

Consumer Protection in the United States: An Overview

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Forthcoming, in *Strengthening the Consumer Protection Regime* (CUTS Jaipur, India 2007)

General Country Data

| | |
|-----------------------------------|---|
| Population | 296.4 million *** |
| GDP (Current US\$) | 12.4 trillion*** |
| Per Capita Income (Current US\$): | \$43,560***, GNI Per Capita, Atlas Method |
| Surface Area | 9.6 million sq. km. |
| Life Expectancy | 77.7 years *** |
| Literacy (%) | 99%**** |
| HDI Rank | 8 ** |

World Development Indicators database, April 2007.

(***) For the year 2005.

(**) For the year 2004.

****Literacy Statistic from The World Factbook, U.S. Central Intelligence Agency, <https://www.cia.gov/library/publications/the-world-factbook/print/us.html> (last visited July 11, 2007).

Top Ten Categories of Consumer Complaints Registered with the United States Federal Trade Commission, between January 1 and December 31, 2006.

| Rank | Top Categories | Complaints | % |
|------|--|------------|-----|
| 1 | Identity Theft | 246,035 | 36% |
| 2 | Shop-at-Home/Catalog Sales | 46,995 | 7% |
| 3 | Prizes/Sweepstakes and Lotteries | 45,587 | 7% |
| 4 | Internet Services and Computer Complaints | 41,243 | 6% |
| 5 | Internet Auctions | 32,832 | 5% |
| 6 | Foreign Money Offers | 20,411 | 3% |
| 7 | Advance-Fee Loans and Credit Protection/Repair | 10,857 | 2% |
| 8 | Magazines and Buyers Clubs | 8,924 | 1% |
| 9 | Telephone Services | 8,165 | 1% |
| 10 | Health Care | 7,467 | 1% |

Source: Federal Trade Commission, Consumer Fraud and Identity Theft Complaint Data 5 (2007), *available at* <http://www.consumer.gov/sentinel/pubs/Top10Fraud2006.pdf>.

Percentages are based on the total number of FTC Sentinel database complaints received in 2006 (674,354). Eight percent of complaints are not itemized in this chart; twenty-four percent of the complaints did not match specific FTC service codes.

INTRODUCTION

American consumers are protected from fraud and unfair business practices through a m elange of national, state, and local governmental and private actors. These actors both protect consumers and equip them with the knowledge they need to protect themselves. Although U.S. mechanisms for consumer protection often exist separately

from each other, what the overall scheme lacks in centralization, it gains in depth and variety of protection.

I. FEDERAL MECHANISMS FOR CONSUMER PROTECTION

The principal, but not the only, consumer protection agency at the federal level is the United States Federal Trade Commission (FTC). This section outlines the powers and remedies of the FTC in the consumer protection and then briefly describes some of the other federal agencies with significant consumer protection responsibilities.

Federal Trade Commission

The United States Federal Trade Commission (FTC) works alone, and in concert with other federal agencies, to administer a wide variety of consumer protection laws. The overall goal is to afford consumers a deception-free marketplace and provide the highest-quality products at competitive prices. The FTC is an independent federal agency with five Presidentially-appointed, Senate-confirmed commissioners who each serve seven-year terms. No more than three commissioners may be members of the President's political party. The FTC has three bureaus: the Bureau of Competition, the Bureau of Consumer Protection, and the Bureau of Economics. Initially authorized in 1914 by the passage of the Federal Trade Commission Act, the FTC is currently dedicated to achieving two goals: 1. to protect consumers by preventing fraud, deception, and unfair business practices in the marketplace and 2. to maintain competition by preventing anticompetitive business practices.

The FTC's Bureau of Consumer Protection aims to achieve the first goal, and is the focus of this section. For more information on the relationship between consumer protection and competition law in the United States, see Spencer Weber Waller, "In Search of Economic Justice: Considering Competition and Consumer Protection Law," *Loyola University Chicago Law Journal*, Vol. 36, p. 631, 2005, available at SSRN: <http://ssrn.com/abstract=726512>.

The FTC's Jurisdiction

The FTC derives its consumer protection authority primarily from Section 5(a) of the FTC Act, which prohibits "unfair or deceptive acts or practices in or affecting commerce." According to the FTC, deception occurs when there is a material representation, omission, or practice that is likely to mislead a consumer who is acting reasonably under the circumstances. Unfair practices are those which cause, or are likely to cause, reasonably unavoidable and substantial injury to consumers without any offsetting countervailing benefits to consumers or competition.

In addition to its authority under Section 5(a), the FTC has enforcement and administrative abilities under forty six other statutes, thirty-seven of which relate to the FTC's consumer protection mission. Among these laws are credit-related acts, such as the Truth in Lending Act, Fair Credit Billing Act, Fair Credit Reporting Act, and the Equal Credit Opportunity Act, as well as industry-specific acts, such as the Petroleum Marketing Practices Act, and the Comprehensive Smokeless Tobacco Health Education Act of 1986, and additional laws relating to consumer privacy such as the Do-Not-Call

Registry Act of 2003, and the Controlling the Assault of Non-Solicited Pornography and Marketing (CAN-SPAM) Act of 2003.

FTC Investigation and Enforcement Authority

The FTC uses its investigative authority to uncover deception, unfair activities, or violation of any statute under which it has authority. The Bureau of Consumer Protection may issue civil investigative demands (CIDs) to explore possible violations. Like a subpoena, a CID can compel the production of existing documents or oral testimony, while also requiring that a recipient file written reports or responses to questions. Investigations can be triggered by Presidential or Congressional requests, court referrals, consumer complaints, or internal research.

Upon completion of an investigation, if the FTC has reason to believe that a violation exists, and that enforcement is in the public interest, it may issue a complaint to the violating person, partnership, or corporation. An administrative hearing will be held in front of an Administrative Law Judge, and if the actions at issue are deemed a violation, the ALJ may recommend entry of a cease and desist order.

Cease and desist orders are the FTC's primary tools to stop anti-consumer practices. If a party violates a cease and desist order, the FTC is authorized to use the courts to seek civil penalties and restitution for consumers who are harmed.

A party may appeal an order to the full FTC, the federal appellate court, and eventually the Supreme Court of the United States, if it chooses to accept the case. If neither party appeals the order, it becomes final within sixty days of being issued. Once final, a respondent's violation of the order could bring a civil penalty of up to \$11,000. A

non-respondent who has actual knowledge and violates Commission standards articulated in an order may also be subject to fines.

The FTC further has the authority to make trade regulation rules that specifically define unfair or deceptive trade practices. For example, according to the FTC Telemarketing Sales Rule, it is deceptive when a telemarketer fails to truthfully disclose the cost of products or services, or the nature of certain return policies. Knowingly violating FTC trade regulation rules may result in a civil penalty of up to \$11,000.

Under section 13(b) of the FTC Act, the FTC can make victimized consumers whole through restitution and punish wrongdoers through disgorgement of ill-gotten gains. The FTC seeks these remedies when it can objectively determine a clear violation of a law and reasonably calculate the damages payment. However, where the FTC determines that private actions or criminal proceedings will result in complete relief for the consumer, it may choose not to use the restitution or disgorgement remedies.

Finally, if the FTC has reason to believe that a party is violating, or will violate a law, it may seek a preliminary or permanent injunction from the district court to prevent the violation from occurring. The Division of Enforcement of the Bureau of Consumer Protection handles litigation of both Court and administrative orders.

The FTC does not have the power to bring criminal charges. Any such federal cases in the consumer protection area would be brought in federal courts by the U.S. Department of Justice. A defendant can be convicted of a criminal offense only upon proof beyond a reasonable doubt before a judge or jury.

Carrying Out the FTC Mandate

Seven divisions of the Bureau of Consumer Protection carry out the FTC's mandate to protect consumers against unfair, deceptive, or fraudulent practices. These divisions include: Advertising Practices, Financial Practices, Marketing Practices, Privacy and Identity Protection, Planning and Information, Consumer and Business Education, and Enforcement.

The Division of Advertising Practices works to prevent false advertising claims, particularly when the claims affect health and safety or cause economic injury. In addition to advertising claims regarding dietary supplements, weight loss products, alcohol, and tobacco, this Division also monitors the marketing of food, violent movies, as well as music and electronic games to children.

The Division of Financial Practices specifically protects consumers from fraud or deceptive practices in the financial services industry. Credit card offers, mortgage practices, and debt collection practices are all covered by this Division.

The Division of Marketing Practices addresses the marketing of products and services over the Internet, the telephone, or through the mail. This Division has issued a number of trade regulation rules to address marketing practice concerns. For instance, the Telemarketing Sales Rule governs when and how marketers may use the telephone for sales pitches. Other rules, such as CAN-SPAM Rules, the Franchise and Business Opportunity Rule, the 900 Number Rule, and the Funeral Rule outline proper methods for how, when, and to whom products or services may be marketed.

The newest division, the Division of Privacy and Identity Protection, protects consumers' personal information from being used improperly, and works to ensure that

companies with access to that information, such as credit card companies, keep it secure. The FTC also maintains a website wholly dedicated to preventing identity theft, at <http://www.ftc.gov/bcp/edu/microsites/idtheft/>. The website specifically addresses the needs of identity theft victims, as well as those seeking information about identity theft.

The Division of Planning and Information manages the Consumer Response Center and the Consumer Sentinel database. The Consumer Response Center receives and addresses consumer complaints via the phone or mail, while the Consumer Sentinel is a central database which contains over 3.5 million fraud and identity theft complaints. The Sentinel website analyzes complaint data to better understand and prevent fraud and identity theft.

Finally, the Division of Consumer and Business Education seeks to equip consumers with skills to protect themselves by disseminating information to consumers through a myriad of media, including print, broadcast, and electronic outlets. Recent education efforts include the creation of industry-specific websites to educate consumers about how competition in the healthcare, real estate, oil and gas, and technology marketplaces can result in better products at lower prices. When a survey showed that Hispanics were more than twice as likely than non-Hispanic whites to be victims of consumer fraud, the Division extended its outreach by releasing its educational materials in both Spanish and English. The Division also educates young consumers to be smarter shoppers through publications such as “The Real Deal,” a booklet that teaches through the use of games, puzzles, and cartoons.

Other federal agencies

Other federal agencies also play an important role in protecting consumers. The U.S. Consumer Product Safety Commission (CPSC) is a federal regulatory agency with the goal of reducing injury or death caused by consumer products. The CPSC develops product standards for manufacturers while also conducting recalls of any products that could or do cause harm.

The CPSC does not however have jurisdiction over all consumer products. For example, food, drug, cosmetic, and medical device safety is the focus of the U.S. Food and Drug Administration (FDA), while the National Highway Traffic Safety Administration (NHTSA) covers automobile, truck, and motorcycle safety.

The Federal Communications Commission (FCC) has a Consumer and Governmental Affairs Bureau that ensures that consumer interests are considered in FCC decisions. The Bureau also monitors and resolves consumer complaints regarding communications services. In the financial services sector, the Office of the Comptroller of the Currency (OCC), a Bureau of the U.S. Department of the Treasury, regulates and supervises over 1,750 national banks to ensure a safe and competitive banking system for consumers. Virtually every federal executive branch and independent agency has some similar office or bureau designed to advance consumer interest in its particular field. All federal resources for consumers may be reached via www.consumer.gov.

II. STATE MECHANISMS FOR CONSUMER PROTECTION

Much like the federal government, state governments act as both consumer law enforcement agencies and consumer advocates, again without the presence of any single overarching consumer protection department or agency.

State Level Investigation and Enforcement

In most of the fifty states, State Attorney Generals are charged with enforcing state consumer protection laws. As consumer advocates for their state populations, Attorney Generals may file lawsuits on behalf of consumers, investigate possible violations, issue injunctions to terminate ongoing illegal activity, obtain restitution on behalf of consumers, bring criminal cases when authorized by law, and make rules to govern trade practices. The National Association of Attorneys General (NAAG) facilitates cooperation among Attorney Generals to enhance their consumer protection effectiveness and support multi-state consumer protection activity and litigation. Information about NAAG's consumer protection efforts can be found at http://www.naag.org/consumer_protection.php. In larger cities, the locally elected or appointed state's attorney or district attorney may also have a consumer protection division handling criminal and civil investigations and cases under state or local law.

State Investigative Powers

When State Attorney Generals become aware of a possible violation, the agencies have the authority to issue Civil Investigative Demands, or CIDs. These CIDs may request documents or oral testimony from specific individuals or companies. While the

Attorney Generals have discretion to initiate investigations, they may not use CIDs to fish for evidence – the CIDs must specifically describe the type of evidence requested.

Attorney Generals may issue CIDs when they merely have a reason to believe a violation has or will occur, and need not have probable cause. Criminal investigations are conducted through the grand jury process and must be proved beyond a reasonable doubt in the appropriate state court.

Prevention and Enforcement

Each state Attorney General has statutory authority to issue injunctions to remedy unfair or deceptive trade practices. A company may face contempt charges if it continues a practice against which an injunction has been issued. Attorney Generals may also obtain voluntary assurances of compliance from violating companies. Where state statutes allow, breach of the voluntary assurance is akin to an injunction violation. States also may use civil and criminal penalties to end or prevent unfair or deceptive trade practices.

Finally, Attorney Generals may seek restitution on behalf of consumers who are victims of fraud and deception. Some states expressly grant Attorney Generals the statutory power to obtain restitution; other states do so implicitly as a result of state court decisions authorizing such actions. This remedy is especially effective when consumers have been harmed, but monetary damages are not large enough to warrant litigation by private individuals. Restitution is paid directly to affected customers when they can be readily identified and otherwise distributed in lump sums to consumer groups and related nonprofit organizations under the doctrine of cy pres.

Rulemaking Authority

In addition to investigatory and enforcement powers, most state consumer protection statutes allow the Attorney General, or other state regulatory or enforcement agency, to create rules that advise businesses of prohibited and acceptable business practices. Approximately twenty states have chosen to create such rules.

State Regulatory Authorities

States also regulate trades and professions through licensing boards and enforcement divisions. These state departments attempt to protect consumers by licensing only qualified individuals to work in specific professions, from health care providers to real estate agents to accountants. Consumers may search state license databases to research potential service providers or lodge a complaint against a licensed professional.

III. PRIVATE RIGHTS OF ACTIONS FOR CONSUMERS

As private citizens, Americans use the state and federal court systems to protect themselves from fraud and deceit in the marketplace. At the state level, consumers may use both common law and statutory causes of action to bring unsavory merchants into court. Although the federal courts and each state court system operate independently, there are numerous commonalities to their consumer protection schemes.

Common Law Torts

Common law legal action is one of the oldest forms of consumer protection. Although common law torts initially developed during an era where “caveat emptor” or “let the buyer beware” was the dominant doctrine, current common law actions provide consumers protection through torts for deceit, fraud, misrepresentation, and breach of warranty.

A consumer may file a lawsuit for deceit or fraud when a vendor intentionally conceals a material fact or makes a false representation of a material fact, knows that the representation is false, and meant to induce the consumer to act based on the misrepresentation. In order for the consumer to be successful in court, a plaintiff must also reasonably rely on the misrepresentation and suffer damage as a result of the reliance. Deceit can occur when a vendor makes a direct false statement, or when a misrepresentation is achieved through silence, concealment, half-truths, or ambiguity about a good. While misrepresentation of product facts may bring legal action, mere puffery and sales representative opinions are generally not subject to lawsuits for deceit.

If successful in court, a consumer may receive damages for out of pocket losses, rescission of the transaction at issue, damages to ensure the consumer receives the benefit of the bargain, or even punitive damages. Most common law consumer protection actions are brought in state court, although actions between citizens of different states can be brought in federal court under certain situations.

Statutory Causes of Action

Although common law actions have long protected consumers from fraud, it is burdensome to successfully plead and prove such a case, particularly because a consumer must prove that the seller intended harm. If a common law claim is not possible, consumers may rely on state unfair trade practice statutes to remedy sales misrepresentations.

Each state has some form of consumer protection law, and many are modeled after the Federal Trade Commission Act and prohibit “unfair and deceptive” trade practices. Consumers have a better chance of success in combating misrepresentations under these statutes because they do not typically require proof that the seller intended harm. In addition to protection from unfair and deception trade practices, many states also specifically prohibit certain deceptive pricing, bait and switch tactics, and pyramid sales scheme practices. In addition to preventing the broader harms of “unfair and deceptive” trade practices, state “lemon” laws streamline the remedy process for consumers who purchase a defective new or used car.

Class Actions and Attorney Fee Shifting

Although filing a lawsuit is an option for combating fraud, when the economic harm is small, expensive litigation is not always a viable option. Class action lawsuits allow victimized consumers with smaller damages to file a lawsuit collectively, thereby offsetting litigation costs while still providing protection from fraud.

Bringing a class action lawsuit for common law fraud is difficult because U.S. courts require a high degree of commonality among all the plaintiffs’ claims in order for

the class lawsuit to proceed. Still, where there is such commonality, class actions can be a useful tool for consumers to assert their rights.

Attorney fee shifting also makes legal action a possibility for consumers who have suffered low amounts of damages. In the American legal system, each party customarily pays its own legal expenses. However, in many federal and state consumer protection causes of action, and in class actions, a prevailing party is entitled to the greater of actual damages or statutory specified minimum damages, plus reasonable attorney fees and litigation costs paid by the defendant. In most circumstances, unsuccessful plaintiffs are not responsible for the attorney fees and costs of the prevailing defendant. Such provisions have the effect of both increasing the incentives to bring such claims and minimizing the cost of a successful lawsuit.

Breach of Warranty

When a product fails to live up to a consumer's expectations, yet no misrepresentations about the product were made, the breach of warranty cause of action may protect the consumer from losses.

Forty-nine states use the framework of the Uniform Commercial Code to protect consumers through express and implied warranties. Express warranties are explicit promises that the manufacturer or seller will stand behind the product sold. These may be either written or oral.

Although express warranties offer protection to consumers, that protection is only as strong as the explicit promise made by the seller. A more standard level of protection exists in the implied warranty of merchantability. The Uniform Commercial Code

requires that all merchant-sold goods are, at a minimum “fit for the ordinary purposes for which such goods are used.” This protects consumers against product defects. In order to receive protection through an implied warranty of merchantability, the good in question must be purchased from a merchant, or someone with some level of expertise and skill with the product.

When a product fails to conform to an express or implied warranty, the consumer may either keep the product and seek damages or return the product for a refund. In most cases consumers choose the latter action. If a consumer retains the product, he may seek difference in value between the good in hand and the warranted good.

The Federal government also affords consumers warranty protection through the Magnuson-Moss Warranty Act. Although it does not require warranties for consumer products, the Magnuson-Moss Warranty Act requires standardization of terms when a written warranty is offered. Such regulation is meant to minimize confusion about warranty terms while increasing warranty coverage clarity.

IV. CONSUMER CREDIT AND DEBT COLLECTION

Americans use credit to make almost all major purchases. A variety of laws are in place to attempt to protect credit consumers from fraud or deceptive practices in the credit industry.

Credit Reports

Companies extend credit to a consumer if he or she is deemed creditworthy through a credit history or credit report. These reports contain individual identifying

information, descriptions of existing credit and bank accounts, payment history on those accounts, as well as public record information. Until the Fair Credit Reporting Act (FCRA) was passed in 1970, consumers could not easily confirm the accuracy of the information. Passage of the FCRA allowed consumers the ability to view and repair possible mistakes thereby increasing their opportunity to obtain better credit. In 2003, the FCRA was amended to ensure American consumers annual access to a free copy of their credit reports.

Credit Disclosures

Consumers face a complex credit marketplace where terms in small print, changing interest rates, and a variety of fees can contribute to confusion. To combat such confusion, Congress passed the Truth in Lending Act, which requires standardized credit disclosures to facilitate consumer ability comparison shop for the best credit opportunity. It further attempts to protect credit consumers from unfair billing practices. The Fair Credit Billing Act also created procedures to require creditors to promptly process billing disputes and corrections. It also created an option for consumers to withhold payments when a good purchased with credit is defective.

Debt Collection

From 1990 to 2005, U.S. credit card debt increased 238 percent from \$237 billion to \$802 billion. In addition to enhancing consumer opportunity to obtain the best credit possible, federal statutes also protect consumers who fall behind in debt payments from improper collection processes. The Fair Debt Collection Act prevents debt collectors

from using threats, profanity, or lies when attempting to collect from debtors. Collectors are limited to contacting a debtor during reasonable times of the day.

V. CONSUMER ASSOCIATIONS AND RELATED GROUPS

In addition to government based agencies, private actors and nonprofit entities also play an important role in consumer protection matters. Much like governmental action in this area, they are highly decentralized and focus on different aspects of the consumer protection field as outlined above. A small sample of such private sector entities follows.

Citizen Utility Boards

Citizen Utility Boards are nonprofit, nonpartisan agencies that exist to represent the interests of residential utility consumers in their respective states or regions. They address concerns related to quality and price of natural gas, electric, and telephone services. *See, e.g.*, <http://www.citizensutilityboard.org/>

Consumer Federation of America

The Consumer Federation of America has four main functions. First, it advocates for consumers to state and federal legislative and regulatory bodies. Second, it researches consumer behavior and concerns through polling and surveys. Third, it attempts to provide education about consumer concerns by disseminating press releases, reports, and other material to the media, government representatives, and consumers. Finally, it supports a variety of local consumer-related organizations. <http://www.consumerfed.org/>

Consumers Union

The Consumers Union was founded in 1936 and is a nonprofit, nonpartisan organization that educates consumers about a wide variety of products. To achieve its stated mission, “to work for a fair, just, and safe marketplace for all consumers,” the Consumers Union publishes the magazine, *Consumer Reports*, as well as two newsletters, *Consumer Reports on Health* and *Consumer Reports Money Adviser*. *Consumer Reports* provides product reviews of cars, computers, appliances, extended warranties, and even sporting equipment so that consumers may have reliable third-party information before making a purchase. The Consumers Union also supports initiatives for health care access, food safety, and consumer choice in media. <http://www.consumersunion.org/>

Institute for Consumer Antitrust Studies

The Institute for Consumer Antitrust Studies is a nonpartisan, independent, academic center designed to explore the impact of antitrust enforcement and consumer protection law on the individual consumer and the public, and to shape public policy in these fields. Part of the Loyola University Chicago School of Law, the Institute contributes to consumer protection through teaching, research, symposia, publications, consumer advocacy, and academic colloquia on consumer and competition law. <http://www.luc.edu/antitrust>.

National Consumer Law Center

The National Consumer Law Center is a nonprofit organization that advocates on behalf of low-income individuals who have been harmed by deception, fraud, or unfair practices. In addition to addressing concerns with credit, credit reports, and debt collection, the National Consumer Law Center deals with payday loans, predatory lending, public utilities, and other fraud. <http://www.consumerlaw.org>.

Public Citizen

Founded in 1971 by Ralph Nader, Public Citizen is a nonpartisan, nonprofit organization that represents consumer interests before the executive, legislative, and judicial branches of the U.S. Government. In order to retain its independence and maintain its ability to impartially represent consumers, Public Citizen refuses donations from the government, corporations, or professional associations. Public Citizen advocates specifically for clean and safe energy sources, just trade policies, safe vehicles, and effective, affordable prescription drugs and health care. <http://www.citizen.org/index.cfm>.