscrupulous businessmen may devise in the future to stay one step outside the boundary of the law and thereby evade its impact. A civil code does not have the flexibility necessary to meet these changes.

¹⁷ 15 U.S.C.A. 1640(a).

¹⁸ *Ratner v. Chemical Bank New York Trust Co.*, 329 F. Supp. 270, 280 (S.D.N.Y. 1971).

¹⁹ *Sosa v. Fite*, 498 F. 2d 114, 121 (5th Cir. 1974).

²⁰ *Delay v. Hearn Ford*, 373 F. Supp. 791, 796 (D.S. Car. 1974).

This is not to say that a civil code should be devoid of general principles concerning the relationship between consumers and merchants; and, certainly, if a balance in bargaining power between consumers and merchants is ever restored, then a code may be all that is necessary. However, until that happens both Louisiana and Quebec need consumer statutes with strong enforcement provisions, especially incentives for private enforcement.