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Roles of Public Law in Consumer Redress

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Introduction

In 2007, the OECD issued “Recommendation on Consumer Dispute Resolution and Redress”¹ which advises Member countries to develop adequate mechanisms for effective consumer dispute resolution and redress. Reiterating the importance of developing an effective enforcement framework against fraudulent and deceptive commercial practices and of providing victimized consumers with effective access to redress mechanisms, the Recommendation sets out principles for an effective and comprehensive dispute resolution and redress system. In the document, “redress” is defined as compensation for economic harm in the form of either a *monetary* remedy (e.g., a voluntary payment, damages, restitution, or other monetary relief) or a *conduct* remedy with a restorative element (e.g., exchange of defective goods or services, specific performance or rescission of contracts).

Consumer redress can be obtained through private lawsuits for damages or injunctive reliefs filed by victimized consumers themselves or somebody who represents a group of victims (Option I). It may also be obtained through lawsuits filed by non-victims such as qualified consumer protection organizations or the government (Option II). It may further be realized through administrative orders issued by the consumer protection authority to the effect that monies wrongfully obtained by a trader be returned to consumers (Option III).

¹ www.oecd.org/dataoecd/43/50/38960101.pdf.

In Japan, a recently enacted statute mandates the government to examine a possibility to legislate such schemes. Based on my experience of having participated with the government-initiated research projects for that purpose, this paper will discuss a possibility of government-obtained redress in the form of Option III in Japanese law: whether or not, and how, a government agency, or a quasi-governmental one, may be authorized to issue such administrative orders that can be characterized as a consumer redress mechanism.

I. Government Functions in Consumer Redress

(1) Current Status in Japan

The Consumer Affairs Agency (CAA) of Japan, the nation's first governmental organization focusing exclusively on consumer protection, was established in 2009. The Act establishing the CAA provides in its supplementary article 6 that "within approximately three years after this Act and the other two CAA-related statutes come into force, the Government shall examine schemes for depriving the person or entity who has caused injuries to a large number of consumers of their unjustified profits for the purpose of redressing victims, including schemes to prevent the wrongdoers' property from concealment and dissipation; and shall take necessary measures based upon those results."

Such schemes obviously include private lawsuits in the form of class action which Japanese law has long been skeptical about. Based upon the CAA's preliminary researches on abovementioned Option I, the Consumer Commission, newly established in 2009 as a watchdog over the CAA, issued in August 2011 a report on a class action scheme in the field of consumer law. It proposed to introduce a new "collective consumer lawsuit" to be filed by qualified consumer protection organizations on behalf of a large number of victimized consumers. The new class action is for damages or conventional restitution of unjust enrichment in relation to consumer transactions. The CAA should now be drafting a new bill in accordance with the report.

On the other hand, the CAA's examination on schemes of government-obtained consumer redress either in the form of Option II or Option III has been very slow. As I have participated all the CAA's preliminary researches on this matter, it has become clear how theoretically and practically difficult to make new schemes as demanded by the abovementioned supplementary article 6. This paper explains my own tentative proposal of a scheme utilizing administrative orders for the purpose of consumer redress.

(2) Current Status in Other Nations

Examples of consumer redress in the forms of Option II or Option III are found, for example, in the United States both at the federal and state levels. The "unfair and deceptive acts and practices" (UDAPs) provision generally prohibiting unfair and deceptive trade practices was introduced into the Federal Trade Commission Act which originally was enacted in 1914. It provides that "[u]nfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce, are hereby declared unlawful." (15 U.S.C. § 45(a)(1)) If the FTC finds any violation of the UDAP provision, it may sue the rogue traders in the federal court for injunctive reliefs including, at the discretion of the court, redressing victimized consumers.²

Similar provisions have been legislated in all the 50 states. Influenced by the UDAP provision of the Federal Trade Commission Act, states sought new tools to for protection of consumers from abusive trade practices. The state government, typically through its Attorney General's Office, sues rogue traders for injunctive reliefs including consumer redress.³ The State of Maryland has an exceptional statute that authorizes

² See, e.g., J.Noonan, Federal Trade Commission Activity: Pursuing Unfair and Deceptive Practices in Consumer Financial Services, 43 *The Business Lawyer* 1069 (1988).

³ See, e.g., E. Myers & L. Ross (eds), *STATE ATTORNEYS GENERAL POWERS AND*

the Attorney General's Office to choose between pursuing the judicial proceeding for injunctive reliefs or issuing administrative orders, both of which produce consumer redress⁴.

Some other nations also have legislated or will soon legislate consumer protection schemes in which consumer protection authority has vital functions.⁵

II. An Overview of Legislative Developments in Japanese Consumer Protection

(1) Legislative Inactiveness in Consumer Law Before 1990s

Consumer law in principle deals with purchase of goods or services. Disputes between consumers and traders arise either because the goods or services are defective, because consumers have been misled by the advertisements or representations, or because consumers could not make a reasonable and informative judgment due to deceptive solicitations or other unfair practices. Thus, consumer protection is usually classified into three areas: (i) consumer safety of goods, facilities, and services, (ii) prohibition of false or misleading advertisements or represen-

RESPONSIBILITIES, 2nd Ed., 233-245 (National Association of Attorneys General, 2007) and N. Bernstine, Prosecutorial Discretion in Consumer Protection Divisions of Selected State Attorney General Offices, 20 Howard L. J. 247 (1977)

⁴ Maryland Commercial Law, § 13-301- § 13-410 (providing for prohibition of unfair or deceptive trade practices, the Office of the Attorney General's authority to issue a cease and desist order, its dual authority to seek an injunctive order from the court, and its authority to impose civil money penalty whenever necessary).

⁵ See, e.g., M. Faure, A. Ogus & N. Philipsen, "Enforcement Practices for Breaches of Consumer Protection Legislation," 20 Loyola Consumer Law Review 361 (2008) and "OECD Workshop on Consumer Dispute Resolution and Redress in the Global Marketplace: Background Report," <http://www.oecd.org/dataoecd/59/21/34699496.pdf>.

tations, and (iii) prohibition of unfair and deceptive acts and practices in consumer transactions.

Before 1990s, only a few consumer protection laws were enacted in Japan. Among them was the Act against Unjustifiable Premiums and Misleading Representations of 1962 which prohibited false or misleading advertisements or representations. Other examples include the Fundamental Act on Consumer Protection of 1968 which declared consumer rights under the influence of John F. Kennedy's Consumer Bill of Rights of 1962. The Act on Door-to-Door Sales of 1976 was enacted to provide cooling-off in door-to-door sales, telemarketing sales, and multilevel marketing transactions.

Many regulatory statutes were enacted for industry and they also had some aspects of consumer protection. Those aspects, however, were arguably easily compromised with the government mentality for industry promotion especially during the high-growth period of Japanese economy from 1954 to 1973.

Consumer law at the time was rather case law produced through several widely-known lawsuits on unsafe foods and drugs for damages filed by injured consumers. Conflicts with regard to consumer transactions, on the other hand, tended to be resolved in out-of-court settlements, with the assistance of the local governments which set up "advice offices" dealing with complaints from consumers and helping them negotiate with traders for solution. The National Consumer Affairs Center of Japan (*Kokumin-seikatsu-sentaa*) was established in 1970 to offer similar services nationwide.

(2) Change in the Tide since 1990s

Legislative inactiveness in consumer law has finally been changed in the 1990s. The Diet legislated several private law schemes to intensify consumer protection, including the Product Liability Act of 1994 which made it easier for consumers to win the lawsuits against

traders for damages due to defects in goods. The Consumer Contract Act of 2000 was another example of such legislation. In dealing with unfair and deceptive solicitations in consumer transactions, it provides, for example, that consumers in certain situations may rescind their manifestations of intention to offer or accept a consumer contract. It also declares void certain types of clauses in consumer contracts, such as a clause which excludes a trader from liability to compensate damages to consumers.

In the 2000s, public law approaches to consumer protection has become apparent.

Frist, the CAA Establishment Act of 2009 provided that the CAA's jurisdiction extended to all the three areas of consumer law: consumer safety, proper advertisements, and fairness in consumer transactions. Its authority to issue administrative orders for consumer protection is extensive. For example, cease and desist orders against false representations (Fair Trade Commission) and restraining orders of unfair solicitation (several Ministers) have been transferred to the CAA.

Secondly, several consumer protection laws have adopted what I call a dual scheme of private law and public law enforcement. They first prohibit certain acts by traders and then provide that violation of such prohibition should lead both to private law remedies (i.e., damage awards, contract revocation) and public law remedies (i.e., administrative orders for prevention of illegal acts).

One such legislation is the 2004 amendment to the Act on Specified Commercial Transactions. The Act on Door-to-Door Sales of 1976 was renamed the Act on Specified Commercial Transactions in 2000 to reflect its broaden scope of protection. After the 2004 amendment, it now prohibits various acts of solicitation by traders vis-à-vis consumers and provides for preventive remedies through administrative orders for compliance or suspension issued by the competent ministers while it also

creates the right of the consumers to rescind their manifestations of intention.

Another example is the Consumer Safety Act of 2009 which was enacted alongside with the establishment of the CAA. Fifteen years after the Products Liability Act of 1994 which provides for private law remedies, the Consumer Safety Act was the first comprehensive public law approach in the field of consumer safety.

The Consumer Safety Act provides that the CAA must gather information obtained by the national and local governments about accidents possibly caused by defects in consumer goods, facilities, or services. It is expected that, by unifying various kinds of accident information scattered within the government entities, the CAA may effectively warn the public about consumer safety. It also authorizes the CAA head to deal with the situation through some administrative orders. (There is a similarly named, but separate act about accident information.⁶)

This Act makes clear that defects in goods, facilities, or services, which means lack of usual safety as used in the Product Liability Act, lead to administrative remedies by the competent government agencies or, if no such agency exists, by the CAA itself. The CAA itself may issue a compliance order and temporary restraining order with regard to defective goods (§ 16 - § 19 of Consumer Safety Act).

Thus, in the fields of consumer safety and fair consumer transac-

⁶ The Consumer Product Safety Act which dates back to 1973 obliges companies in certain business areas to report accidents to the Ministry of Economy, Trade and Industry (formerly the Ministry of International Trade and Industry: MITI). The competent regulator of the relevant industry, including the METI, may issue hazard prevention orders, recall orders, and other orders to deal with the situation. In 2009, the Act was amended to require business to report accidents to the CAA.

tions, we now have legislations of a dual enforcement scheme. The exception is representations and advertisements where false advertisements have long been prohibited by the Act against Unjustifiable Premiums and Misleading Representations of 1962 authorizing administrative orders.

Thirdly, a new device was introduced in 2006 into the Consumer Contracts Act of 2000. The Act now includes provisions that authorize “Qualified Consumer Organizations” to file lawsuits enjoining rogue traders from engaging in prohibited acts.

Similar injunctive provisions were also introduced in 2008 into the Act against Unjustifiable Premiums and Misleading Representations (enjoining false and misleading representations and advertisements) and the Act on Specified Commercial Transactions. Though the consumer organizations are purely private entities, it might be said that such “qualified” organizations are expected to act for the interest of general consumers.

III. A Public Law Approach to Compensate Victimized Consumers

(1) Necessity of Public Law Approaches in Consumer Law

Consumer law deals with conflicts between consumers and business. The conflicts are undoubtedly private law controversies in nature, and have traditionally been dealt with in private law schemes: individuals file lawsuits against traders, or utilize ADRs, for private law liabilities such as damages, restitution, or specific performance of contracts.

A problem with the classic private law remedies, however, is their practical unavailability to many consumers. First of all, individual consumers need to be quick and brave enough to fight against rogue traders who might be good at running away and/or harassing people. Secondly,

most consumers do not take any action against traders if the monetary loss to each victim is fairly small as compared to the cost of action. Finally, remedies can be obtained only if the consumer plaintiffs have access to evidence to establish their case. Such evidence, including lists of customers, books and records, internal directions, and manuals, is in the hand of the defendants and are hardly available to outsiders who do not have legally authorized investigative power. The discovery system in Japanese court proceedings does not seem to be powerful enough for this purpose.

If private law remedies are not always effective in consumer conflicts, it means that enormous amounts of unjustified profits remain in the hand of rogue traders, which can be strong incentives for them to repeat the same scams. Public law approaches, such as prevention orders, have thus been introduced into consumer law in many nations. Japan has not been an exception as seen in Part II.

Public law remedies are generally good at *preventing* illegal conducts from happening. Statutes authorizing agencies to act against rogue traders are full of *preventive* remedies as follows:

Suspension orders are issued to stop the ongoing business operations so that injuries to be caused by illegal acts would not spread any further. Revocation of permits and licenses is to kick violators out of the market. Restraining orders, such as orders to stop illegal solicitations and untrue representations, directly have preventing effects. Orders to take necessary measures are issued to require business to rectify the current illegal situation and/or to build a measure to prevent future repetition of illegal acts. Compliance orders typically ask rogue traders to improve their internal governance so that illegal acts would not happen again.

Monetary sanctions are very effective in preventing repetition of illegal acts if the amount is large enough. Examples of monetary sanctions include civil money penalties in the Anglo-American context and

“monetary penalties (*Kachokin*)” imposed by the Fair Trade Commission of Japan.

These preventive administrative orders and sanctions have been included in not a few consumer protection laws. The current problem, however, is that, while prevention may work for potential victims, it leaves behind already victimized consumers. Are they not entitled to be redressed by the agency as well? Should the agency be authorized not only for preventive relief but also for consumer redress?

This is a question whether public law for the purpose of consumer protection should include *compensatory* remedies for already-victimized consumers in addition to *preventive* remedies for potential victims.

Surely, government agencies must act in the public interest: it cannot act simply on behalf of the interests of private entities. *Preventive* remedies, such as compliance orders, permit revocations, and civil money penalties, are issued by the agency to protect potential victims, i.e., for the sake of the public as a whole. It should be asked whether agency-obtained consumer redress would function to protect potential victims from harmful transactions rather than simply helping victimized individuals. One can argue that, if the government can successfully deprive unjust profits of rogue traders, such mechanism should very effectively prevent them from repeating the same illegal acts in the future, just like civil money penalty.

(2) A Proposal of “Undo” Order for Consumer Redress

My tentative proposal for a new administrative redress mechanism is as follows: the consumer protection agency should be authorized to issue the following orders when it detects legally prohibited acts or practices against consumers, finding that they are serious in the sense that injuries have already extended and/or seem to extend to a large number of consumers:

- (1) a money penalty order with preliminary enforcement effects,
- (2) a suspension order mandating the addressee to stop engaging in specified illegal acts,
- (3) an “undo” order to repair or rectify *past illegal acts*, and
- (4) an improvement order that requires the trader to take necessary measures, including creating better internal governance, not to repeat the same violations in the future.

Administrative law is full of suspension orders and improvement orders. On the other hand, the monetary penalty is still an unusual method in Japanese law. In my proposal, this device should carefully be designed to work effectively in the sense that it is imposed for the main purpose of obtaining preliminary injunctions to keep the traders’ money and property from being hidden underground or abroad.

The “undo” order means that the addressee must *undo* their unfair and deceptive acts *in the past*. It asks traders to “clean up” the result of its past illegal acts. The order needs to specify illegal acts, but only by category, just like the repair order with regard to defective automobiles under the Road Traffic Automobile Act. Under the order, the traders must do something to clean up the result of their illegal acts, such as to ask the past customers to renegotiate their agreements for repayment. It does not by itself nullify agreements or contracts between consumers and traders.

I expect that, with the undo order coupled with the monetary order, the addressee should have a strong incentive to repair its past illegality. Cleaning up the past mess causes extra cost on the traders, sometimes a very large amount of money, and this should create a strong disincentive for the traders not to engage in the same illegality again. Thus, the purpose of the undo order is to offer a preventive remedy with a secondary effect of compensation of consumer injuries (but not necessarily full compensation in the sense of torts or restitution).

If the addressee complies with the undo order, with fair amount of

money being repaid to the victims, and if the agency finds no reason to believe that the trader would repeat the same illegal practices, then, the agency may reduce the amount of the money penalty, even to zero. If, on the other hand, the traders flee away or go bankrupt without performing the undo order, the agency should be authorized, for the purpose of private lawsuits filed by victimized consumers, to abandon its right to temporarily seized money and property.

The consumer protection agency needs to ask the addressee trader for detailed information about its past illegal acts so that the agency can decide the degree to which the undo order has been complied with. Because of this, it needs to be authorized to order the trader to report the list of customers who were judged to be victims according to the categorical standards the agency showed in the undo order.

For comparison, the Anti-monopoly Act of Japan provides for a restraining order and a money penalty, which are imposed at the same time when the Fair Trade Commission finds legally prohibited acts being taking place. The Act also authorizes the Commission to impose a reduced amount of penalty if a violator voluntarily reports its illegality to the agency. This creates a strong incentive for companies to be honest to the Commission. As compared to the Anti-monopoly Act scheme, what I propose here is similar in one aspect but different in another aspect.

First, the restraining order in the Anti-monopoly Act is not interpreted to include the authority to ask the addressee to rectify its past illegal acts, but only to do something for the future. My proposal of the undo order is very different in this aspect. Secondly, the money penalty order in the Anti-monopoly Act can be reduced if the violators are honest. The same reasoning applies to my proposal of money penalty imposed as coupled with the undo order. If the undo order is satisfactorily complied with, and the addressee trader does not seem to repeat the violation, then the consumer protection authority may reduce the already imposed amount of penalty.

Concluding Remarks

Obviously, there are many technical difficulties in legislating my proposal. However, considering the ineffectiveness of private law remedies in many consumer conflicts, a way must be found towards government-obtained redress.

In the consume safety area, several statutes, including the Consumer Safety Act of 2009, have provided for a kind of the undo order for defective goods, forming a fairly complete dual system of private law and public law enforcement. If a new scheme of government-obtained redress, such as the one proposed in this paper, is legislated, it may be said that the dual scheme becomes a full-fledged one in the area of fair consumer transaction as well.