Chapter 10: Consumer Law

William F. Willier

Follow this and additional works at: http://lawdigitalcommons.bc.edu/asml

Part of the Consumer Protection Law Commons

Recommended Citation
CHAPTER 10

Consumer Law

WILLIAM F. WILLIER

§10.1. Introduction. During the 1972 survey year the Massachusetts General Court again demonstrated its concern for consumer problems, while the Supreme Judicial Court, even with new members, continued to exhibit its historical conservatism. In legislative activity, there was no grand design for resolution of consumer problems. There was, however, further activity in the field of consumer credit, in which Massachusetts has become the national leader in the protection of consumer interests. Real estate interests also came in for new scrutiny under the Consumer Protection Act,¹ which was amended specifically to include real estate transactions as they affect consumers. Perhaps the year is as significant for the bills filed and not enacted as it is for the bills that were enacted into law. The following analysis attempts to include both to the extent that they lend themselves to a logical delineation.

§10.2. Credit cards: Issuance, charges and liability. Since they were first introduced by American Express, “three-party credit cards”—those used to obtain goods, services or money from someone other than the issuer—have steadily grown in acceptance by consumers. Several oil companies are now allowing their cards to be used with non-affiliated companies. The gasoline credit card of one oil company may thus be honored at the service station of a non-affiliated company or used to purchase unrelated services such as hotel accommodations. And, after attempting to promote more cumbersome devices such as check credit, commercial banks plunged into the credit card arena in the 1960’s with Bank Americard and Master Charge. Clearly, such enterprises were designed to compete with those retailers who issued two-party cards which could only be used at the issuer’s establishments.

During the 1972 survey year, the legislature passed new laws affecting the three-party credit card industry. One of these enactments, Chapter 381 of the Acts of 1972, amending Chapter 168 of the General Laws, adds savings banks to the list of institutions permitted to issue three-party credit cards. No doubt the savings banks will take advantage of this new

WILLIAM F. WILLIER is the Chairman of the Massachusetts Consumer’s Council and a Professor of Law at the Boston College Law School.

§10.1. ¹ G.L., c. 93A.
§10.2 CONSUMER LAW

privilege. When they do, Massachusetts consumers can expect to receive another flood of inducements to acquire still more credit cards, since, as the commercial banks have learned, only volume produces profit. Yet, careless mailing and selection of holders may lead to the unauthorized and imprudent use of credit, ultimately resulting in great financial loss to the issuer.

An equally significant development is Chapter 783 of the Acts of 1972 which clarifies the law regarding maximum interest rates and billing periods for the credit card business. Prior to the effective date of this act, it had been a matter of dispute between three-party credit card issuers and consumer advocates whether the finance charge ceilings applicable to three-party credit cards were those under the Small Loans Act or those under the Retail Instalment Sales Act which includes revolving charge accounts. Truth in lending requirements also differed accordingly. Chapter 783 now treats extensions of credit under a three-party credit card as loans with separate interest rate ceilings: one and one-half percent per month on an unpaid balance of five hundred dollars or less, and one percent per month on any balance which exceeds five hundred dollars. The change will force most issuers to adjust their previously imposed finance rates by making them comply with the five hundred dollar breaking point and/or reducing them to meet the statutorily imposed rate ceilings. This may cause savings banks and other segments of the credit card industry to reevaluate their participation in the credit card business.

Chapter 783 applies to any “open end credit” or revolving credit

§10.2. 1 Even though computer companies are now experienced in such activity, the cost to banks of initiating a credit card program is extremely high; therefore, as a practical matter, savings banks will first have to make a very serious financial risk determination.

2 The direct issuance, however, of an unsolicited credit card is proscribed by G.L., c. 255, §12E(2), which provides that, except in cases of renewal or substitution, “[n]o credit card shall be issued except in response to a request or application therefor.”

3 G.L., c. 140, §96 (loan ceiling of $3,000). The following maximum interest rates were set by the Small Loans Regulatory Board under the authority granted to it by Acts of 1962, c. 795, §4:

(1) 2 1/2% per month on the unpaid principal balance not exceeding $200 (30% annual percentage rate);
(2) 2% per month on that part of the unpaid principal balance exceeding $200 but not exceeding $600 (24% annual percentage rate);
(3) 1 3/4% per month on that part of the unpaid principal balance exceeding $600 but not exceeding $1,000 (21% annual percentage rate);
(4) 3/4% per month on that part of the unpaid principal balance exceeding $1,000 (9% annual percentage rate);
(5) 1/2% per month on the unpaid principal balance 12 months after the original date of maturity (6% annual percentage rate).

4 G.L., c. 255D, §11 (10% maximum annual interest rate on first $500; 8% on amounts exceeding $500).

5 Acts of 1972, c. 783, §1, adding G.L., c. 140, §114B.

6 G.L., c. 140C, §1(r) defines “open end credit” as:
transaction and not only to credit card transactions. It prescribes two alternate and exclusive methods for calculating finance charges, each of which may have a different impact on the consumer. Under the “adjusted balance” method the finance charge is computed at the beginning of the billing cycle on the customer’s previous balance, i.e. that amount due and payable. Before the finance charge is computed the customer’s account must be credited by deducting all payments on accounts, returns and other credits made or given during the prior billing cycle. However, a deduction for a return or other credit is permitted only to the extent that the purchase to which the return or credit relates has been reflected in the previous balance. Thus, the purchase made and returned during the new billing cycle does not have to be deducted since it is not reflected as a charge in the balance at the beginning. The debit-credit items would be reflected in the next balance. This method is advantageous to the debtor who can avoid a finance charge by paying off his entire previous balance before the finance charge is calculated. The “average daily balance,” practicably calculable only by creditors with access to computers, adds the balance for each day (which will reflect credits) and applies the finance charge rate to the average. If the creditor utilizes this method, there will always be a finance charge so long as there was a balance on any day during the billing period. However, the practice of some creditors of assessing a finance charge against the previous balance without taking credits into account is now prohibited.

The liability of a cardholder for the unauthorized use of his lost or stolen credit card is limited by both Massachusetts and federal law. Additionally, if certain statutorily prescribed conditions are not met, the holder may sustain no liability at all. Recent judicial authority also appears to have made new inroads on the issue of the liability of a cardholder for the unauthorized use of his credit card.

---

10 Regardless of the date on which the card was issued, a holder will not be liable for the unauthorized use of his card unless “the card is an accepted card.
§10.3 CONSUMER LAW

Lechmere Tire and Sales Co. v. Burwick\(^{11}\) involved a situation in which the missing credit card of the defendant had been used by an unknown party to make fifteen unauthorized purchases totaling $611.78. The plaintiff-company sought to recover that amount from the defendant under the terms of the credit agreement, and was successful in the lower courts. The Supreme Judicial Court, however, determined that, irrespective of any clause imposing liability in an "adhesion" contract, the test of liability in this case revolved around the question of whether the plaintiff’s employees used due care in preventing the use of the credit card by imposters, not merely whether they acted in good faith.\(^{12}\) Finding that "the evidence warrant[ed] the conclusion that Lechmere was negligent in failing to make any comparison of the signature on the card with the signatures on the sales slips," the Court ruled that "the issue of Lechmere’s due care must be decided by the trier of fact."\(^{13}\) A new trial was ordered.

Although the transactions in Burwick took place in 1967, one year prior to the enactment of the Massachusetts credit card statute discussed above, the Court cited the recent statutory authority as indicative of the trend of public policy in the area of consumer protection.\(^{14}\) Since it is highly doubtful that either the Massachusetts or federal law was intended to completely supplant judicially imposed obligations upon credit card issuers, the duty of due care sanctioned by the Supreme Judicial Court no doubt supplements those duties and proscriptions imposed by statute. Thus, a credit card holder may escape even the limited liability allowed by the statutes if he can establish that the issuer was negligent in honoring a card presented by an unauthorized user.

§10.3. Credit: Definition; criteria. The meaning of "credit," as an abstract legal concept, has been the subject of much debate over the years. While the draftsmen of the Uniform Commercial Code\(^{1}\) failed to define the term, Congress filled the gap with the Truth-In-Lending [as defined in G.L., c. 255, §12E(1)], the liability is not in excess of fifty dollars, the card issuer gives adequate notice to the cardholder of the potential liability, the card issuer has provided the cardholder with a self-addressed, prestamped notification to be mailed by the cardholder in the event of the loss or theft of the credit card, . . . the unauthorized use occurs before the cardholder has notified the card issuer. . . . [and] the card issuer has provided a method whereby the user of such card can be identified as the person authorized to use it." G.L., c. 255, §12E(3).

\(^{12}\) Id. at 21-23, 277 N.E.2d at 506-507.
\(^{13}\) Id. at 23, 277 N.E.2d at 507.
\(^{14}\) It is interesting to note that the testimony of Attorney Jerald D. Burwick, the defendant in the case, before the Joint Committee on Commerce and Labor in 1968 was likely to have been the key factor in getting the bill through the legislature.

§10.3. 1 The Uniform Commercial Code was enacted in Massachusetts by Acts of 1957, c. 765, amending G.L., c. 106.

http://lawdigitalcommons.bc.edu/asml/vol1972/iss1/13
Act of 1968. The Act defines "credit" as "the right granted by a creditor to a debtor to defer payment of debt or to incur debt and defer its payment." The term "creditor," however, "refers only to creditors who regularly extend, or arrange for the extension of, credit for which the payment of a finance charge is required." In addition, the disclosure of credit terms required by the Act must be made to "each person to whom consumer credit is extended and upon whom a finance charge is or may be imposed." It would thus appear that only those extensions of credit to which a finance charge is applied would be covered by the Federal Truth-In-Lending Act.

The Board of Governors of the Federal Reserve System, pursuant to its regulatory authority under the Truth-In-Lending Act, has defined the scope of the Act to include any transaction which is payable in more than four instalments, whether or not a finance charge is separately imposed, or one upon which a finance charge is or may be imposed. In adding the "four instalment" alternative, the Board recognized that no consumer creditor would extend finance-free credit since there are necessarily costs involved in administering a credit transaction. If such costs are not specifically called "finance charges," it is likely that they are built into the price of the goods and services or other charges. To mitigate the effect of its definition on simple, short-term transactions, the Board wrote in the "more than four instalments" limitation.

Reading the disclosure requirements of the Federal Truth-In-Lending Act in a more narrow and less commercially realistic way, the United States Court of Appeals for the Fifth Circuit has recently held in the case of Mourning v. Family Publications Service, Inc. that the Board overstepped its authority in promulgating its four instalment rule. The case will be heard by the United States Supreme Court which has granted certiorari, and Senator Proxmire, the sponsor of the original truth-in-

3 Id. at §1602(f). "Creditor" is also defined in the U.C.C.: "Creditor includes a general creditor, a secured creditor, a lien creditor and any representative of creditors, including an assignee for the benefit of creditors, a trustee in bankruptcy, a receiver in equity and an executor or administrator of an insolvent debtor's or assignor's estate." G.L., c. 106, §1-201(12).
5 Id. at §1604.
7 449 F.2d 235 (5th Cir. 1971), cert. granted 405 U.S. 987. (1972).
8 449 F.2d 235, 241. The Court of Appeals also held that the "four instalment rule" was unconstitutional as a violation of the Fifth Amendment in that the rule creates a conclusive or irrebuttable presumption that the price paid by the consumer in such transactions includes the cost of extending credit. Id. at 242.
lending bill, has introduced legislation which would make it clear that the Board's rule was in fact authorized by the Act.\textsuperscript{10}

The Massachusetts Truth-In-Lending Law\textsuperscript{11} specifically adopts a form of the four instalment rule in defining transactions to which the statute applies.\textsuperscript{12} The applicability of state disclosure requirements to many Massachusetts credit transactions is therefore fairly clear despite the controversy over the federal law since transactions subject to Massachusetts law are exempt from the requirements of the Federal Act.\textsuperscript{13} However, consumer credit transactions of certain institutions including federally chartered banks are subject to the federal rather than the state truth-in-lending requirements.\textsuperscript{14} While the Mourning decision remains in effect, disclosure may be required in some Massachusetts transactions involving more than four instalments and not in others.\textsuperscript{15}

Regardless of how "credit" is defined for a given legal purpose, the qualifications that a consumer must meet to receive that credit are by and large left to the discretion of creditors. Over the years, various segments of the consumer credit industry have established different standards for qualifying consumers as eligible to receive credit. Due to the lack of uniformity of these qualifying criteria the standards applied by any given creditor may be highly subjective and, in some instances, discriminatory. The legislature is now beginning to take steps to alleviate this problem. Specifically, the General Court has determined that it is an "unlawful practice" for retailers to refuse to extend credit to a person solely because he or she is sixty-two years of age or older.\textsuperscript{16} Since this proscription reaches only retailers, it may be asked whether other classes of creditors are still free to discriminate on the basis of old age. Under the amended statute, "[t]he term 'unlawful practice' includes only those unlawful practices specified [therein]."\textsuperscript{17} (Emphasis added). A bill which was introduced to prevent credit discrimination on the basis of marital status and sex\textsuperscript{18} was not enacted.\textsuperscript{19}

§10.4. Credit: Truth-in-lending. The truth-in-lending provisions of

\textsuperscript{10} S. 652, 92nd Cong., 1st Sess. (1972).
\textsuperscript{11} G.L., c. 140C.
\textsuperscript{12} Id. at §1(j).
\textsuperscript{14} McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 435 (1819).
\textsuperscript{15} If the constitutional basis for the Mourning decision is sustained by the Supreme Court, such determination will not adversely affect the status of the four instalment rule in Massachusetts. The rule will remain valid since it was statutorily imposed rather than added by regulation as was the federal rule. Thus, as regards the Massachusetts rule, the question of "conclusive presumption" will be foreclosed.
\textsuperscript{17} G.L., c. 151B, §1.4.
\textsuperscript{18} Cf. G.L., c. 151B, §3B (making it unlawful for a creditor to discriminate on the basis of sex in a mortgage transaction).
\textsuperscript{19} H. 6282 (1972).
the General Laws\(^1\) have been amended\(^2\) to bring them into conformity with amendments to Regulation Z made by the Federal Reserve Board.\(^3\) While some of the amendments might be viewed as "clean-up" provisions, clarifying more or less minor points,\(^4\) others are more substantive in nature.

Under the former law, a creditor was required to mail or deliver to a buyer a notice of change in credit terms under an open end credit plan,\(^5\) such as a revolving charge account, thirty days before the change became effective or thirty days prior to the beginning of the next billing cycle, whichever came sooner.\(^6\) To avoid the cost of a mailing separate from a regular monthly billing, the change would have had to have been decided upon at least two billing periods prior to its becoming effective. By an amendment to that law, the required notice need be sent only fifteen days prior to the beginning of the billing period in which the change is to become effective, and no notice at all is required if the only change is to be a reduction in payments, rates or minimum charges.\(^7\)

Unanswered is the question of how changes made unilaterally by the creditor can bind a customer who has not agreed to them, especially since the amended chapter speaks in terms of a revolving credit "agreement."\(^8\)

The argument might be made that absent such an agreement, the change is ineffective notwithstanding the notice which could be construed as no more than an invitation to a customer to enter into such an agreement.

Also within the purview of the federal and state truth-in-lending laws is the practice of the merchant who quotes a certain price for his goods or services but will accept a lesser amount to induce prompt payment.\(^9\) The customer who makes his payment after the expiration of the "discount" period pays what amounts to a finance charge. While consumers may not have viewed it in that way, this practice resembles an instalment sale transaction. Such discount transactions are subject to the disclosure provisions of the truth-in-lending laws unless expressly exempted, as are bills from utilities regulated by state or federal agencies.\(^10\)

An amendment to the Massachusetts Truth-In-Lending Law permits

\[ \text{§10.4. } \]

\(1\) G.L., c. 140C and G.L., 255D, §27.


\(3\) See §10.3, note 6, supra.

\(4\) For example, c. 140C was amended to allow creditors to ignore the twenty-ninth day in February every four years in calculating and disclosing such items as finance charge, payment, and percentage rate. Acts of 1972, c. 229, §1, amending G.L., c. 140C, §5 by inserting subsection (i). Another example of a clean-up provision is the amendment which permits a creditor to substitute prescribed language for the word "home" in the notice to rescind a security interest in real property which does not include a dwelling. Id. at §5, amending G.L., 140C, §8(b).

\(5\) "Open end credit" is defined in §10.2, note 6, supra.


\(7\) Acts of 1972, c. 229, §10 amending G.L., 225D §27E.

\(8\) The language of "agreement" appears in G.L., c. 255D, §§27B and 27C.

\(9\) Regulation Z, 12 CFR §226.8(o); G.L., c. 140C, §7(o).

\(10\) G.L., c. 140C, §2(d).
§10.4 CONSUMER LAW

some deviation from the disclosures otherwise required where a discount transaction is involved. The creditor must disclose on the invoice or other evidence of sale (1) the date of the sale or invoice; (2) the rate of discount, the periods within which the discount may be taken and the dates on which the full amount of the obligation is due and payable; (3) the amount or the method of computing the amount of any default or similar late payment charges; (4) a description of the type of any security interest to be held by the creditor in connection with the extension of credit and a clear identification of the property to which the security interest relates; (5) the amount of the discount, designated specifically as a “finance charge;” and (6) the “annual percentage rate,” (using that term) for any discount exceeding five percent of the obligation to which the discount relates.\(^{11}\)

The disclosure requirement for default charges should be read with another rule promulgated by the Federal Reserve Board which explains that a delinquency or default charge is not a finance charge requiring disclosure, but becomes such if the creditor continues to extend credit, adding such charges to the debtor’s account following the nonpayment of balances previously due and payable.\(^{12}\)

Conforming to the federal truth-in-lending provisions, the Massachusetts law provides that the disclosure of discount need be made only once, usually on the sales slip, if a debt is charged to an open end account. The discount need not be included in the finance charge or annual percentage rate calculated on the account itself.\(^{13}\) This provision further distorts disclosures in open end accounts, but the Federal Reserve Board appears to have sacrificed accuracy for simplicity and expediency. For transactions which are not open ended, the discount must be deducted from the price and added to any other finance charge in computing the annual percentage rate if the debtor may make more than one payment.\(^{14}\) This method more accurately reflects the true annual percentage rate. If the debt is payable in only one payment, however, the discount may be ignored in computing and disclosing the cash price, finance charge, and annual percentage rate.\(^{15}\) To make things still easier for merchants giving discounts, the Massachusetts law permits the required disclosures to be made after the consummation of the transaction.\(^{16}\)

The financial affairs of farmers who frequently live from crop to crop and from herd to herd may be erratic as compared to those of other businessmen. It is, therefore, understandable that agricultural creditors have difficulty determining finance charges and annual percentage rates when such payments are dependent upon the farmer’s growing or harvest

\(^{11}\) Acts of 1972, c. 229, §3, adding G.L., c. 140 C, §7(o) (1).
\(^{12}\) Federal Reserve Board Interpretation, 12 CFR §226.401.
\(^{13}\) Acts of 1972, c. 229, §3, adding G.L., c. 140C, §7(o) (6).
\(^{14}\) Id., adding G.L., c. 140C, §7(o) (7).
\(^{15}\) Id.
\(^{16}\) Id., adding G.L., c. 140C, §7(o) (8). “Consummation” is that point in time when a contractual relationship is created. Regulation Z, 12 CFR §226.2(cc).

http://lawdigitalcommons.bc.edu/asml/vol1972/iss1/13
season or other operational factors. Nevertheless, such credit transactions
are within the purview of both the federal and state truth-in-lending
laws.\textsuperscript{17} To alleviate the problem for those who extend credit to farmers
and for agricultural purposes generally, the state disclosure requirements
have been somewhat relaxed in situations where credit terms are difficult
to compute in advance due to fluctuating operational factors.\textsuperscript{18} The prin-
cipal exceptions permitted where such a credit transaction is involved is
that the method of computing the finance charge, rather than the dollar
amount of such charge, may be disclosed and that the annual percentage
rate need not be disclosed.\textsuperscript{19} Furthermore, the number, amount, and due
dates or periods of payments scheduled to repay the indebtedness need
be disclosed only if these items are determinable at the time the disclosures
are required to be made.\textsuperscript{20}

\textbf{§10.5. Debt collection: Due process: Wage exceptions.} Massachu-
setts has long been notorious throughout the country for legally sanction-
ing the creditor practice of commencing civil actions against defaulting
debtors by tying up the defendant’s property, with virtually no procedural
safeguards, by writs of attachment or trustee process.\textsuperscript{1} A defendant could
thus be deprived of the money in his bank account and other property
essential to his health and welfare without any judicial determination
of his liability or advance notice of the attachment. During the 1972
Survey year these statutes were finally challenged on constitutional
grounds and the federal district court for Massachusetts ruled that trustee
process infringes the Fourteenth Amendment due process guarantee.

In \textit{Schneider v. Margossian},\textsuperscript{2} the plaintiff had been sued in state court
under the trustee process attachment procedure;\textsuperscript{3} his bank account was
attached without notice or opportunity to be heard. The plaintiff then
sought injunctive relief in federal district court alleging the unconstitu-
tionality of the statutes permitting such attachments. Relying upon the
much heralded Supreme Court decisions of \textit{Sniadach v. Family Finance}
\textsuperscript{17} Both acts include regulation of credit extended for agricultural purposes as
well as for strictly consumer purposes. Regulation Z, 12 CFR §226.8(p); Acts
\textsuperscript{19} Id.
\textsuperscript{20} Id.

\textbf{§10.5. 1} "Under [the attachment] procedure, the plaintiff simply fills in the
blanks on a writ, averring that the defendant is liable to him for a certain amount
on a particular cause of action; the writ then directs the appropriate officer to
attach the property of the defendant, either in the defendant’s hands or . . .
in the hands of a trustee. Mass. G.L. c. 223, §16. Whether the goods are at-
tached in the defendant’s or the trustee’s hands is immaterial: the property is
held to ‘satisfy such judgment as the plaintiff may recover,’ c. 223, §42; see also
c. 246, §20, unless the defendant has the attachment dissolved by posting bond,
\textsuperscript{3} G.L., c. 246.
§10.5  CONSUMER LAW

4 and Fuentes v. Shevin, the court agreed with the plaintiff's contention that the Massachusetts trustee process law was a violation of due process and made the following observation:

[T]rustee process may work a substantial hardship on defendants by . . . freezing their bank accounts and forcing them to borrow money in order to live. Not all trustee process actions may have this result, but what is important is that the statutes are not drafted to preclude this possibility.

The court went on to specifically enjoin the enforcement of the trustee process statutes to the extent that they denied defendants notice and a hearing prior to prejudgment attachments by means of trustee process.

As if anticipating the Schneider decision, the General Court in Chapter 179 of the Acts of 1972 provided that attachments of the defendant's real property must be dissolved unless notice is in fact served on the defendant, as the court directs, within 60 days of commencement of the action. Attachments must also be dissolved if the action upon which they are based is not filed within 35 days. It is highly doubtful, however, that either of these provisions comports with Schneider, which found that an attachment must be preceded by notice and a hearing to be constitutional. Since the new enactments provide that notice need only be given after the attachment and make no provision allowing the defendant to contest the matter, it would appear that they lack necessary elements of due process and are, therefore, constitutionally defective.

Under another 1972 enactment the amount of gross wages exempt from attachment was raised from $100 to $125 per week, and an exemption of $100 per week was created for income from pensions. No logical reason for the difference in amounts is apparent since the social policy is the same in both cases. The Federal Wage Exemption Law continues to apply, exempting three quarters of disposable earnings (wages after taxes and the like) from the attachment. In any event, since under the Schneider decision trustee process under Massachusetts law is unconstitutional insofar as it denies defendants notice and a hearing prior to prejudgment attachment, the exemption is irrelevant except as it applies to a levy of execution following a judgment.

§10.6.  Unfair and deceptive practices: Remedies.  Few of the industries which provide important goods or services to Massachusetts

4 395 U.S. 337 (1969) (overturning Wisconsin statute which allowed a creditor to garnish the wages of his alleged debtor prior to a hearing as violative of due process).
5 407 U.S. 67 (1972) (broadening Sniadach rule to apply to all property of the defendant and not only his wages). The Fuentes decision is discussed at §6.12, supra.
6 349 F. Supp. 741, 745.
7 Acts of 1972, c. 179, §1, amending G.L., c. 223, §115A.
8 Id. at §2, adding G.L., c. 223, §115B.
11 For a discussion of the prospective effect of the Schneider decision see §6.13, supra.

http://lawdigitalcommons.bc.edu/asml/vol1972/iss1/13
consumers escape some form of regulation by federal, state or local law. Much of that regulation is provided through administrative agencies which are specially constituted to make and enforce the rules which will govern a particular industry. Intricate procedures are established to ensure that the affected industry receives due process in the course of its regulation. For some industries, such as utilities, insurance companies, and common carriers, in which the competition of the marketplace is not sufficient to keep prices down, regulatory agencies are empowered to regulate the prices or rates at which goods or services may be sold. The rate setting procedures are particularly cumbersome, time-consuming and costly, and they tend to favor the regulated industry which can maintain a full time advocacy system.

By and large, the regulatory agencies are empowered to act only on behalf of the public and not on behalf of individual consumers. There is virtually no legally established way by which an individual consumer can obtain monetary redress through resort to such an agency. The agency can only, as a courtesy to the consumer, urge the industry to refund overcharges and the like under the threat of public action or enforcement. It was clearly with this need in mind that the legislature enacted Chapter 93A which provides, in Section 9, private remedies to consumers who are victims of unfair or deceptive acts or practices, and public remedies through the Attorney General, independent of action which a regulatory agency may take.

Unfortunately, by Justice Braucher's opinion in Gordon v. Hardware Mutual Casualty Co., the Supreme Judicial Court has held that the remedies of Chapter 93A are not so independent of agency action as had been supposed. The plaintiff in Gordon sought relief from the imposition of an automobile insurance premium levied by the defendant in 1970. For several years prior to the one in question, the defendant insurance company had sought and been granted permission from the Commissioner of Insurance to reduce the manual rates set by the Commissioner and pass such discounts on to the defendant's subscribers. The plaintiff, who had for several years purchased insurance from the defendant at the reduced rates, was not notified that the defendant had planned to discontinue the discount on his 1970 automobile policy. He learned of the change only when he received the written policy reflecting higher premiums, at which time the new policy was already in effect. Not wishing to suffer a loss due to short rates on cancellation, the plaintiff did not cancel his policy but sought a reimbursement under Section 9 of Chapter 93A. The Court held that the plaintiff was required to seek relief through the Commissioner of Insurance before resorting to the remedies provided under the Consumer Protection Act.

It is not at all clear that the plaintiff could have obtained a rebate if he had resorted to the administrative procedure provided in the in-
Although the insurance laws, at the time of the alleged unfair practice, provided "any person aggrieved by the application of its rating system" with a right to petition for review, and further provided the Commissioner with a prerogative to investigate unfair or deceptive practices and to seek an injunction through the Attorney General, such remedies are designed exclusively to vindicate the public interest. The plaintiff was not aggrieved by the rate setting system and he did not want an injunction. The cost in time and money of using such indirect procedures would be prohibitive when weighed against the relatively small amount of the claim. Nevertheless the Court summarily dismissed the problem, noting simply that "[w]e should not pass upon such questions without having the benefit of a prior determination by the commissioner [that the act or practice in question is unfair or deceptive]." That holding effectively deprives consumers of their private remedies under Chapter 93A insofar as their claims relate to practices which may be regulated by the Commissioner of Insurance.

Throwing salt into the plaintiff's wound, the Court invoked the mandate of an exclusionary provision of Chapter 93A which exempts from that Act "transactions or actions otherwise permitted under laws as administered by any regulatory board or officer acting under statutory authority of the commonwealth." In fact, another provision of the chapter expressly provides that the burden of proving the exemption falls upon the person claiming the exemption. The Court unduly favored the defendant by invoking the exemption clause without regard to his burden of proof, and by requiring the plaintiff to resort to administrative remedies when the scheme of Chapter 93A was thereby frustrated. The question might rightly be asked why the burden of proving exemption was explicitly set forth by the legislature and whether it should be so readily disregarded by a court. The burden of proof provision was not inserted disingenuously by the legislature, and it does not leave the courts free to declare an exemption when the person who should claim the exemption has failed to do so. Such a reading would make the claim of exemption provision a hollow and easily cracked shell. Rather, the provision should be read to encourage "circumvention" of the administrative procedure for consumers where an alternate, simpler and more complete remedial procedure is available under Chapter 93A.

Since a practice or act which is unfair or deceptive is unlawful under both Chapter 93A and 176D, the central issue in choosing a forum is the relative competence of the Commissioner of Insurance and the judicial

3 G.L., cc. 174A-178.
4 G.L., c. 175A, §11.
7 G.L., c. 93A, §3(1) (a).
8 Id. at §3(2).
9 G.L., c. 93A, §3.
10 G.L., c. 176D, §2 (1972), formerly G.L., c. 176D, §3.
system in determining what constitutes an unfair or deceptive practice. Although the Commissioner may be more familiar with details of the insurance industry, Chapter 176D reserves to the Supreme Judicial Court a broad power to review any report of the Commissioner which concludes that a challenged practice is not unfair or deceptive. If the Court disagrees with the Commissioner's conclusion, it may enjoin the act or practice "notwithstanding such report of the commissioner." This power of broad judicial review demonstrates a clear legislative intent that the Court should have the final word in defining what constitutes an unfair or deceptive practice. Certainly where the act in controversy is as simple as the one involved in the Gordon case, it seems very doubtful that the specialized expertise of the Commissioner need be invoked.

The Gordon decision could be relegated solely to cover conduct of insurance companies were it not for Justice Braucher's broad dictum to the effect that administrative procedure is required as to the acts or practices of any industry regulated by a state agency prior to seeking relief under Chapter 93A. Gordon is a dangerous decision—one reflective of the Court's reluctance to afford consumers effective private relief, and perhaps one susceptible only to legislative remedy.

Subsequent to the Gordon decision, Chapter 176D of the General Laws was revised by Chapter 543 of the Acts of 1972. Under Section 9 of the old law the Commissioner of Insurance was given authority to hold hearings, and, through the Attorney General, cause a petition to be filed in the Supreme Judicial Court to enjoin an unfair or deceptive act or practice which was not specifically enumerated in the chapter. Perhaps it was because this authority was rarely used that the above provision was eradicated from the statutory scheme of Chapter 176D. The new chapter contains a comprehensive list of prohibited conduct, and the need for the old provision was thereby eliminated.

The new Chapter 176D should modify the myopic decision in Gordon. Section 7 permits consumers to recover punitive damages up to twenty-five percent of any claim in an action on an insurance policy if the court finds that the consumer has been damaged by a practice which violated the statute. Section 8 provides that "[n]o order of the commissioner under this chapter or order of a court to enforce the same shall in any way relieve or absolve any person affected by such order from any liability under any other laws of this commonwealth." A fair reading of these provisions suggests that the remedies afforded by Chapter 176D are not

11 Id. at §9 (1972), formerly G.L., c. 176D, §10.
12 While it is not entirely clear that the claim of the plaintiff in Gordon would have been covered by the new provisions of Chapter 176D, it is conceivable that the act complained of may be characterized as a misrepresentation. It would appear that the provision which comes closest to covering the Gordon situation is the new §3(12) of c. 176D which applies §181 of c. 175 to prohibit any insurance company from making any "misleading representation in respect to the terms . . . of any policy of insurance . . . in order to induce or which tends to induce [the insured] . . . to exchange it for any other such policy . . . ."
§10.7 CONSUMER LAW

exclusive, and that relief should be independently available under Chapter 93A.

The public remedies under the new chapter entitle the Commissioner to hold hearings on violations, to issue cease and desist orders, to suspend or revoke licenses and to impose fines. The Supreme Judicial Court is vested with a broad power to review and affirm or modify the order of the commissioner. Further, the commissioner can promulgate regulations refining but not expanding upon the conduct proscribed by the new chapter. However, none of these remedies afford pecuniary relief directly to aggrieved consumers and the remedies under Chapter 93A should therefore be independently available.

It should be noted that a consumer seeking a private remedy under Section 9 of Chapter 93A must establish a loss, a difficult burden in the case of some kinds of unfair and deceptive practices. A bill was recently filed to liberalize this requirement, but the General Court has thus far only provided a resolution calling for an investigation of the problem by the Judicial Council.

§10.7. Unfair and deceptive practices: Inclusions; landlord and tenant. Chapter 93A of the General Laws has been amended to clarify language under an existing provision which left in doubt the question of whether the prohibition against "unfair or deceptive acts or practices" encompassed transactions involved in the rental and leasing of services and property, including realty, as well as the sale thereof. As a result of the change, tenants are now supplied with another potent weapon in their protective arsenal.

Under Section 9 of Chapter 93A a tenant or group of tenants similarly situated can recover actual pecuniary losses resulting from an unfair act or practice of a landlord, may seek injunctive relief, or pursue both remedies. At least thirty days prior to instituting such actions, the tenant must mail a written demand for relief to the landlord, "identifying the

13 Acts of 1972, c. 543, §1, adding G.L., c. 176D, §6. The provisions of former §6 are substantially retained by the new section.
14 Id., adding G.L., c. 176D, §7. The provisions of former §7 are substantially retained by the new section.
15 Id.
16 Id., adding G.L., c. 176D, §9. The new §9 is derived from former §10.
17 Id., adding G.L., c. 176D, §11. This section is new.
18 H. 508 (1972).
19 Resolves of 1972, c. 31.

§10.7. 1 Acts of 1972, c. 123, amending G.L., c. 93A, §1(b).
2 G.L., c. 93A, §2(a).
3 The prior law, by its terms, covered only the sale of such services and property.
4 For other examples of legislation protective of tenants see, e.g., G.L., c. 239, §§9, 10, as amended by Acts of 1972, c. 23, §1 (stay of proceedings for evictions without cause), and G.L., c. 111, §127H (institution of rent receivership in cases where condition of premises violates standards of fitness for human habitation established under sanitary code or department of health standards).

http://lawdigitalcommons.bc.edu/asml/vol1972/iss1/13
claimant and reasonably describing the unfair or deceptive act or prac­tice relied upon and the injury suffered. . . ."5 The landlord may make a written tender of settlement within thirty days of the receipt of the tenant's demand, and if such tender is made and rejected, the landlord may set up, by affidavit, the fact of tender and rejection and file it with the superior court. If, upon reviewing the circumstances, the court finds the amount of the tendered relief to have been reasonable, it may limit the tenant's recovery to that amount in any subsequent action.6 The method of relief provided by Section 9 avoids the more cumbersome procedure of rent receivership; however, it does not expressly permit the withholding of rent and can ultimately involve the expense and formality of a suit in superior court.

At the time of this writing the Attorney General had not promulgated regulations dealing specifically with acts and practices in real estate transactions. They no doubt will be forthcoming. In the interim, certain existing regulations could cover such acts and practices. For example, regulations prohibiting advertising an apartment at one price when in actuality only a higher priced apartment is available might, by analogy, be applied to a similar real estate transaction. The same logic should hold true for the prohibition against the false or misleading description of premises.

§10.8. Unsafe products. The concern of consumers for improved product safety was echoed in the chambers of the General Court where several items of legislation were enacted in 1972 dealing with the regulation of hazardous or potentially hazardous products. The most comprehensive of those enactments is Chapter 506 of the Acts of 1972 amending Chapter 94B of the General Laws by modifying the labeling requirements of that chapter and further regulating the sale of unsafe products.

By Section 1 of Chapter 506 the Commissioner of Public Health is given broad authority to take out of the marketplace any household substance including toys

which the commissioner by regulation classifies as a 'banned hazardous substance' on the basis of finding that notwithstanding cautionary labeling required under this chapter, the degree or nature of the hazard involved in the presence or use of the substance in households is such that the protection of the public health and safety can be adequately served only by keeping the substance out of the channels of commerce.1 (Emphasis added).

The new statute introduces the term "misbranded hazardous sub­stance," in the place of "misbranded package" in the old statute. It

6 G.L., c. 93A, §9(3).
§10.8. 1 Acts of 1972, c. 506, §1, amending G.L., c. 94B, §§1 and 2(d).
§10.8 CONSUMER LAW

further prescribes that the label on any hazardous substance that is not a "banned hazardous substance" and which is intended for use by children must bear adequate directions for the protection of children from the hazard.2 Also, by Chapter 427 of the Acts of 1972,3 drugs which the United States Food and Drug Administration designates as "misbranded" will be given the equivalent designation under state law.

The Director of the Food and Drug Division of the Department of Public Health or his inspector is given authority under Chapter 506 to detain or embargo any banned hazardous substance or any hazardous substance he finds or has probable cause to believe is misbranded.4 If the person responsible for such banned or misbranded hazardous substances does not voluntarily destroy them, the Director or his inspector may seek a libel for condemnation within thirty days of detention or embargo and an order for destruction.5

The new Section 8 of Chapter 94B now provides for the mandatory repurchase of any banned hazardous substance sold by any manufacturer, distributor or dealer.6 Of particular significance to the consumer is the provision that:

In the case of any article or substance sold at retail by a dealer, if the person who purchased it from the dealer returns it to him, the dealer shall refund the purchase price paid for it and reimburse him for any reasonable and necessary transportation charges incurred in its return.7

While the above provision appears to be fair, there is no guarantee that a consumer will be warned that a product he has purchased is a banned hazardous substance. The power to warn the public of health dangers from hazardous substances is purely discretionary with the Commissioner of Public Health.8 A more effective measure would be to require the seller of a banned hazardous substance to notify the buyer of the danger, and also of his rights of resale.

Chapter 94B imposes various penalties for noncompliance with its provisions. The new Section 4 imposes penalties for the failure to comply with Section 3 which prohibits certain acts in relation to misbranding. The new Section 6 imposes severe penalties on any person who obstructs an authorized search, under a valid search warrant, of premises where

2 Id., amending G.L., c. 94B, §1.
3 Amending G.L., c. 94, §187.
5 Id.
6 The new §8 provides that "the term 'manufacturer' includes an importer for resale, and . . . a dealer who sells at wholesale an article or substance shall with respect to that sale be considered the distributor of that article or substance."
8 Id., amending G.L., c. 94B, §9. The new §9 merely reiterates the old §8, substituting the words "possible danger to health" for the words "imminent danger to health."
a hazardous substance is kept or records showing the movement in commerce of any such substances. Section 21, which was only slightly amended, continues to impose strict liability on any person who himself or by his servant or agent, violates any provision of Sections 1 to 18 of Chapter 94B.

In another recent enactment the legislature declared that by 1976, grass cutting machines sold in the Commonwealth must have safety devices to protect users from objects ejected from the blade in accordance with regulations promulgated by the Commissioner of Public Safety. Failure to install such a device will result in a fine of up to five hundred dollars.

Animals were not omitted from the General Court's largesse. Eleven sections of Chapter 94 were repealed and new sections added to Chapter 128 all designed to provide labeling on commercial feeds (including pet foods) in terms of weight, brand, manufacturer, directions for use, precautions and nutritional contents. All such feeds must be registered prior to their sale. Distribution of unlabeled, mislabeled or adulterated feed is prohibited, with both administrative enforcement and criminal penalties possible. In this respect, animals fare better than humans whose food need not bear labels with nutritional content—an anomaly, perhaps, since animals can't read.

11 Id.
14 G.L., c. 128, §52.
15 G.L., c. 128, §61.